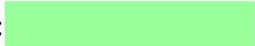


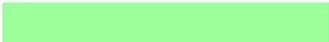


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 02 2014** OFFICE: CALIFORNIA 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)

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, an Illinois corporation established in September [REDACTED] states that it engages in the manufacturing and marketing of chemical process equipment. The petitioner claims to be an affiliate of [REDACTED] located in the United Kingdom. The petitioner seeks to employ the beneficiary as the technical director of its new office in the United States.

The director denied the petition on two alternate grounds, concluding that the petitioner failed to establish that (1) the beneficiary was employed in a qualifying managerial or executive capacity at the foreign entity, and (2) it has a qualifying relationship with the beneficiary's foreign employer.

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, the petitioner contends that the beneficiary is an executive at the foreign entity and that it maintains an affiliate relationship with the foreign entity. The petitioner submits additional evidence in support of the appeal.

I. THE LAW

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

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

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

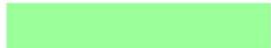
services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

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

II. THE ISSUES ON APPEAL

A. Employment in a Managerial or Executive Capacity at the Foreign Entity

The first issue addressed by the director is whether the petitioner has established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary had been employed by the foreign entity from August 1, 2002 to January 10, 2013, and that his duties abroad for the three years preceding the filing of the petition included:

- Quality Control
- Laboratory Testing
- Product Development
- International Marketing

The petitioner did not submit any additional information about the beneficiary's position abroad.

The director issued a request for additional evidence ("RFE") on May 8, 2013, advising the petitioner that it failed to submit evidence of the beneficiary's employment at the qualifying foreign entity. The director instructed the petitioner to submit evidence that the beneficiary's position abroad was in a managerial or executive capacity.

In response to the RFE, the petitioner submitted a letter from the foreign entity, dated June 1, 2013, describing the beneficiary's duties abroad as follows:

[The beneficiary] is the current CEO of [redacted] and a director of [redacted] its subsidiary company. . . .

* * *

[The beneficiary] began researching the effects of fine grinding on certain organic waste materials in 1996 and since 2001 along with his then partner [redacted] (now deceased) has been developing and testing the effects of our unique nano dispersion technology which has culminated into the [redacted] method of dispersing [redacted] particles into near crystal sizes.

* * *

Due to the death of [redacted] [the beneficiary] has had to fulfill the role of both development director and sales director.

* * *

Prior to this intended temporary move to US [the beneficiary] had to spend nearly 2 years in China working with and on behalf of [redacted] the manufacturers of the [redacted] products and who also act as sales agents for the Asian Region and Jiangyin covered his costs in China. CDC also continued to pay him a small salary.

Although specifically requested by the director in the RFE, the petitioner did not submit any additional information about the beneficiary's position and duties abroad or the organizational structure of the foreign entity.

The director denied the petition on January 10, 2014 concluding, in part, that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. In denying the petition, the director found that the description of the beneficiary's position abroad was insufficient to demonstrate what the beneficiary does on a day-to-day basis. The director observed that without more specific information regarding the duties of the foreign position, including how and at what frequency the stated duties are performed, the job description is insufficient to show that the position is primarily managerial or executive. The director further observed that the petitioner did not submit an organizational chart for the foreign entity or payroll records for the beneficiary, and as such, it appears that his position abroad is primarily assisting in the performance of the day to day non-supervisory duties of the business.

On appeal, the petitioner provides additional details relating to the beneficiary's position abroad and describes his duties as follows:

[The beneficiary's] specific duties are varied as he effectively is the foreign company and therefore makes all executive decisions regarding it's [sic] technical and strategic development including the negotiating of all third party contracts and the engaging of material and component manufacturers.

More specifically to include:

- a. Product Development: (i) the Engaging of Technical Personnel (ii) the approval of new design innovation (iii) the directing of laboratory procedures for [REDACTED] laboratories in the UK, USA and China (iv) approving quality control method and reporting procedures in the [REDACTED] assembly (v) the negotiation and approval of all materials and costs thereof (vi) the final inspection of all completed assembly.
- b. Strategic Development: (i) the engaging and contracting of territory sales agents and distributors (ii) the commissioning and approval of marketing material and press releases (iii) the directing and approval of pricing policy and agency commissions and royalties (iv) the setting up of strategic alliances with third Parties (Customers and Manufacturers) and where required implementing bespoke changes to the product to satisfy customer specifications.

The petitioner submits a letter from the foreign entity, dated January 29, 2014, stating that the beneficiary owns a majority of shares of the foreign entity, and describes his position abroad as follows:

[The beneficiary] is the sole executive director of [REDACTED] and [REDACTED] and is solely responsible for managing these companies at the executive level.

. . . in 2011, [the beneficiary] had to take over the role of development and technical director and has spent almost 2 years with the Chinese subcontract manufacturer to perfect the product which is now robust and taking orders.

[The beneficiary] effectively is the UK company and fundamental to the strategic development of overseas territories.

The petitioner also stated, in the same letter, that the [REDACTED] incurred substantial financial losses in developing the [REDACTED] and in the recession of 2007-2008. Therefore, it cut the beneficiary's salary drastically, to a level below the minimum reporting requirements, so there are no payroll records for the beneficiary's employment at the foreign entity. The petitioner did not submit any additional evidence, such as the beneficiary's UK tax returns or copies of checks paid to the beneficiary during the required time period.

Upon review, and for the reasons stated herein, the petitioner has not established that that the beneficiary worked in a qualifying position abroad for the required one year in the past three years prior to filing.

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

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The petitioner first characterized the beneficiary's role as CEO and director and provided a very vague description of the beneficiary's position abroad that does not establish that he is primarily an executive or is primarily a manager at the foreign entity. The petitioner indicated that the beneficiary "effectively is the foreign company and therefore makes all executive decisions regarding [its] technical and strategic development," but failed to provide an accurate picture of what he does on a daily basis. The petitioner noted that the beneficiary is responsible for quality control, laboratory testing, product development, and international marketing. The petitioner further stated that the beneficiary fulfills the role of development director and sales director and provided a brief list of duties for product development and strategic development on appeal. The petitioner did not include any additional details or specific tasks related to his briefly listed duties, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Furthermore, the petitioner failed to submit an organizational chart or any information relating to his subordinate employees at the foreign entity who would carry out the tasks associated with the day-to-day activities of the company, such as producing a product or providing a service. This is particularly important because most of the briefly listed duties for the beneficiary are not managerial or executive in nature. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive 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. at 1108 *supra*. 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 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. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Here, the petitioner failed to submit an organizational chart or position descriptions for its employees at the foreign entity. Therefore, the petitioner has not shown that the beneficiary has subordinate employees or that they are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties at the foreign entity as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate that he manages an essential function of the foreign entity.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* Section 101(a)(44) of the Act. Whether the beneficiary is an "personnel" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed herein, the petitioner's description of the beneficiary's duties abroad fails to establish that such duties are primarily managerial in nature.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the

petitioner failed to demonstrate that the beneficiary's duties abroad primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the beneficiary's employment abroad fail to demonstrate that the beneficiary focuses the majority of his time on executive duties rather than the day-to-day operations of the business.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

B. Qualifying Relationship

The second issue addressed by the director is whether the petitioner established that the United States and foreign entities are qualifying organizations. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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

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

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

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

* * *

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

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On the Form I-129, the petitioner failed to indicate its relationship to the company abroad to establish a qualifying relationship. Specifically, where asked to explain the company stock ownership and managerial control of each company, the petitioner stated the following:

1. [REDACTED] (Directors: [the beneficiary],
Shareholders: [REDACTED] 560 shares and [REDACTED]
[REDACTED] 140 shares) UK Company
2. [REDACTED] (Directors: R I [REDACTED] [the beneficiary].
Shareholders: R I [REDACTED] 1 share) UK Company

In support of the petition, the petitioner failed to submit evidence of a qualifying relationship with the beneficiary's foreign employer.

In the RFE, the director noted that the petitioner failed to submit evidence to satisfy the requirement demonstrating that it has a qualifying relationship with the beneficiary's foreign employer. The director specifically instructed the petitioner to submit evidence of ownership and control for both the petitioning U.S. company and the foreign entity.

In response to the RFE, the petitioner indicated that it has an affiliate relationship with the beneficiary's foreign employer.

The petitioner submitted the certificate of incorporation for [REDACTED], indicating that it was incorporated on November 11, 2010. A document titled "Application to register a company" indicates that [REDACTED] is authorized to issue one share of ordinary interest in the company. The annual return for [REDACTED] dated January 19, 2013, states that [REDACTED] owns one ordinary share of the foreign entity.

The petitioner submitted the certificate of incorporation on change of name for [REDACTED] changing its name to [REDACTED] on August 5, 2002. The Memorandum of Association for [REDACTED] dated August 11, 2000, indicates that it is authorized to issue 1,000,000 shares of interest in the company. The annual return for [REDACTED] dated September 19, 2012, states that [REDACTED] owns 140 ordinary shares, [REDACTED] Ltd owns 560 ordinary shares, and [REDACTED] owns 499,860 "redeemable preference" shares.

The petitioner also submitted its Articles of Incorporation, dated September 28, 2012, stating that it is authorized to issue 1,000,000 common shares of interest in the U.S. company. The Written Consent of

Directors to Organize the petitioning U.S. company, dated October 1, 2013, states that [REDACTED] and the beneficiary were each issued 1,000 shares of common stock in the U.S. company.

The petitioner's business plan specifically states that the beneficiary and [REDACTED] each own 50% of the company. The petitioner did not submit any information regarding an agreement as to the actual control of the company, if different from the equal control and ownership.

The director denied the petition concluding, in part, that the petitioner failed to establish that it had a qualifying relationship with a foreign entity, noting the inconsistencies contained in the record. In denying the petition, the director found that the petitioner is not an affiliate of the foreign company because the companies are not owned and controlled by the same individual or by an identical group of individuals who each own a proportionate share of each organization. The director further found that the evidence fails to show that an individual, or identical group of individuals has effective de jure or de facto control of both organizations.

On appeal, the petitioner declares that it has made changes to its ownership and the foreign entities' ownership and control to satisfy this requirement. The petitioner made the following changes:

[REDACTED] (United Kingdom)
Mr [REDACTED] has held the one share in [REDACTED] on behalf of himself and [the beneficiary] in the ratio of 30% to himself and 70% to [the beneficiary]. To manifest [the beneficiary's] ownership of [REDACTED] a further 2 shares have been issued to [REDACTED] and 7 shares have been issued to [the beneficiary] to reflect the correct ownership position.

[The petitioner] (USA)
49% (1000 shares) are held by David Peterson
51% (1050 shares) are held by [the beneficiary]
By way of board resolution 50 further shares were allotted at par value to [the beneficiary] who now holds 51% of the issued shares and has overall control of both [REDACTED] and [the petitioner].

In compliance with the definition . . . an affiliate relationship is established between the petitioning entity and the beneficiary's foreign employer.

In support of the appeal, the petitioner submits a letter from [REDACTED] dated January 29, 2014, describing the ownership and control of the foreign and U.S. companies as follows:

I can state that I have held the shares in [REDACTED] on behalf of myself and [the beneficiary] in the ratio of 30% to myself and 70% to [the beneficiary].

* * *

The current structure of [redacted] is

[The beneficiary] 70%
[redacted] 30%

[redacted] holds 560 shares out of a total 700 shares in [redacted] which is the developer of the products and the patent and [redacted] holder.

* * *

To manifest his ownership of [redacted] a further 2 shares have been issued to [redacted] and 7 to [the beneficiary] to reflect the correct ownership position.

The petitioner submits a document for [redacted] indicating that at a board meeting on January 24, 2014, it was resolved that two shares were allotted to [redacted] for a total of three shares (30%) ownership and seven shares were allotted to the beneficiary, for a total of seven shares (70%) ownership of the foreign entity. The petitioner submits a copy of share certificate number three, dated January 24, 2014, issuing seven shares of [redacted] to the beneficiary.

The petitioner also submits a document for the petitioner, indicating that at a board meeting on January 27, 2014, an additional 50 shares were allotted to the beneficiary so that legal ownership of the company is 1050 shares (51%) to the beneficiary and 1000 shares (49%) to [redacted]. The petitioner submits a copy of share certificate number three, dated January 27, 2014, issuing 50 shares of the petitioner's common stock to the beneficiary.

Upon review, the AAO concurs with the director's determination that the petitioner failed to establish that it has a qualifying relationship with a foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner claims an affiliate relationship between the U.S. and foreign entities based on similar ownership of membership interests of the U.S. company and the foreign entity. The petitioner claims that the beneficiary's foreign employer is [redacted] which is majority-owned by [redacted]. The petitioner claims that [redacted] is majority-owned by the beneficiary, who is also the majority shareholder of the petitioning U.S. company.

In support of [REDACTED] ownership, the petitioner now submits a board resolution stating that the beneficiary is issued seven shares, or 70% ownership of the company, and [REDACTED] is issued an additional two shares, for a total of 30% ownership of the company, which, according to its Articles of Incorporation, is only authorized to issue one share. According to the petitioner, on appeal, there was an agreement between [REDACTED], who was issued the single share of interest in [REDACTED] and the beneficiary that the single share was to be split 70% for the beneficiary and 30% for [REDACTED]. However, the petitioner failed to submit any evidence of this agreement. Instead the petitioner submitted a third share certificate issuing the beneficiary seven shares of [REDACTED] which are not authorized by the Articles of Incorporation. Furthermore, even if the shares were authorized for issuance, the petitioner made this change in ownership after the director's decision in order to establish a qualifying relationship where it previously did not exist. 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).

In support of the petitioning U.S. company's ownership, the petitioner now submits a board resolution stating that the beneficiary is issued an additional 50 shares, for a total of 51% ownership of the company, and [REDACTED] maintains 1,000 shares, for 49% ownership of the company, which is authorized to issue a total of 1,000,000 common shares. Initially, the beneficiary and [REDACTED] shared equal ownership of the petitioning U.S. company without any agreement or resolution on the actual control of the company. Again, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Id.*

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

On appeal, the petitioner attempts to establish that the beneficiary majority-owns and controls the petitioning U.S. company and [REDACTED] which majority-owns [REDACTED] the beneficiary's foreign employer. However, the original ownership structure, established prior to filing the petition, did not establish that a qualifying relationship existed between all three entities. It wasn't until after the denial of the petition, on appeal, that the petitioner amended the ownership of [REDACTED] and the U.S. company to specifically indicate that the beneficiary is the majority shareholder in each company. Again, 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). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Based on the foregoing, the evidence on record does not support the petitioner's claim that the U.S. and foreign entities are both owned and controlled by the same individual or group of individuals. See 8 C.F.R. 214.2(l)(1)(ii)(L). As such, the petitioner has not met its burden to establish that the U.S. and foreign entities have a qualifying relationship. Accordingly, the appeal will be dismissed.

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

Beyond the decision of the director, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

On the Form I-129, at Part 9 Explanation Page, the petitioner stated the following regarding the beneficiary's position in the United States:

[The beneficiary] currently oversees the quality control in the manufacture of [redacted] products and it is the intention of the company that it will, over the next few years concentrate on the North American market to capitalise [sic] on recent successes with international companies who have many products which can benefit from [redacted] ability to produce nano particles relatively inexpensively and to a high standard.

He will also conduct all new [redacted] testing on US company's products at our laboratory facility in [redacted] and be responsible for the content of Sales and Marketing materials.

On the same Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

- Laboratory Testing of New Products for compatibility
- Further Development of Current Micro Grinding equipment for the US market
- Quality Control of [redacted] machinery
- Commissioning of New equipment to US customers
- Sales & Marketing and US customer support

The petitioner did not submit any additional information about the beneficiary's proposed position in the United States or the organizational structure of the U.S. company. In support of the petition, the petitioner submitted a business plan; however, the business plan does not include any information about the beneficiary's proposed position or its staffing plan for the U.S. company.

In the RFE, the director advised the petitioner that it failed to submit evidence of the beneficiary's duties in the proposed position in the United States. The director instructed the petitioner to submit evidence that the beneficiary's proposed position in the United States will be in a managerial or executive capacity.

In response to the RFE, the petitioner submitted an undated letter from [redacted] President, describing the beneficiary's proposed position in the United States as follows:

In that [the beneficiary] is one of the founders and designers of the [redacted] and as [the petitioner] has the sole license from [redacted] for the sale of the [redacted] in North America and in particular the USA it is our intention to use him for the benefit of the USA company. He would assist in the technology transfer and bring his product and market knowledge gained from years of experience to the USA company.

[The beneficiary's] duties would include, but are not limited to acting as chief technologist supporting sales and marketing presentations, trade show and technology conferences. In addition he would oversee customer testing in our laboratory and particle size analysis.

In addition he will oversee the review and evaluation of potential agents for [the petitioner].

Although specifically requested by the director in the RFE, the petitioner did not submit any additional information about the beneficiary's proposed position in the United States or the organizational structure of the U.S. company.

On appeal, the petitioner submits a letter dated January 29, 2014, and references the beneficiary's position in the U.S. as follows:

The key customers for [redacted] products are US based and in order to develop strategic alliances with US customers it is necessary for [the beneficiary] as CEO and technical director to lead the effort and to understand the technical requirements of US customers and enable changes to the product as required by those customers.

In due course the appropriate personnel will be employed by the organisation to service the US market once it has been sufficiently developed.

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing operations in the United States.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

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

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the petitioner stated that the beneficiary will be the technical director; however, the petitioner failed to submit information regarding the actual duties to be performed by the beneficiary in this role. The petitioner briefly stated that the beneficiary will conduct laboratory testing of new products for compatibility, further the development of current equipment for the U.S. market, conduct quality control of machinery, commission new equipment to U.S. customers, conduct sales, marketing, and U.S. customer support, act as chief technologist supporting sales and marketing presentations, trade show and technology conferences, oversee customer testing in the laboratory, oversee particle size analysis, and oversee the review and evaluation of potential agents for the petitioner. While these tasks may be undoubtedly necessary in order to continue operations, the petitioner has not indicated how these duties qualify as managerial or executive in nature.

Given the vague and general descriptions of the beneficiary's duties, the record reflects that the beneficiary would more likely than not allocate more than 50% of his time to duties that are non-qualifying. The actual duties themselves 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). 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).

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." See 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. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

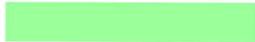
Here, the petitioner failed to submit a proposed organizational chart or staffing plan within its business plan. Therefore, the petitioner has not shown that the beneficiary will have subordinate employees or that they will be supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner has not established, in the alternative, that the beneficiary will be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary would devote to duties that would clearly demonstrate that he would manage an essential function of the U.S. company.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. See 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.* Here, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

Based on the evidentiary deficiencies addressed above, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of the approval of the new office petition. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir.



2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. CONCLUSION

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.