



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,

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, a Canadian entity, states that the U.S. company [REDACTED] a California corporation established in [REDACTED] is its branch office. The petitioner indicates that the U.S. company will engage in the sale, leasing, and export of luxury used cars. The petitioner seeks to employ the beneficiary as the 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) a qualifying relationship exists between the U.S. and foreign entities, and (2) the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge.

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 it maintains a qualifying relationship with the foreign entity and that the beneficiary is the director of 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. Qualifying Relationship

The first 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 25, 2013. On the Form I-129, the petitioner indicated that the U.S. company is a branch office of the foreign entity. Where asked to explain the company stock ownership and managerial control of each company, the petitioner stated the following:

- [The beneficiary] 60% Ownership and Manageria [sic] Control
- [Redacted] 20% Ownership and Managerial Control
- [Redacted] 20% Ownership and Managerial Control

In support of the petition, the petitioner failed to submit evidence of a qualifying relationship between the U.S. and foreign entities.

In the RFE, the director noted that the petitioner failed to submit evidence to satisfy the requirement demonstrating that a qualifying relationship exists between the U.S. and foreign entities. The director specifically instructed the petitioner to submit evidence of ownership and control for both the U.S. company and the petitioning foreign entity.

In response to the RFE, the petitioner indicated that it has a parent-subsidiary relationship with the U.S. company.

The petitioner submitted the articles of incorporation for the foreign entity, indicating that it was incorporated on January 20, 2004, and authorized to issue "unlimited common shares" of interest in the company. The articles of incorporation list the beneficiary as a director and as the incorporator of the company. However, a list of shareholders was not included. The petitioner failed to submit any evidence of the actual ownership of the foreign entity.

The petitioner submitted the Articles of Incorporation for the U.S. company, indicating that it was incorporated on November 12, 2013 and authorized to issue 2,000 shares of stock in the U.S. company. The Action of Sole Incorporator, dated November 21, 2013, states that the beneficiary and [REDACTED] were elected as the directors of the U.S. company. The petitioner also submitted the U.S. company's stock certificate number C-1 issuing the foreign entity 100 shares of common stock at \$.01 par value. The stock certificate is not dated and the U.S. company's name is listed as: [REDACTED]

The petitioner's business plan specifically states that the beneficiary is the 100% owner of the U.S. company.

The director denied the petition concluding, in part, that the petitioner failed to establish that a qualifying relationship exists between the U.S. and foreign entities. In denying the petition, the director found that the evidence presented does not establish that the foreign entity is the parent of the U.S. company because the petitioner did not demonstrate that it owns the U.S. company. The director further found that the petitioner failed to demonstrate that the U.S. company received monies from the foreign entity for the purchase of its 100 shares of stock.

On appeal, the petitioner declares that it submitted evidence of transferring the initial funds to the U.S. company around the date the denial was issued. The petitioner states that this evidence was not available at the time of filing the petition. As such, the petitioner submits the following "payment orders" from [REDACTED] bank in Canada:

- December 12, 2013: The foreign entity wired \$40,048.37 to [REDACTED] in Los Angeles, California. The "details of payment" section for the wire transfer does not list any additional information.
- December 30, 2013: The foreign entity wired \$4,000.00 to [REDACTED] in Los Angeles, California. The "details of payment" section for the wire transfer does not list any additional information.
- January 10, 2014: The foreign entity wired \$200,000.00 to the U.S. company in Los Angeles, California. The "details of payment" section for the wire transfer states, "transfer from head office from [the foreign entity] to [the U.S. company]."

The petitioner also submits a new copy of the U.S. company's stock certificate number C-1 issuing the foreign entity 2,000 shares of common stock at \$.01 par value. The stock certificate is not dated and the U.S. company's name is listed as [REDACTED]

The petitioner submits a letter from a [REDACTED] Client Financial Analyst, dated June 10, 2014, stating that the beneficiary is the account holder of a personal interest checking account and a personal savings plus account, listing the account numbers, balances, and dates opened for each account. It is noted that the account number listed for the U.S. company in the wire transfer order on January 10, 2014 does not match either of the two account numbers listed in the [REDACTED] letter for the beneficiary.

The petitioner also submits a [REDACTED] bank statement for the U.S. company, dated May 1 to May 31, 2014. The account number on the bank statement also does not match the account number listed on the wire transfer order.

The petitioner submits an unsigned letter from a [REDACTED] Client Financial Analyst, dated January 10, 2014, stating that the U.S. company is the account holder of two streamlined checking accounts and a business

IMMA account, listing the account numbers, balances, and dates opened for each account. It is noted that the account number listed for the U.S. company in the wire transfer order on January 10, 2014 is also listed in the letter for the U.S. company, opened on January 8, 2014, and is the only account higher than a \$0 balance at \$199,980.00.

Upon review, the AAO concurs with the director's determination that the petitioner failed to establish that a qualifying relationship exists between the U.S. and foreign entities.

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.

Despite indicating on the Form I-129 that the U.S. company is a branch of the foreign entity, it appears that the petitioner claims a subsidiary relationship between the U.S. and foreign entities based on the foreign entity's majority ownership of the U.S. company. However, the evidence in the record is inconsistent on this issue. Although the petitioner submits a stock certificate on appeal indicating that the foreign entity owns 100% stock in the U.S. company, the Form I-129 lists the beneficiary as having 60% ownership and managerial control, [REDACTED] as having 20% ownership and managerial control, and [REDACTED] as having the remaining 20% ownership and managerial control. Additionally, the U.S. company's business plan states that the beneficiary is 100% owner of the U.S. company.

Further, the documentation provided as evidence of the foreign entity's ownership of the U.S. company is also flawed. The initial stock certificate number C-1 for 100 shares of stock is not dated and incorrectly lists the U.S. company's name as [REDACTED]. Then, on appeal, the petitioner submits a new stock certificate number C-1 that is also not dated, but corrects the U.S. company's name and issues the foreign entity 2,000 shares of stock.

In the instant matter, the petitioner has not explained why it submitted two different stock certificates number C-1 reflecting different information. Nor has the petitioner explained the discrepancies in the information stated in the record about who owns the U.S. company. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the wire transfer orders presented on appeal are not clearly indicative of the foreign entity's investment in the U.S. company. Even if it were the foreign entity's payment for the purchase of stock in the

U.S. company, it occurred after the date of filing the instant petition. As such, the actual ownership and control of the U.S. company at the time of filing the petition remains unclear. 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 deficiencies and inconsistencies discussed above, the evidence on record does not support the petitioner's claim that the U.S. and foreign entities have a parent-subsidiary relationship. 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.

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

The second issue addressed by the director is whether the petitioner has established that the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner stated "Director of [the petitioner/foreign entity]."

The petitioner did not submit any additional information about the beneficiary's position abroad or the organizational structure of the foreign entity.

In the RFE, the director advised 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 an unsigned letter, dated December 17, 2013, describing the beneficiary's duties abroad as follows:

She is presently President and Director for [the petitioner] and has held that position since January 20, 2004.

In her role as President and Director, [the beneficiary] has been responsible for overseeing virtually every function, including product development, finance, human resources, marketing and production.

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 concluding, in part, that the petitioner failed to establish that the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge.

In denying the petition, the director observed that, although specifically requested, the petitioner failed to submit a detailed job description for the beneficiary's position abroad to establish that she has been employed in a managerial, executive, or specialized knowledge capacity, and an organizational chart for the foreign entity to illustrate the number and types of employees. The director found that, based on the provided information, she could not determine whether the beneficiary's position abroad is primarily assisting in the performance of the day to day non-supervisory duties of the business, which preclude her from being considered a manager or executive. The director further found that the petitioner failed to submit any evidence that the beneficiary is a function manager at the foreign entity or that her position involves specialized knowledge.

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

1. Overseeing the hiring and training of all management positions, completing performance evaluations and developing short and long-term goals for each department manager.
2. Planning and developing short and long-term goals annually, and submitting time projections to corporate management for approval.
3. Paying close attention to daily operations, recommending and creating improved courses of action where necessary, explaining the policies and procedures of the dealership to all employees and following up with employees to ensure that these issues are followed.
4. Overseeing the monthly financial statement to ensure it is complete, accurate and submitted on time to the management to audit performance.
5. Creating a good working relationship with lending institutions and manufacturer personnel and maintaining these relationships.
6. Overseeing and maintaining compensation plans for all employees and maintaining an enthusiastic attitude to build positive employee attitudes and morale.

The petitioner also submits a letter from [REDACTED] CA of [REDACTED] dated January 22, 2014, confirming the beneficiary's position at the foreign entity as follows:

We are the accountants for [the petitioner/foreign entity] and [the beneficiary]. We have been asked to confirm [the beneficiary's] director status. [The beneficiary] has has [sic] been the sole director of [the petitioner/foreign entity] since its incorporation date, January 20, 2004, to date.

The petitioner also submits a document with a list of job titles, but it is unclear as to the organizational structure as it lacks lines and blocks depicting which positions report to the director.

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(1)(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 director and failed to provide a description of the beneficiary's position abroad. In response to the RFE, the petitioner provided a vague description of the beneficiary's position at the foreign entity that does not establish that she is primarily an executive or is primarily a manager at the foreign entity. The petitioner indicated that the beneficiary "has been responsible for overseeing virtually every function, including product development, finance, human resources, marketing and production," but failed to provide an accurate picture of what she does on a daily basis. The petitioner did not include any additional details or specific tasks related to her briefly listed duties, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Further, the petitioner failed to submit an organizational chart or any information relating to her 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 the petitioner's description of the beneficiary's duties abroad fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of her 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).

In the RFE, the director specifically advised the petitioner that it must provide a description of the beneficiary's duties at the foreign entity in order to determine whether her position was managerial or executive in nature, or involved specialized knowledge. The petitioner failed to do so, and upon denial of the petition, provides a more detailed description of the beneficiary's duties abroad on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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

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).

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 "activity" 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 her 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.

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:

A new workforce will be hired in the USA. Mr. [REDACTED] will manage the project and the US employees, [the beneficiary] will be the major shareholder and director.

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

[The beneficiary] will be in charge on [sic] the whole operation in the USA including financial aspects. She will endorse potential relations with the financial institutions. Mr. [REDACTED] will report to her regarding the new dealership operation including employees' performance.

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 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 unsigned letter, dated December 17, 2013, describing the beneficiary's proposed position in the United States as follows:

As Director and Manager, [the beneficiary] will have responsibility for: (1) establishing a new showroom in the [redacted] area of California; (2) recruiting, interviewing and hiring new sales and administrative personnel for [the U.S. company]; (3) sourcing high end luxury cars from local and international auctions, and (4) developing a complete business plan and operating budget for [the U.S. company].

* * *

[The beneficiary's] proposed transfer from [the petitioner/foreign entity] to [the U.S. company] as Director and Manager will allow her to: (1) establish a new dealership and base of operations for [the U.S. company] in the southern California market; (2) recruit, interview, evaluate, and hire salespersons, bookkeeping employees, technicians, and a sales manager; (3) provide supervision and guidance for the new employees hired by [the U.S. company]; (4) develop budgets and strategic plans for [the U.S. company]; (5) coordinate the purchasing of its initial inventory; and (6) manage the startup and overall operations of [the U.S. company] over its initial year in business.

The petitioner submitted a business plan for the U.S. company describing its operating and staffing plan as follows:

[The U.S. company] will start with four initial employees. The operation manager will oversee the operation and the sales manager will manage all buying and selling of inventory. A records clerk and a lot attendant will also be hired initially along with sales people and a bookkeeper.

The owner will oversee that the operation is going ahead as planned.

* * *

[The U.S. company] will have the following personnel to launch its presence in the United States:

- 1- Owner will act as Director with no monthly pay. Dividends will be distributed to the owner as owner's income
- 2- Operation Manager with a monthly salary of \$3,330
- 3- by April 2014, A lot attendant and a sales person will be hired when a showroom is opened
- 4- by August 2014, a secretary will be hired along with two other salesmen. The sales force will be placed on a higher commission basis or on base salary with lower commission.

Bonuses will be paid for monthly sales that exceed forecasted sales. As business grows, additional salesmen and sales manager will be hired.

- 5- A bookkeeper will be hired in April 2014 to oversee the financial aspects.
- 6- A Chartered accountant will be consulted by December 2014 to audit all the financials.

On appeal, the petitioner provides additional details about the beneficiary's duties abroad, listed above, and briefly states that "[she] will perform the same at [the U.S. company] until it's setup and running."

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 director of the new office in the United States, but failed to submit information regarding the actual duties to be performed by the beneficiary in this role. In support of the petition, the petitioner briefly stated that the beneficiary will be the major shareholder and director of the U.S. company and will be in charge of the whole operation, including finances. In response to the RFE, the petitioner briefly stated that the beneficiary will establish a new showroom, dealership, and base of operations; recruit, interview, evaluate, and hire sales and administrative personnel; source high end luxury cars from local and international auctions; develop a complete business plan, strategic plan, and operating budget; provide supervision and guidance for new employees; coordinate the purchase of initial inventory; and manage the startup and overall operations over the initial year in business. 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 her 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 for the U.S. company. The U.S. company's business plan did include a brief staffing plan, which indicated that it will hire four employees within its first year of operation and listed the following positions: an operations manager, a sales manager, a records clerk, a lot attendant, salespeople, and a bookkeeper. The business plan simply stated that the operations manager will oversee operations and that the sales manager will manage all buying and selling of inventory. Given the lack of an organizational chart showing whether the beneficiary has any subordinate employees and the vague and brief position descriptions for the U.S. company's proposed other employees,

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 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 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, we cannot conclude 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.

IV. PHYSICAL PREMISES

Beyond the decision of the director, the petitioner has not established that it has secured sufficient physical premises to house the new office. See 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the Form I-129 on September 25, 2013 and indicated that it will engage in the sale, leasing, and export of luxury used cars. The petitioner indicated that the beneficiary's worksite will be located at [REDACTED] and marked "Yes" at question 5, where

asked if the beneficiary will work off-site. The petitioner then handwrote the following: "when establishing at new dealership."

In the RFE, the director advised the petitioner that it failed to submit evidence that sufficient physical premises to house the new office have been secured. The director instructed the petitioner to submit evidence to meet this requirement.

In response to the RFE, the petitioner submitted an "Office Agreement" with [REDACTED] dated October 29, 2013. The agreement lists the leased office space at the business center located at [REDACTED] and states that it is for office number 256 and the number of people is "1-10." The "service provision" section of the agreement is blank and the commencement date is November 1, 2013 to January 31, 2014, only three months. The petitioner also submitted photographs of the facility but failed to identify what each of the photos represents.

The business plan for the U.S. company describes the required physical premises as follows:

The ideal facility for [the U.S. company] is a highly functional location with a lot large enough to hold 80 units and enough space for customer parking. Also, there will be a building large enough to house a reconditioning center and a sales floor with several private offices.

On appeal, the petitioner submits a "Seller's Permit," issued to the U.S. company by the California State Board of Equalization. The permit specifically states that the U.S. company is authorized to engage in the business of selling tangible personal property solely at the listed location of [REDACTED] and it is not valid at any other address.

Upon review, the evidence in the record demonstrates that the petitioner failed to submit evidence that it had secured sufficient physical premises to house the new office prior to filing the petition.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires 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 sufficient physical premises to house the new office have been secured. This requirement must be met at the time of filing the petition. In the instant matter, the petitioner has not clearly demonstrated that it had acquired any physical premises at the time of filing the petition. The petitioner submitted an "Office Agreement" in response to the RFE, dated 34 days after the filing of the instant petition and 22 days after the RFE was issued. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Further, we acknowledge that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective, leaving United States Citizenship and Immigration Services (USCIS) some flexibility in adjudicating this legal requirement. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To

do so, it must clearly identify the nature of its business, the specific amount, and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations.

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). Here, the U.S. company engages in the sale, leasing, and export of luxury used cars. The U.S. company's business plan indicates that it requires a large lot to hold 80 vehicles and additional space for customer parking along with a facility for reconditioning vehicles and a sales floor with several private offices. In response to the RFE, the petitioner briefly states that one of the beneficiary's proposed duties is to establish a showroom and dealership in the United States.

Upon review, it is apparent that the petitioner is not prepared to commence doing business upon approval of its initial new office petition. The petitioner has not secured sufficient physical premises to conduct its intended business. The "Office Agreement" does not provide sufficient information to clearly demonstrate the type and size of office space it has leased and it appears that the U.S. company has leased office space in [REDACTED] California for a period of three months. The U.S. company has not acquired any premises to house its required lot for vehicles and customers, sales floor with several private offices, and facility for reconditioning vehicles. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. 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)). Again, a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Furthermore, the worksite address listed on the Form I-129 is different from that of the leased office space in [REDACTED] California. The "Seller's Permit" authorizing the U.S. company to engage in the sale of tangible personal property lists the [REDACTED] California address as the sole location for the U.S. company to conduct such business. However, that location appears to simply be an office space and the petitioner claims that the U.S. company will require a lot for the vehicles along with a sales floor with several private offices in order to conduct its business, which, according to the "Seller's Permit," cannot be conducted at any other location. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the deficiencies and inconsistencies discussed above, the petitioner has not established that it had secured sufficient physical premises to house the new office as of the date of filing the petition. Accordingly, the appeal will be dismissed.

V. CERTIFICATION REGARDING THE RELEASE OF CONTROLLED TECHNOLOGY OR TECHNICAL DATA TO FOREIGN PERSONS IN THE UNITED STATES

Additionally, beyond the director's decision, the AAO observes that the petitioner did not indicate whether an export license is required, as instructed on page 5, Part 6 of the Form I-129. The instructions state, "If you do not completely fill out the form . . . you will not establish a basis for eligibility and we may deny your petition." See also 8 C.F.R. § 103.2(a)(1) (incorporating the instructions into the regulations). By completing Part 6 of the form, the petitioner certifies that it has reviewed the Export Administration Regulations and the International Traffic in Arms Regulations and determined whether it will require a U.S. Government export license to release controlled technology or technical data to the beneficiary.¹ By signing the Form I-129, the employer certifies under penalty of perjury that the information provided on the form is true and correct.

In the instant case, the petitioner failed to complete Part 6 of the Form I-129 and, thus it did not comply with the Form I-129 instructions. Accordingly, the petition was not properly filed and must be denied for this additional reason.

VI. CONCLUSION

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

The 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.

¹ The Export Administration Regulations (15 C.F.R. § 770-774) and the International Traffic in Arms Regulations (22 C.F.R. § 120-130) require U.S. persons, including companies, to seek and receive authorization from the U.S. Government before releasing controlled technology or technical data to foreign persons in the United States. U.S. companies must seek and receive a license from the U.S. Government before releasing controlled technology or technical data to nonimmigrant workers employed as H-1B, H-1B1, L-1, or O-1A beneficiaries.