



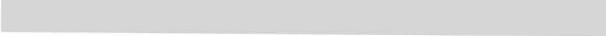
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 10 2015**

PETITION RECEIPT #: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to 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 appeal will be dismissed.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker (Form I-129), 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 California corporation established in [REDACTED], states that it operates a restaurant franchise. The petitioner claims to be an affiliate of [REDACTED], located in Russia. The petitioner seeks to employ the beneficiary as the President/General manager of its new office in the United States.

The director denied the petition on two alternate grounds, concluding that the petitioner did not establish that (1) the beneficiary was employed abroad primarily in a qualifying executive or managerial capacity; and (2) the beneficiary will be employed primarily in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office. On appeal, the petitioner asserts that the beneficiary has been employed in an executive and managerial capacity abroad and will be employed in a managerial capacity in the United States. The petitioner submits a brief 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. NEW OFFICE PETITION

As a preliminary matter, we note that the instant petition will be considered a new office petition, as defined in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F). The petitioner submitted copies of its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for 2012 and 2013 showing that it did not have any gross receipts or sales or otherwise conduct business during that time. Although the petitioner's franchise agreement was effective February 8, 2012, it did not actually start doing business until January 2014 when the first restaurant opened in [REDACTED] California. As such, the petitioner is considered a new office for the purpose of this petition.

III. THE ISSUES ON APPEAL

A. Employment Abroad in a Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner established that the beneficiary was employed full time by a qualifying foreign entity for one continuous year in the three year period preceding the filing of the petition in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

1. Facts

In a letter of support dated July 11, 2014, the petitioner described the beneficiary's position abroad and indicated that he spends 30% of his time on managing and directing the business, setting financial goals, formulating policies, establishing procedures, and implementing policies and procedures to ensure that the foreign entity attains its goals; 20% of his time on financial and budget analysis, overseeing the compilation of financial forecasts to plan future activities, overseeing the distribution of resources, overseeing cash management activities, compiling cash flow projections, executing capital raising strategies, negotiating loan

agreements, and directing the investment of funds; 15% of his time on overseeing inventory management and quality control functions; 10% of his time on marketing activities; and an undetermined amount of time on overseeing, planning, and coordinating the services provided by the foreign entity, and overseeing the activities and policies the company uses to procure the materials and products needed in accordance with the contracting entities' needs.

The petitioner did not submit any additional information pertaining to the beneficiary's position abroad or the foreign entity's staffing and organizational structure with the petition.

The director issued a request for evidence ("RFE") on July 28, 2014, advising the petitioner that the description of duties provided for the beneficiary's position abroad is not sufficient to demonstrate what he actually does on a day to day basis. The director also noted that the petitioner did not provide an organizational chart for the foreign entity. The director instructed the petitioner to submit evidence demonstrating that the beneficiary's position abroad has been managerial or executive.

In response to the RFE, the petitioner submitted a letter from the foreign entity, dated October 1, 2014, listing the beneficiary's duties abroad as follows:

[The beneficiary] holds the position of Chief Executive Officer at [the foreign entity]. As its CEO, [the beneficiary] is in charge of managing and directing the business. The following is the summary of [the beneficiary's] duties as CEO at [the foreign entity] and the approximate percentage of time [the beneficiary] spent performing each duty:

- Set financial goals, formulates policies, and establishes procedures for [the foreign entity], and implements these policies and procedures to ensure that [the foreign entity] attains its goals. (30%)
- Oversee the compilation of financial forecasts to plan future activities, to improve efficiency, and to estimate future funding requirements. Oversee the preparation of the company's annual budget to determine [the foreign entity's] allocation of funds and distribution of resources among various activities, and to meet estimated expenses. Oversee cash management activities, compile cash flow projections, execute capital raising strategies and negotiates loan agreements. Direct the investment of funds and determine whether surplus cash should be invested in interest-bearing instruments. (20%)
- Oversee, plan, and coordinate the services provided by [the foreign entity]. . . . Evaluate past sales records, and analyze market conditions and inventory turnover, and after taking into account budgetary considerations and consumer demand, and approves the list of in-demand materials to suppliers and orders indicating the desired brands, quantities, deadlines and other specifications. (10%-15%)
- Set the policies, which the company uses to determine acceptable quality standards for projects, perform quality control functions, and assure that the final product meets the company's high quality standards. Oversee functions related to inventory control and inventory management. . . . (15%-20%)
- Direct and oversee strategies and policies related to marketing activities. Analyze data gathered on competitors' prices, products and methods of marketing. Analyze data

pertaining to [the foreign entity's] past sales to determine demand for specific types of projects and to predict future construction activity. Oversee the creation of [the foreign entity's] marketing and promotions program, hire and train the company's Sales Manager, and oversee the establishment of the sales staff's training program. (10%-15%)

[The beneficiary] has been given high latitude to perform his functions. [The beneficiary] reports directly to the board of directors and the stockholders. [The beneficiary] does not operate under supervision of any other officer in the company.

Despite the director's request for evidence pertaining to the staff or organizational structure of the foreign entity, the petitioner did not supplement the record with the requested documentation.

The director denied the petition on November 29, 2014, concluding, in part, that the petitioner failed to establish that the beneficiary was employed full time by a qualifying foreign entity for one continuous year in the three year period preceding the filing of the petition in a qualifying managerial or executive capacity. In denying the petition, the director found that the duties provided for the beneficiary's position abroad do not appear to be consistent with those typically performed by someone in a managerial or executive position as they are indicative of an employee who performs the tasks necessary to produce a product or provide a service. The director noted that the petitioner did not provide an organizational chart for the foreign entity to illustrate the number and types of employees, concluding that it remains unclear who the beneficiary oversees abroad.

On appeal, the petitioner contends that the duties performed by the beneficiary at the foreign entity qualify as both executive and managerial. The petitioner provided a breakdown of the beneficiary's duties, as listed in response to the RFE, and illustrated how the duties correlate to the definitions of both executive and managerial capacity. The petitioner, again, did not submit any information pertaining to the staff or organizational structure of the foreign entity.

2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary has been employed by a qualifying foreign entity in a primarily managerial or executive capacity.

By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary may exercise discretion over the day-to-day operations of the foreign entity, the petitioner has not shown that the beneficiary's actual duties are primarily managerial in nature. 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).

As described above, the petitioner first characterized the beneficiary's role at the foreign entity as Chief Executive Officer and described his duties in very broad terms. The foreign entity described the beneficiary's duties abroad, in part, as follows: 30% of his time on managing and directing the business, 20% of his time on financial and budget analysis, 10% of his time on marketing activities, and an undetermined amount of time on overseeing, planning, and coordinating the services provided by the foreign entity, and overseeing the

activities and policies the company uses to procure the materials and products needed in accordance with the contracting entities' needs.

In response to the RFE, the petitioner provided an equally vague description of the beneficiary's position at the foreign entity, including the same allocation of percentages of time the beneficiary spends on specific duties, as listed above. Neither the petitioner nor the foreign entity include any additional details or specific tasks related to each duty, nor did they indicate how such duties qualify as managerial or executive in nature. 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. *Id.* at 1108.

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties at the foreign entity to demonstrate that these duties qualify as managerial or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. 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 her daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.*

Further, the petitioner did not provide an organizational chart or other information about the staff at the foreign entity. The only reference to additional staff at the foreign entity is a statement in the response to the RFE referencing the employees who will take over the beneficiary's duties abroad while he is in the United States. However, the petitioner did not submit an organizational chart or list of employees sufficient to demonstrate that the foreign entity has employees to support its business and carry out the day-to-day operations of providing a service or producing a product of the business. Absent any information about the foreign entity's staffing and organizational structure, it cannot be determined whether the beneficiary is employed in a managerial and executive capacity and is relieved from performing non-qualifying operational and administrative duties.

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

B. Employment in the United States in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

1. Facts

The petitioner filed the Form I-129 on July 14, 2014, indicating that it has 19 current employees in the United States and an estimated gross annual income of \$250,000. In a letter of support dated July 11, 2014, the petitioner described the beneficiary's proposed position in the United States and indicated that he would spend 10% of his time on establishing company goals, devising strategies, preparing operating procedures, and setting goals; 20% of his time on financial management and financial planning activities; 30% of his time on

overseeing, planning, and coordinating the petitioner's service and supply needs, such as directing staff to place orders and setting policies for handling inventory and ensuring that merchandise is stocked at proper levels; 20% of his time on overseeing, monitoring, and coordinating the activities of other managers, including an operations manager at all three locations, setting policies and strategies related to employees' schedules, activities, job duties, and performance, and setting policies for personnel procedures pertaining to benefits, compensation packages, promotional guidelines, and insurance; 10% of his time on marketing activities; and 10% of his time on planning and directing the expansion of the company's operations in the United States, such as selecting new sites, overseeing the opening of additional retail locations, and executing capital raising strategies.

In the same letter of support, the petitioner went on to state that the beneficiary will hire a Sales Manager and an Operations Manager. The Sales Manager will oversee sales and marketing activities, assist in developing a pricing strategy, handle the company's advertising and promotional campaign, oversee the design, production, and distribution of in-store displays, company catalogs, and product literature, design and distribute the petitioner's catalogs, displays, and exhibits, devise purchase incentives to promote the petitioner's products and services, and train and supervise the activities of sales representatives. The Operations Manager will be in charge of opening and closing the store locations, making daily bank deposits, opening and closing cash registers and terminals, perform general bookkeeping assignments, be in charge of in-store displays, investigate any customer complaints and any disputes between customers and staff, arrange for the purchase of inventory and delivery of merchandise shipped to the petitioner, and assist with establishing credit policies. The petitioner states that these positions "have been filled or will be filled during the next year" of its company's operations.

The petitioner submitted a copy of its franchise agreement with [REDACTED] dated February 8, 2012. The franchise agreement specifically requires that the petitioner employ a general manager as follows:

6.3 General Manager

You shall designate and retain at all times a general manager . . . to direct the operation and management of the Restaurant. The General Manager shall be responsible for the daily operation of the Restaurant and may be one of the Controlling Principals. The General Manager shall, during the entire period he serves as General Manager, meet the following qualifications:

6.3.1 The General Manager shall satisfy our educational and business experience criteria as set forth in the Manuals as defined herein or otherwise in writing by us;

6.3.2 The General Manager shall devote full time and best efforts to the supervision and management of the Restaurant;

6.3.3 The General Manager shall be an individual acceptable to us; and

6.3.4 The General Manager shall satisfy the training requirements set forth in Section 6.4.

The petitioner also submitted evidence of wages paid to 20 employees during the first quarter of 2014.

In the RFE, the director advised the petitioner that the description of duties provided for the beneficiary's position at the U.S. company is not sufficient to demonstrate what he will actually do on a day to day basis. The director also noted that the petitioner did not provide an organizational chart for its U.S. company. The director instructed the petitioner to submit evidence demonstrating that the proposed position in the United States will be managerial or executive.

In response to the RFE, the petitioner submitted a letter, dated October 15, 2014, listing the beneficiary's proposed duties as follows:

Approximately 10% of [the beneficiary's] activities will be devoted to the development of policies, strategies and operating procedures

* * *

Approximately 20% of [the beneficiary's] time will be devoted to financial management and financial planning activities

* * *

Approximately 30% of [the beneficiary's] time will be dedicated to overseeing, planning and coordinating company's service and supply needs

* * *

Approximately 20% of [the beneficiary's] time will be spent on overseeing, monitoring and coordinating the activities of other managers, setting policies and strategies related to employees and management staff

* * *

Approximately 10% of [the beneficiary's] time will be devoted to marketing activities

* * *

Approximately 10% of [the beneficiary's] time will be dedicated to planning and directing the expansion of company's operations in the United States

* * *

[The beneficiary] will act as a liaison with the [redacted] to ensure [the petitioner's] compliance with Franchise Agreement as it relates to operations at all three store locations.

The letter went on to state the same information about the Sales Manager and Operations Manager.

The petitioner submitted its organizational chart depicting the beneficiary at the top tier of the hierarchy as President, directly supervising a Vice President, [REDACTED]. According to the chart, the Vice President directly supervises an Operations Manager and a Sales Manager, both to be hired, and the Operations Manager and Sales Manager both supervise the three store locations, two of which are not currently in business. The chart also demonstrated that the first store location in [REDACTED], California has a Store Manager, [REDACTED] who supervises two Shift Supervisors, who, in turn, supervise nine employees.

The petitioner submitted a copy of a Manager Employment Contract, dated May 28, 2014, for [REDACTED] [REDACTED] who appears in the organizational chart as the Store Manager for its first restaurant in [REDACTED], California.

The director denied the petition concluding, in part, that the evidence of record did not establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the petitioner did not provide evidence to show that [REDACTED], the listed Vice President of its U.S. company, along with other employees listed on the organizational chart, are currently employed as they are not listed on the petitioner's quarterly wage report. The director further found that it appears the beneficiary is a first line supervisor of non-professional employees. The director noted that the petitioner did not provide a description of duties for the beneficiary's subordinate employees in the United States.

On appeal, the petitioner contends that the beneficiary will devote more than 51% of his time to managerial tasks and his daily activities will mainly involve organizing, overseeing, and managing the entire business of the corporation and will not be limited to the store currently in operation. The petitioner also explained that the Vice-President is not listed as an employee of the U.S. company because, as a 5% shareholder, he has opted not to receive a salary until the business is profitable and has provided an affidavit attesting to this claim. The petitioner, again, did not submit any information pertaining to the staff at its U.S. company or their associated duties.

2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, or as a function manager, in the United States within one year of approval of the petition.

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/executive 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.*

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 first characterized the beneficiary's role as President and General Manager and briefly described his proposed duties in very broad terms: 10% of his time on establishing company goals, 20% of his time on financial management and financial planning activities, 30% of his time on overseeing, planning, and coordinating the petitioner's service and supply needs, 20% of his time on overseeing, monitoring, and coordinating the activities of other managers, 10% of his time on marketing activities, and 10% of his time on planning and directing the expansion of the company's operations in the United States.

In response to the RFE, the petitioner provided an equally vague description of the beneficiary's proposed position in the United States, including the same allocation of percentages of time the beneficiary will spend on specific duties, as listed above. The petitioner did not include any additional details or specific tasks related to each duty, nor did it indicate how such duties qualify as managerial or executive in nature. 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. at 1108.

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's proposed duties at the U.S. company to demonstrate that these duties will qualify him as a manager or executive, or as a function manager. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner's description of the proposed duties does not 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. *Id.*

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

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.

In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner's organizational chart indicates that the beneficiary will directly supervise a Vice President, who will in turn supervise a Sales Manager and Operations Manager; however, the petitioner did not submit any information relating to these positions or how they will relieve the beneficiary from performing non-qualifying operational or administrative duties. The petitioner did provide a brief description of the Sales Manager and Operations Manager positions, however those descriptions are insufficient to establish that the positions themselves will be supervisory, managerial, or professional. The petitioner did not provide any description of the Vice President position and therefore, it cannot be determined that the Vice President relieves the beneficiary from performing non-qualifying operational and administrative duties. The petitioner has not demonstrated that the beneficiary's duties primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the U.S. company. As noted above, the petitioner did not submit a detailed description of the beneficiary's position or those of his subordinates sufficient to establish that the beneficiary's daily routine will consist of primarily managerial duties. The petitioner has not submitted evidence that the beneficiary's subordinate employees will relieve him from performing non-qualifying operational and administrative duties at the U.S. company.

Further, the petitioner's franchise agreement requires that the petitioner employ a general manager to directly and specifically "devote full time and best efforts to the supervision and management of the Restaurant." The petitioner has not indicated who will perform the tasks specifically outlined in the franchise agreement and as such, it is reasonable to assume that the beneficiary, as General Manager, will also perform the listed tasks.

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(1)(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 is a function manager. The petitioner did not describe an essential function to be managed by the beneficiary or provide a breakdown of the beneficiary's job duties to support such a claim.

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. 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 did not demonstrate that the beneficiary's proposed duties 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 proposed employment, and the lack of job duties provided for his direct subordinate, do not demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct

business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

At the time of filing, the petitioner was an almost [REDACTED]-old company operating a restaurant franchise. The company employs a Vice President, Store Manager and lower-level employees specific to the single restaurant location, and seeks to employ the beneficiary as an executive function manager. On appeal, the petitioner provided resumes for two prospective employees to occupy the Sales Manager and Operations Manager positions directly subordinate to the Vice President, who will support the beneficiary in his position in the United States. However, the petitioner did not submit any position description for the Vice President or additional details relating to the Sales Manager and Operations Manager positions it claims will carry out the policies implemented by the beneficiary in his management of the organization. Therefore, the petitioner did not submit evidence that it employed any staff members who would perform the actual day-to-day, non-qualifying operations of the company, and it has not established a reasonable need for an employee who performs primarily executive duties or manages the organization. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, or as a function manager, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the deficiencies discussed above, we concur with the director's finding that the beneficiary will be employed in a primarily managerial or executive capacity, or as a function manager, in the United States within one year of approval of the petition. Accordingly, the appeal will be dismissed.

IV. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner has not established whether the beneficiary's foreign employer and the U.S. company 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[.]

* * *

(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 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'r. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

If one individual owns a majority interest in a the petitioner and a the foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. *See* 8 C.F.R. 214.2(l)(1)(ii)(L)(1).

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In this case, the petitioner has established that the beneficiary has majority ownership of the U.S. company at 95%. The petitioner has also established that the beneficiary has 50% ownership of the foreign entity. However, the petitioner has not established that any one person sharing the 50% ownership of the foreign entity has control of the same. The fact that the beneficiary is employed as the CEO of the foreign entity is not sufficient to establish that he has control over it. It appears to be clear that the one individual controls the U.S. entity, but absent documentary evidence such as voting proxies or agreements to vote in concert, the petitioner has not established that the same individual controls both entities. Thus, the companies are not affiliates as both companies are not owned *and controlled* by the same individuals.

Based on the deficiencies discussed above, the petitioner has not established that the two entities qualify as affiliates as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(L). For this reason, the petition cannot be approved.



V. CONCLUSION

We maintain discretionary authority to review each appeal on a *de novo* basis. Our *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 does not comply with the technical requirements of the law may be denied by our office 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).

When we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that we abused our discretion with respect to all of our enumerated grounds. *See id.* at 1037. 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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.