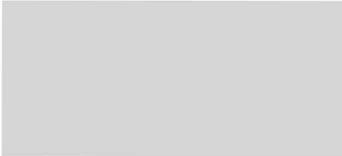




U.S. Citizenship  
and Immigration  
Services

(b)(6)



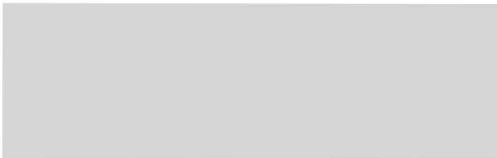
DATE: **AUG 21 2015**

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:



INSTRUCTIONS:

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](http://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,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner filed this Form I-129, Petition for Nonimmigrant Worker (Form I-129), seeking to employ 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 Florida corporation established in [REDACTED], states that it is a wholesale lighting firm. It claims to be a subsidiary of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a period of three years.<sup>1</sup>

The director denied the petition, concluding that the evidence of record did not establish: (1) the size of the investment in the new office and its ability to support a qualifying managerial or executive position within one year; and (2) that the beneficiary has been employed in a qualifying managerial or executive position for the claimed foreign parent company for at least one year in the three years preceding the filing of the petition or application for admission to 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 for review. On appeal, the petitioner asserts that it provided sufficient evidence to support the approval of the petition. The petitioner submitted a brief and 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, Petition for a Nonimmigrant Worker, 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.

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<sup>1</sup> Per 8 C.F.R. § 214.2(l)(7)(A)(3), "[i]f the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year."

- (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. Beneficiary's Foreign Employment

The first issue to be addressed is whether the petitioner established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity for one year in the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

## 1. Facts

In a letter of support dated August 7, 2014, the petitioner stated that the beneficiary served as the District Manager of the foreign entity from June of 2010 to January of 2012. In this position, the petitioner stated that the beneficiary led a branch of the company's marketing, production, and sales teams. The petitioner also claimed that the beneficiary's position "qualifies as a 'traditional' manager in that the District Manager directly supervises professional and supervisory-level employees in the course of his daily duties, has the authority to hire and fire his personnel, and is independently responsible for the branch's operational success and budgets."

Specifically, the petitioner described the beneficiary's duties as the District Manager as follows:

- Responsibility for the operational practices of the local store;
- Monitoring budget and sales goals;
- Complying with marketing campaigns and promotions;
- Developing the District's Annual Plan of Work, Long Range Plan and Annual Report;
- The accountability of sales, KPI's, shrinkage, and payroll cost and the overall results for his District;
- Driving and supporting all company merchandise promotions;
- Mentoring, developing, and motivating District management and hourly teams;
- Be accountable for end-to-end execution (employee, customer experience and financial outcomes) within a given district.
- Maintain and achieve key business performance goals (sales, margins, and net operating profit).
- Encourage innovation and use ideas from employees as a means to grow the business.
- Implement and inspect Company and Territory Strategies (inspection, validation, accountability).
- Identify and react to the unique needs of the district (assortment/marketing/competition).
- Be responsible for talent selection and development of General Managers.

The petitioner also submitted a copy of the foreign entity's organizational chart, listing the Board of Directors and General Manager at the top of the organization's hierarchy. It did not list the beneficiary's position of District Manager, but collectively listed various departments within the company. The chart also did not list the names of any of the foreign entity's employees.

In a request for evidence (RFE) issued on August 22, 2014, the director requested evidence to show that the beneficiary served in a managerial or executive position for at least one year in the three years prior to his application for admission to the United States. The director noted that the organizational chart did not identify the beneficiary's position in the chart, nor did it identify his claimed subordinates, and requested additional evidence from the petitioner to support the

contention that the beneficiary would be supervising subordinate staff members as initially claimed in its August 7, 2014 letter of support.

In response, the petitioner declined to provide additional details regarding the beneficiary's foreign position. Instead, the petitioner provided a pay stub and pay summary for the beneficiary for his time with the foreign employer. The petitioner claimed that the beneficiary directly supervised an unspecified number of sales representatives, and provided a description of the position of "sales representative" within the foreign entity. The position of sales representative was described as including, but not limited to, the following duties: (1) servicing existing sales accounts, obtaining orders, and establishing new accounts; (2) adjusting sales presentations; (3) submitting orders; and (4) resolving customer complains.

The petitioner also provided resumes for two individuals it claimed were employed by the foreign entity, [REDACTED] and [REDACTED], claiming that they have also held the position of District Manager. Finally, the petitioner claimed in its RFE response letter that the beneficiary "managed an essential function/component of the organization while he was employed at the foreign company."

The director denied the petition on October 3, 2014, finding that the record did not contain sufficient evidence to support a finding that the beneficiary served in a managerial or executive capacity while employed abroad. Specifically, the director found that the petitioner did not provide sufficient evidence to show that the beneficiary supervised professional or subordinate supervisory employees. The director also found that the petitioner's description of the beneficiary's duties abroad did not support a finding that he was employed in a managerial position, as specifically claimed by the petitioner in response to the RFE.

The director also noted that the beneficiary did not serve in a managerial position with the foreign entity for one continuous year in the three years prior to the filing of the instant petition.

On appeal, the petitioner provides a letter from the foreign employer stating that the beneficiary served as "*Sales Manager* of Sales Department and *District Manager* of Domestic Marketing Division." The petitioner also provided an organizational chart showing the position of sales manager with a sales representative and an after-sales service position reporting to the sales manager. The organizational chart also shows a District Manager position with two levels of subordinates reporting to this position. Additionally, the petitioner stated that the beneficiary supervised two employees as the District Manager and provided resumes for the two claimed subordinates.

## 2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary was employed by the foreign entity in a managerial or

executive capacity for at least one continuous year in the three year prior to the beneficiary's application for admission.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 petitioner's description of the beneficiary's duties in the initial petition stated that the beneficiary was responsible for overseeing a branch of the company's marketing, production, and sales teams. Specifically, the beneficiary's duties included: mentoring, developing, and motivating District management and hourly teams as well as responsibility for operational practices of the local store and responsibility for talent selection and development of General Managers. We note, however, that a review of the *organizational chart* submitted with the petition demonstrates that the sales and production departments, two of the three departments that the beneficiary was tasked to oversee, appear under the supervision of the General Manager, not the beneficiary in the capacity of District Manager. In fact, and as previously noted, the beneficiary's position of District Manager is not identified anywhere within the petitioner's organizational structure. 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).

We note that the petitioner submits a new *organizational chart* on appeal that identifies the beneficiary's position of District Manager. Specifically, this new chart indicates that he oversaw a sales manager, a financial manager, and a store manager, who in turn supervised subordinate staff members including a sales representative, a cashier, and a maintenance worker. This chart, however, is significantly different from the organizational chart initially submitted, and omits numerous departments and levels within the foreign entity's organization that were included on the original chart. No explanation is provided for these notable discrepancies.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary, when the petition was filed, merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). 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).

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).

The petitioner claimed that the beneficiary supervised two sales employees. On appeal, the petitioner submits the same resumes previously submitted, for [REDACTED] and [REDACTED] asserting that these individuals are the beneficiary's subordinate sales employees and thus demonstrate that the beneficiary was employed abroad in a managerial capacity. We recall, however, that these resumes were previously submitted as representative of the credentials of other District Managers employed at the foreign entity, and that the petitioner relied on these resumes as evidence that the beneficiary's position abroad was managerial. Now, on appeal, the resumes are submitted as examples of the credentials of the beneficiary's claimed subordinates, not as managerial peers within the foreign organization. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Moreover, the petitioner did not provide any documentation identifying the beneficiary's claimed subordinate employees by name, nor did the organizational chart identify any individuals in any of the positions and/or departments set forth therein. The petitioner's attempt to present resumes for two individuals, not identified within the petitioner's organizational hierarchy, is insufficient to establish that the beneficiary supervised a subordinate staff of managerial or professional employees while abroad. Further, the fact that the petitioner previously claimed that these resumes represented the credentials of other similarly-employed individuals in the beneficiary's position of District Manager is not credible, since these resumes also indicate that the individuals named therein were simultaneously employed as sales managers and sales representatives. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). These inconsistencies, coupled with a lack of evidence demonstrating that these individuals were actually employed by the foreign entity as claimed, render it impossible to conclude that the beneficiary qualifies as a personnel manager.

We note the petitioner's alternative claim, articulated in its response to the RFE, that the beneficiary is 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

Here, despite claiming that the beneficiary managed an essential function/component of the foreign entity, the petitioner has not supplemented the record with any evidence to support this contention. This unsupported statement was submitted simultaneously with a claim that the beneficiary supervised subordinate staff, thereby raising questions regarding the validity of the claim. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Finally, the petitioner does not assert that the beneficiary's employment abroad was in an executive capacity, nor do we find any evidence in the record that would support a finding that the beneficiary's claimed duties abroad encompassed executive functions.

Therefore, for the reasons set forth above, we find that the evidence of record does not establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

As the petitioner has not established that the beneficiary served in a managerial or executive position with the foreign employer, the related issue of whether the beneficiary was employed in the claimed managerial position for at least one year in the three years prior to the application for admission does not need to be reached.

We note that the petitioner claimed on appeal that the beneficiary's time with the foreign employer should be considered as accumulated prior to his admission into the United States in F-1 status in January of 2012. The beneficiary's admission into the United States was for the purposes of obtaining a Master of Business Administration at [REDACTED]

The regulation at 8 C.F.R. 214.2(l)(ii) defines an intracompany transferee, in pertinent part, as:

[A]n alien who, within three years preceding the time of his or her application of admission into the United States, has been employed abroad continuously for one year... and seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The petitioner points to the definition to show that the beneficiary's time with the foreign employer is correctly counted from the day of his application of admission into the United States. In the present case, this would be from the day that the beneficiary entered in F-1 status to attend Weber International University.

The regulation, however, also states that the beneficiary must enter to render his or her services to the United States entity in a capacity that is managerial, executive, or involves specialized knowledge. Even if the petitioner can show that the beneficiary's studies as an F-1 student are connected with the services the beneficiary provides to the petitioning organization, the petitioner still has not met its burden. Specifically, the petitioner has not shown that as a student, the beneficiary possesses knowledge that warrants employment in a capacity that is managerial, executive, or involves specialized knowledge.

The petitioner states that the beneficiary served as an employee in a managerial capacity for the United States entity upon receiving authorization for Optional Practical Training (OPT) in connection with his F-1 status. The beneficiary, however, did not enter the United States in OPT status, but as a student attending [REDACTED] on a full-time basis. The petitioner, therefore, has not meet its burden to show that the beneficiary rendered his services to the petitioner in a capacity that is managerial, executive, or involves specialized knowledge, *upon entering the United States*. As such, the petitioner cannot show that the beneficiary meets the definition of intracompany transferee.

For the reasons outlined above, the appeal will be dismissed.

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

The second issue to be addressed is whether the petitioner established that the new office will support an executive or managerial position within one year of approval of the petition.

1. Facts

On the Form I-129, the petitioner stated that is was a wholesale lighting company with two employees established in [REDACTED]. In its August 7, 2014 support letter, the petitioner claimed that the beneficiary would be employed as its Chief Executive Officer, and described the beneficiary's proposed job duties as follows:

- Creating, communicating, and implementing the organization's vision, mission, and overall direction;
- Leading, guiding, directing, and evaluating the work of other leaders;
- Evaluating the success of the organization; and
- Maintaining awareness of both the external and internal competitive landscape, opportunities for expansion, customers, markets, new industry developments and standards.
- Plan, develop, organize, implement, evaluate, and direct programs, policies and activities in accordance with overall company guidelines.
- Interpret policies and procedures to associates, guests, family members, visitors, government agencies, etc., as necessary, and ensure that those policies and procedures are followed.
- Prepare annual operating budgets for approval by the governing board and allocate the resources to carry out programs and activities of the facility.
- Review and report details on monthly financial statements and provide such information to [REDACTED]
- Keep abreast of the economic status of the U.S. organization and make adjustments as necessary to assure the continued ability to provide quality services.
- Participate in and/or oversee the decision-making process around all employment actions including hiring, terminating, promoting, and demoting.
- Review competence of work force and counsel/discipline personnel as necessary.
- Ensure that disciplinary action is administered fairly.
- Consult with department directors concerning the operation of their departments to assist in eliminating/correcting problem areas, and/or improvement of services.
- Represent the facility at, and participate in, top-level meetings.
- Represent the facility in dealings with outside agencies, including governmental agencies and third party payers, or provide an authorized representative of the facility when unable to attend such meetings.
- Make routine inspections of the facility to assure that established policies and procedures are being implemented and followed.
- Participate in state/federal surveys, and assist in developing plans of correction for cited deficiencies.
- Work to improve market share and reputation in the market through relationships with key market players.

The petitioner stated that the beneficiary would earn \$11,636.40 per year "plus 40% dividends from [REDACTED] annual profits."

The petitioner submitted a business plan that included an organizational chart showing the beneficiary as chief executive. Five departments are shown reporting to the beneficiary including an Operations Department, Supply Department, Marketing Department, Service Department, and Financial Department. The chart does not specify whether the departments include managerial

positions or are shown for organizational purposes. All departments except the Service Department appear to have positions reporting to them. The chart does not describe the number of employees, positions, or provide descriptions for the duties of each position. The petitioner did not provide a specific timeline for hiring, stating only that the beneficiary will hire two to three sales people "once a proven track record has been established."

The petitioner states that the company is managed by both the beneficiary and [REDACTED]. The beneficiary is stated to be responsible for "product management, sales, and coordination with the parent company." The petitioner explains that [REDACTED] is "mainly in charge of marketing and sales strategies, financial management, and sales."

The petitioner included a projected balance sheet for the end of its first year operations. It also provided a profit and loss projection including \$10,000 in salary, \$5,100 in rent, \$5,000 in advertising, and \$5,000 in insurance, among other items. The petitioner also provided a "Capital Statement" to show that the parent company invested \$10,000 cash in the petitioner and "LED lighting products worth \$60,000."

In the RFE issued on August 22, 2014, the director requested evidence to demonstrate that the new office will support an executive or managerial position within one year of approval of the petition.

The petitioner submitted a letter from the foreign entity, dated September 23, 2014, describing the beneficiary's past history with the company, and his duties to be performed in the United States. The duties were the same duties provided with the initial petition. In its own letter responding to the RFE, also dated September 23, 2014, the petitioner stated that the foreign entity's letter described in detail the foreign entity's financial investment, proposed number of employees, and the foreign entity's ability to support the United States operations. The letter, however, did not contain this information as described. The petitioner also included a copy of the foreign entity's most recent bank statements and federal tax return.

The director concluded that the evidence did not establish that the new company would grow to a sufficient size to support a managerial or executive position within one year. The director observed that the petitioner did not submit evidence to show the proposed nature of the office, the scope of the entity, its organizational structure, and its financial goals.

On appeal, the petitioner states that the projected financials for the new entity and financial strength of the foreign parent company shows that the company would support a manager within one year of approval of the petition. The petitioner provides a letter stating that expected sales will reach \$100,000 for 2014 and \$200,000 in gross sales for 2015. The petitioner submits an organizational chart showing a CEO (the beneficiary's proposed position). Reporting to the CEO are a sales manager, financial manager, and general manager and, according to the chart, each manager has departments reporting to them. No specific numbers or positions for subordinate employees are listed. The petitioner stated that by July of 2015 it expects to have three to five employees in charge

of accounting, inventory, shipping, and customer service. The petitioner also states that it plans to use non-contract sales representatives.

## 2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year of the petition's approval.

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

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* 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 proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

In the initial submission and in response to the RFE, the petitioner described the beneficiary's duties in very broad terms, noting that he will create and implement the organization's visions; lead, guide,

and evaluate the work of other leaders; evaluate the success of the organization; maintain awareness of the competitive landscape; plan, develop, organize, and direct programs and policies; interpret policies and procedures; participate in and/or oversee the decision-making process; and review the competence of the work force. These duties merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

While several of the duties broadly described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's proposed responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity.

Furthermore, the petitioner states that it will have a second manager, [REDACTED] working for the company. The petitioner broadly defines what areas the beneficiary and the second manager will be responsible for, but does not show how it will support a second manager by the end of the first year of operations or how the second manager fits into the organizational chart. The organizational charts submitted in the initial submission and on appeal show a position for only one chief executive officer or manager.

As noted previously, 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).

The petitioner indicates that it will operate a lighting wholesale business and that the beneficiary will manage subordinate general managers. The petitioner, however, does not provide any position descriptions for the subordinate managers or describe who will perform the day-to-day operations of the business. Furthermore, the petitioner does not describe with specificity the number and types of employees that will report to the subordinate managers as listed on the organizational chart. Therefore, the record does not support a finding that the beneficiary would act as a personnel manager within one year.

In addition, the U.S. organizational chart submitted on appeal, like the new organizational chart submitted on appeal for the foreign entity, differs from the chart submitted with the initial business plan. The first chart shows five departments reporting to the CEO and the second chart shows only three with only the financial department remaining the same between the two charts. Additionally, the chart submitted on appeal shows sales services, yet the petitioner stated in the letter submitted in conjunction with the chart that it would rely on non-contract outside sales services.

Finally, the petitioner's projected financials submitted with the initial petition show only \$10,000 per year set aside for payroll purposes. The beneficiary himself is to be paid \$11,686; therefore, the financials as projected would not be able to support any additional employees.

Our analysis of this issue is restricted by the petitioner's failure to submit an adequate business plan. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

*Id.*

The petitioner states that the parent company invested \$10,000 for start-up business costs and \$60,000 in valued goods. The petitioner, however, did not provide with any specificity sales projections, specific start-up costs, income projections, and/or operational costs. In fact, the petitioner states that it expects to turn over \$200,000 in gross sales, but includes inadequate financials to cover payroll at a minimum, calling into question whether the \$10,000 and \$60,000 in goods will be sufficient for start-up purposes. 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)).

A review of the totality of the evidence submitted provides very little information regarding the number of employees to be hired, the timeline for hiring employees, the financial position of the U.S. company, the petitioner's anticipated start-up costs and financial objectives for the first year of operations, and the physical premises secured by the U.S. company. The petitioner's submission of a vague job description for the beneficiary, and a general business plan, falls significantly short of meeting its burden to establish that the company will be able to support a qualifying managerial or executive position within a twelve-month period. The regulations require the petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

Overall, the vague job description provided for the beneficiary, considered in light of the petitioner's minimal business and hiring plans for the first year of operations, prohibits a determination that the petitioner could realistically support a managerial or executive position within one year. Accordingly, for this additional reason the appeal will be dismissed.

### III. Beyond the Director's Decision

We also take administrative notice that the beneficiary's salary may not meet the required minimum wage. According to the petitioner, the beneficiary will be paid \$11,636.40 plus 40% of any dividends from the petitioner's profit.

The petitioner states on the Form I-129 that the beneficiary will be employed full-time. If the beneficiary works a minimum of 40 hours per week or more, he will be making at most \$5.59 an hour.<sup>2</sup> The federal minimum wage has remained at \$7.25 per hour since July 24, 2009. *See* 29 U.S.C. § 206(a)(1)(C); *see also* <http://www.dol.gov/whd/minimumwage.htm> (last accessed August 14, 2015). The state of Florida imposes a higher minimum wage, mandating \$8.05 per hour at the time of filing. *See* <http://www.dol.gov/whd/state/stateMinWageHis.htm> (last accessed August 14, 2015). Where state law requires a higher minimum wage than the federal minimum wage, that higher standard applies. 29 U.S.C. § 218(a). If the petitioner's offer of employment proves to be \$5.59 per hour, as represented on the Form I-129, the salary would violate the minimum wage protections and the offer of employment would be invalid under the Fair Labor Standards Act of 1938 (FLSA).

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<sup>2</sup> The petitioner states that the beneficiary will also make 40% of any dividends from the petitioner's profit. The petitioner has not, however, articulated the specific monetary value of the dividends that will be guaranteed to the beneficiary. As such, the vague and unsupported claims that the beneficiary will receive additional compensation is not supported by the record and will not be included in the calculation of the beneficiary's yearly salary.



To avoid a potential conflict with the FLSA, any approval of employment authorization under the INA must be conditioned upon sufficient evidence that the nonimmigrant worker will be paid a wage that meets the minimum required wage under state or federal law, whichever is higher. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 218(a). USCIS may not approve a visa petition that is based on an invalid or illegal employment agreement. Such an approval would not only trivialize the FLSA, it would also condone and encourage future violations. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 150; *cf. Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 936 (8th Cir. 2013) ("[T]he FLSA unambiguously requires that any unauthorized aliens—hired in violation of federal immigration law—be paid minimum and overtime wages.").

#### IV. Conclusion

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

**ORDER:** The appeal is dismissed.