



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF GICS-, LLC

DATE: DEC. 16, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a Tennessee limited liability company claiming to engage in “shipping and procurement in energy services,” seeks to extend the Beneficiary’s classification as an L-1A nonimmigrant intracompany transferee. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The Petitioner filed a motion to reopen and a motion to reconsider the Director’s decision. The Director granted the motion, but subsequently affirmed its denial. The Petitioner filed a second motion to reopen the Director’s decision, which was denied by the Director. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner, established in September 2011, claims to be a subsidiary of [REDACTED] located in Nigeria. It seeks to employ the Beneficiary as its Managing Director/CEO for a period of two years.

The Director denied the petition concluding that the Petitioner did not establish that the Beneficiary has been and will be employed in a qualifying managerial or executive capacity in the United States.

On appeal, the Petitioner contends that the petition was denied in error and without proper review of the records and additional evidence. 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, 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.
- (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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

## II. THE ISSUE ON APPEAL

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary will be employed in a qualifying executive or managerial capacity under the extended petition or that

the Petitioner's new office has grown enough to support an executive or managerial position after one year.

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.

#### A. Facts

The Petitioner filed the Form I-129 on October 1, 2012. The Petitioner indicated on the Form I-129 that it is operating a "shipping and procurement in energy services" business with three current

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employees. On the Form I-129, where asked to describe the Beneficiary's proposed duties in the United States, the Petitioner stated the following:

As Managing Director, [the Beneficiary] has hired two employees so far, and will be responsible for continuous hiring and training employees in the US. She will complete developing standard operation procedures for US Subsidiary Company. She will keep monitoring domestic and international regulations in Energy Services, direct and coordinate international procurement for the Parent Company, and advising the Parent Company to comply with US regulations. Also, she will seek business chances, negotiate contracts, market company service, oversee all finances, and ensure profitable operations.

In its letter of support, dated September 7, 2012, the Petitioner described the Beneficiary's position in the United States as follows:

[W]hile [the Petitioner] is still within the first year of initial set-up period, [the Beneficiary's] job responsibilities hardly include administrative duties, and almost 100% in managerial/executive capacities. With two administrative staff employees, [the Beneficiary] has been able to concentrate in negotiating and executing business deals with parts and equipment suppliers and in seeking new business venture in Texas.

....

[The Beneficiary] knows the details of day-to-day duties, so that she can hire staff members and delegate responsibilities, as well as managerial/executive decision making as an executive of [the Petitioner]. She has hired two employees so far, and is in the exploratory phase of opening a new venture, a full service gas station, in [redacted] Texas. This may create additional seven full-time jobs in the next one to three years, including store service staff, store clerks and mechanics.

In addition to making hiring decisions, she negotiates major deals on the Parent's behalf. . . .

....

As a Managing Director/CEO of our company, [the Beneficiary] is the top manager in the US operations. She has the managerial/executive control and authority over all future departments of the company, to make discretionary decisions in business operations with our focus on import & export business between Nigeria and US.

The Petitioner also provided the following list of the Beneficiary's duties and responsibilities:

**Reporting to the Parent Company:** As the top of the US Subsidiary, Beneficiary only reports to the board of the Parent Company, and advises the Parent. . . .

**Managing Human Resources:** Beneficiary directs creation of each department, recruits staff members and trains them, delegates authority to run each department during the set-up period, and evaluates employees by reviewing quarterly staff audit and performance index submitted through Department Heads.

**Planning and Managing Office in Business Operations:**

- › Until Beneficiary hires employees in the Shipping Department, Beneficiary is to act through subcontractors to procure parts for export to the Parent Company in Nigeria, negotiates contracts for transportation and handling, checks documents to meet requirements of national customs authorities, and be the contact person to be reported of the routes and means of transport.
- › Beneficiary ensures compliance with the US regulations governing import/export Compliance in any special requirements in ordering process and handling and care of goods, applies for export license, if necessary.
- › After setting up departments, Beneficiary sets up annual operating plans and coordinates activities of the company within annual operating budgets, collects information in renewable energy and waste system in the US to apply in Nigeria, and makes performance reports on a regular basis during the set-up period, and later reviews reports and evaluates performance and adjust business strategy.

**Control of Financial Management:**

- › Beneficiary negotiates deals and signs checks for contractors and professional work in setting up and running the company, and, until setting up the Sales & Marketing department, administer inventory, purchasing and marketing, and develop clients and referral system in energy business.
- › Beneficiary makes discretionary decisions in hiring an accountant, and oversees preparation of annual audit . . . determine budgets for approval in each department . . . and reviews accounting reports for expenses, ensures the consistency of book-keeping with the company policies.

(Emphasis in original.)

The Petitioner submitted copies of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2011 and first and second quarters of 2012. The Forms 941 indicate that for the third quarter of 2011, it had one employee and paid \$320.00 in wages, tips, and other compensation during that period; for the fourth quarter of 2011, it had two employees and paid \$5,337.20 in wages, tips, and other compensation during that period; for the first quarter of 2012, it had one employee and paid \$24,000.00 in wages, tips, and other compensation during that period;

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and for the second quarter of 2012, it had three employees and paid \$30,825.00 in wages, tips, and other compensation during that period.

The Petitioner submitted its Payroll Register, dated January 1, 2012 to August 17, 2012, from [REDACTED]. The Payroll Register lists the following employees during the indicated dates:

- Beneficiary, from January 1, 2012 to July 31, 2012.
- [REDACTED] from March 31, 2012 to August 5, 2012.
- [REDACTED] from May 14, 2012 to August 5, 2012.

The Director issued a request for evidence (RFE) on October 31, 2012, instructing the Petitioner to submit, in part, the names of the U.S. subordinate supervisors who are managed by the Beneficiary, their educational requirements, and copies of their educational credentials.

In response to the RFE, the Petitioner submitted a letter, dated December 27, 2012, describing the Beneficiary's position and its current staffing as follows:

[A]t the current location in [REDACTED] Tennessee, we have three employees: [REDACTED] [sic] [REDACTED] (Manager/Secretary), [REDACTED] (Receptionist) and [the Beneficiary] (Director). . . .

As our business is settled and successful, we are ready to hire more employees as soon as we relocate the business premises, and we project to hire 10 more employees by the end of 2013 for the positions of supervisor, manager, clerk and office assistant.

The Petitioner submitted its Form 941 for the third quarter of 2012, indicating that it had three employees and paid \$33,700.00 in wages, tips, and other compensation during that period.

The Petitioner did not submit any additional information pertaining to the Beneficiary's position under the extended petition or the requested evidence pertaining to the Beneficiary's subordinate employees.

The Director denied the petition on February 19, 2013, concluding that the Petitioner did not establish that the Beneficiary has been and will be employed in a qualifying executive or managerial capacity in the United States or that the Petitioner could currently support such a position. In denying the petition, the Director noted that, although requested in the RFE, the Petitioner did not state the educational requirements necessary to perform the duties of the positions subordinate to the Beneficiary, nor did it submit the educational credentials of the Beneficiary's subordinate employees. The Director found that the Petitioner did not establish that the Beneficiary will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve her from performing the services of the organization. The Director

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further found that the Petitioner did not demonstrate that the Beneficiary will function at a senior level within the organizational hierarchy other than in position title alone.

The Petitioner filed a joint motion to reopen and a motion to reconsider the Director's decision. In support of its motion, the Petitioner submitted a letter, dated March 18, 2013, stating that the Beneficiary has been and will be employed in an executive capacity and that its U.S. company will continue to support an executive position, as shown in the evidence presented. The Petitioner stated that the "Beneficiary hired and will continue to recruit employees for business expansion, which will leave her to concentrate on exclusively executive assignments." The Petitioner further stated that in its response to the Director's RFE, it "could not provide employee credentials because [the Beneficiary] was in the process of making a recruitment decision of firing one employee in [redacted] and hiring new ones for the [redacted] office." The Petitioner submitted a second letter, dated March 13, 2013, stating that the Beneficiary is planning on hiring 10 additional employees as a result of its expansion. The Petitioner further stated that the Beneficiary has hired a Business Development Manager and an Executive Director of Procurement and Operations Manager for the [redacted] office and a Secretary/Manager for the Tennessee office.

The Petitioner submitted a resume for the following employees:

- [redacted] appears to be the Operations Manager in [redacted] Texas from March 2013 to the present.
- [redacted] appears to be the Business Development Officer/Executive Director in [redacted] Texas from March 2013 to the present.
- [redacted] whose most recent position listed on the resume is that of Admin Secretary/Office Manager from May 2012 to the present.<sup>1</sup>

The Director denied the motion to reopen and motion to reconsider on January 16, 2014, affirming its decision dated February 19, 2013. The Director found that the Petitioner could not currently support an executive or managerial position. The Director further found that the record did not establish that the Beneficiary would manage other supervisory or managerial employees who would relieve her from performing the services of the organization.

The Petitioner filed a second motion to reopen the Director's decision. In its second motion to reopen, the Petitioner submitted a brief, dated February 12, 2014, stating that the Beneficiary was employed in an executive capacity and performed executive duties. In its brief, the Petitioner referenced a detailed organizational chart that had been previously submitted. However, the only organizational chart contained in the record is that of the foreign entity; the record, as currently constituted, does not include any organizational chart for the petitioning U.S. company. The Petitioner further claimed that it was submitting a list of employees and independent contractors along with other evidence meant to establish the Beneficiary's eligibility as an executive of its U.S.

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<sup>1</sup> We note, however, that the name of the employer for [redacted] most recent position is not listed.

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company; however, the Petitioner did not include the listed evidence. The Director denied the motion to reopen on September 8, 2014 finding that the Petitioner's submission did not meet the requirements of a motion to reopen or a motion to reconsider.

The Petitioner then filed the instant appeal. In support of the appeal, the Petitioner submits an undated brief in which it contends that neither the Petitioner, nor its Counsel, received any notice of decision for its motion to reopen filed on February 14, 2014. In its brief, the Petitioner outlines the sequence of events leading up to the instant appeal and explains that it became aware of the motion's denial online, but has not received a copy of the Director's decision, despite its contact with U.S. Citizenship and Immigration Services (USCIS) in an attempt to obtain a copy. As such, the Petitioner contends that the Director's decision on its motion to reopen filed on February 14, 2014 is erroneous for the following reasons:

[T]here is still no denial detailing the grounds of the alleged denials, neither is there any evidence that USCIS reviewed the records of the I-290B filed in on [sic] February 14, 2014, nor is there evidence that USCIS based its decision on probative and substantive evidence, after reviewing the additional supporting evidence, sent to establish why this case should never have been denied in the first place.

The USCIS did not explain what or whether any evidence was looked at. Evidently, USCIS completely failed to review the I-290B filed on February 14, 2014. There has clearly been an error of Judgment in this case. The service failed to consider the evidence submitted and the alleged denial on USCIS website had only a scanty information without substantiating service's findings and the grounds for denied [sic].

In an attempt to reconcile information pertaining to the petitioning U.S. company found online, this office contacted the Petitioner and advised that additional evidence is required. In response, the Petitioner submitted a letter, dated September 11, 2015, stating that it has expanded its operations to [redacted] Texas and is submitting evidence, such as documentation establishing that it continues to do business in the United States, its comprehensive Business Plan documents, salaries and pay slips of employees from 2013, 2014, and 2015, and copies of its tax returns. The Petitioner further states that it currently has three employees and is projecting to hire 10 more employees by the end of 2016, for the positions of Marketing Manager, Clerk, and Supervisor.

In support of the appeal, the Petitioner submits a new business plan, dated 2013, specifically describing its management as follows:

[The Beneficiary], upon approval, will continue to carry out the duties of [the Petitioner's] Managing Director/CEO and as such will manage and oversee the business operations of the company while focusing on the continue growth [sic] and expansion of its sales and the growth of its Company's market share.

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She will also continue maintaining full administrative authority, responsibility, and accountability for carrying out any and all assigned duties as required by the demands of the business and the Parent Company. [The Beneficiary] will have discretionary decision making authority as she supervises all of [the Petitioner's] staff. She will continue to oversee the procurement of products, the establishment of new contracts, the delegation of operational duties of the business, and the further development of new marketing campaigns for the subsidiary in conjunction with the Parent Company.

She will continue to be responsible for ensuring a viable and profitable company and will work diligently to maintain the business on a sound financial and operational footing, while at the same time using her knowledge to continue running the business.

The business plan goes on to describe the Petitioner's current staffing plan (as of 2013, the date of the business plan) and states that it currently has three employees and plans to increase its staff to eight by the end of 2013. The business plan specifies that the Petitioner currently employs a part-time Business Development Manager, [REDACTED] and a full-time IT/Operation Manager, [REDACTED] and plans to hire a receptionist. The business plan does not indicate whether these employees work at the Petitioner's Tennessee or Texas offices. The Petitioner goes on to state that it plans to open a gas station in Texas and will hire an office clerk, two supervisors, and two gas attendants in the future.

The business plan now includes an organizational chart depicting the Beneficiary at the top tier of the hierarchy as MD/CEO, directly supervising a Chief Operating Officer. The Chief Operating Officer supervises an Executive Director of Sales and Marketing, an Executive Director of Procurement, an Executive Director of Shipping, and an Executive Director of Power Projects. The Executive Director of Sales and Marketing supervises an Operations Manager who supervises a QHSE Coordinator who supervises a Safety Officer who supervises technicians and IT Trainers; the Executive Director of Procurement and the Executive Director of Shipping jointly supervise an Admin Secretary who supervises "Office Assistance;" and the Executive Director of Power Projects supervises an Account/Admin Manager who supervises an Account Clerk who supervises "Office Assistance." The organizational chart does not include the names of any employees in the listed positions, other than the Beneficiary.

The business plan further includes a list of duties for the Managing Director/CEO position and describes the Beneficiary's duties as follows:

As the President of [the Petitioner], [the Beneficiary] will continue to oversee the business operations of [the Petitioner] in addition to other duties including:

- Negotiating deals and contracts on behalf of the Parent Company,
- Making discretionary decisions regarding all business operation,

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- Reporting back to the Parent Company,
- Managing all human resource issues and needs for all its US locations,
- Ensuring the company is complying with all US regulations governing export compliance,
- Setting up all annual operating budgets,
- Maintaining responsibility for the quality and quantity of products and services being rendered,
- Liaising and communicating with suppliers, vendors, and manufacturers for products,
- Forecasting and establishing daily, monthly, quarterly, and annual sales and goals,
- Reviewing all accounting reports and records,
- Maintaining overall company operations standards,
- Overseeing all marketing and advertising activities,
- Directing and delegating company operational activities.

[The Beneficiary] will also provide the strategic leadership, direction and coaching necessary for the staff of [the Petitioner] in order to achieve results in higher levels of performance.

Furthermore, [the Beneficiary] will exercise and have wide latitude in discretionary decision-making over [the Petitioner] and its staff, including: hiring, firing, promoting and demoting of business personnel. [The Beneficiary] will also choose and direct what services will be incorporated and promoted within [the Petitioner].

The Petitioner submits pay stubs for three employees, including the Beneficiary, working at its [redacted] Texas office: [redacted] from September 21, 2013 to October 18, 2013; [redacted] from August 2, 2015 to August 15, 2015; and the Beneficiary from June 14, 2015 to June 27, 2015.

The Petitioner also submits its 2012 and 2013 IRS Forms 1120, U.S. Corporation Income Tax Return, indicating that it paid \$88,000.00 in compensation of officers, \$23,327.00 in salaries and wages, and \$0 in costs of labor in 2012, and \$26,247.00 in compensation of officers, \$8,025.00 in salaries and wages, and \$0 in costs of labor in 2013. The Petitioner did not include IRS Form 1125-E, Compensation of Officers, as instructed on Form 1120, for 2012, but did include it for 2013, indicating that the Beneficiary is its sole officer dedicating 100% of her time to the business. Although both Forms 1120 list the same Employer Identification Number, the Petitioner's 2012 Form 1120 lists its Tennessee address and its 2013 Form 1120 lists its Texas address.

B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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 in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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

In the instant matter, the Petitioner first characterized the Beneficiary's role as Managing Director/CEO and briefly described her duties in the following very broad terms: negotiate and execute business deals with parts and equipment suppliers; seek new business venture in Texas; make hiring decisions; negotiate major deals on the parent company's behalf; has managerial/executive control and authority over all future departments of the company; make discretionary decisions in business operations; direct creation of each department; recruit staff members and train them; delegate authority to run each department; evaluate employees; ensure compliance with US regulations; negotiate deals and sign checks for contractors and professionals; hire an accountant; oversee preparation of annual audit; determine budgets for approval in each department; and review accounting reports for expenses. The Petitioner also listed duties that the Beneficiary will perform until subordinate employees are hired. Specifically, the Petitioner indicated that until the Sales & Marketing Department is set up, the Beneficiary will administer inventory, purchasing, marketing, and develop clients and referral system; until the Shipping Department is set up, the Beneficiary will act through subcontractors to procure parts for export to the parent company in Nigeria, negotiate contracts for transportation and handling, check documents to meet requirements of national customs authorities, and be the contact person for reporting of the routes and means of transport; and, after setting up all the departments, the Beneficiary will set annual operating plans, collect information in the renewable energy and waste system in the US to

apply in Nigeria, and create performance reports. The Petitioner did not include any additional details or specific tasks related to each duty, nor did the Petitioner 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner also did not indicate how much time the Beneficiary will devote to each duty. Based on the current record, we are unable to determine whether the few claimed managerial duties would constitute the majority of the Beneficiary's duties. The Petitioner's description of the Beneficiary's job duties does not establish what proportion of the Beneficiary's duties will be managerial in nature, and what proportion will be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). These general statements do not offer any clarification as to the Beneficiary's actual proposed duties in the United States, and fall considerably short of demonstrating that the Beneficiary will primarily manage the organization and supervise and control the work of other supervisory, professional, or managerial employees. 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 has not provided any detail or explanation of the Beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

As noted, the Petitioner submits a new business plan on appeal, dated 2013, which includes an equally vague and broad list of duties for the Beneficiary's position of Managing Director/CEO. The new list of duties includes tasks such as: negotiate deals and contracts; make discretionary decisions regarding all business operation; manage all human resource issues; ensure compliance with U.S. regulations; set up all annual operating budgets; liaise and communicate with suppliers, vendors, and manufacturers for products; forecast and establish sales and goals; review all accounting reports and records; maintain overall company operations standards; oversee all marketing and advertising activities; direct and delegate company operational activities; and provide strategic leadership.

Here, the Petitioner listed the Beneficiary's duties but did not quantify the time the Beneficiary would spend on them. This lack of documentation is important because the Beneficiary's proposed daily tasks, as noted above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the Petitioner did not establish that the Beneficiary would primarily perform duties in either a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 or her 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.”

Here, the Petitioner indicated that the Beneficiary had two subordinates at the time of filing, a Manager/Secretary and a Receptionist. The brief descriptions of their actual job duties do not demonstrate that a professional degree is required to perform the duties of these positions. Nor do they indicate that the positions have supervisory or managerial responsibilities. 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 to establish that her daily routine will consist of primarily managerial duties. Finally, the Petitioner has not submitted evidence that the Beneficiary’s subordinate employees will relieve her from performing non-qualifying operational and administrative duties at the U.S. company.

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

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial.

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 asserts that the Beneficiary will be an executive; however, the Beneficiary's proposed position has not been shown to be primarily executive in nature. The Petitioner has not demonstrated that the Beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the Beneficiary's position are not sufficiently detailed to demonstrate that she will primarily focus her time on executive duties rather than the day-to-day operations of the business.

Finally, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the Petitioner has not reached the point that it can employ the Beneficiary in a primarily managerial or executive position.

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Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or executive capacity, or that the Petitioner has grown to the point where it will require the services of a full-time manager or executive. Accordingly, the appeal will be dismissed.

### III. QUALIFYING RELATIONSHIP

Beyond the decision of the Director, the Petitioner has not established that the United States and foreign entities are qualifying organizations. To establish a “qualifying relationship” under the Act and the regulations, the petitioner must show that the beneficiary’s foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with “branch” offices), or related as a “parent and subsidiary” or as “affiliates.” *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

As noted, the Petitioner indicated on the Form I-129, that it is a subsidiary of the Beneficiary’s foreign employer, [REDACTED]. Where asked to explain the company stock ownership and managerial control of each company, the Petitioner stated, “[The foreign entity] owns 60% of [the Petitioner].”

Throughout the record, the Petitioner claims that its “parent company” is the foreign entity; however, the record is lacking specific evidence and contains contradictory and inconsistent evidence as to the Petitioner’s actual ownership.

In support of the petition, the Petitioner submitted its Articles of Organization within the State of Tennessee, dated September 7, 2011, stating that the limited liability company will be “director managed” and that the Beneficiary is the sole member of the company with 100% of the shares.

The Petitioner also submitted its Articles of Amendment to the Articles of Organization, dated October 14, 2011, stating that “[the foreign entity] shall own sixty percent (60%) of [the Petitioner].” The Petitioner did not submit any additional evidence as to its actual ownership and control.

In support of the petition, the Petitioner submitted copies of the Beneficiary’s 2011 IRS Form 1040, U.S. Individual Income Tax Return. The 2011 Form 1040, at question 17, states that the Beneficiary earned \$12,431.00 from “rental real estate, royalties, partnerships, S Corporations, trusts, etc.” The 2011 Form 1040 at Schedule E, which includes questions related to the Beneficiary’s income or loss from Partnerships and S Corporations, states that the Beneficiary is a partner in the petitioning U.S. company.

The Petitioner also submitted its 2011 IRS Form 1065, U.S. Return on Partnership Income. The 2011 Form 1065 at Schedule B, which includes questions related to the Petitioner’s ownership and control, is marked “no” at question 3 which asks, “[a]t the end of the tax year: [d]id any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization, or any foreign government own, directly or indirectly, an interest of 50% of more in the

profit, loss, or capital of the partnership?” The same is marked “yes” at question 3b which asks, “[a]t the end of the tax year: [d]id any individual or estate own, directly or indirectly, an interest of 50% or more in the profit, loss, or capital of the partnership?”

On appeal, the Petitioner submits its 2012 and 2013 IRS Forms 1120. The 2012 and 2013 Forms 1120, at Schedule K, which includes questions related to the Petitioner’s ownership and control, are both marked “no” at question 4 which asks, “[a]t the end of the tax year: **(a)** [d]id any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation’s stock entitled to vote?” and **(b)** [d]id any individual or estate own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation’s stock entitled to vote?” Further, the Petitioner’s 2013 IRS Form 1125-E lists the Beneficiary as its sole officer and owner of 100% of its company stock.

In the instant matter, the record does not clearly demonstrate the actual ownership of the petitioning U.S. company, as some evidence reflects that the foreign entity is the majority owner, while the Petitioner’s tax documents show that the Beneficiary is the majority owner. 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 (BIA 1988).

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the United States and foreign entities are qualifying organizations. For this additional reason, the petition cannot be approved.

#### IV. CONCLUSION

An application or petition that does not comply with the technical requirements of the law may be denied by this office even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that we review appeals on a *de novo* basis).

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

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**ORDER:** The appeal is dismissed.

Cite as *Matter of GICS-, LLC*, ID# 13149 (AAO Dec. 16, 2015)