U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: FEB 0 9 2015 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this Petition for a Nonimmigrant Worker (Form I-129) seeking to extend the beneficiary's employment as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation established in [redacted] states that it operates an online jewelry store. The petitioner claims be an affiliate of [redacted] located in [redacted] Russia. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend his status for an additional two years in the position of director.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary is employed in qualifying executive or managerial capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the evidence establishes the beneficiary's employment in a managerial or executive capacity. The petitioner submits a brief statement and a copy of California's Corporations Code, and asserts that the beneficiary performs duties consistent with a corporate executive as set forth in the code. The petitioner also asserts that the director provided insufficient support for the conclusion that the beneficiary is performing primarily non-qualifying duties.

I. The Law

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

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

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(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 managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

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. Managerial or Executive Capacity in the United States

The sole issue addressed by the director is whether the petitioner established that the beneficiary is employed in a managerial or executive capacity in the United States.

A. Facts

The Form I-129 states that the beneficiary is the owner and director of the petitioning company, which operates an online jewelry store with six claimed U.S. employees and a gross annual income of $26,571.

The Form I-129 and letter of support describe the beneficiary's duties as:

- Directing the operations and management of the store to achieve short and long term business goals;
- Managing and setting tasks for the various departments of the online store;
- Managing the budget and financials of the company, including decisions connected to the bank operations, investments, and loans, as applicable;
- Maintaining official records and documents, and ensuring compliance with federal, state, and local regulations;
- Holding responsibility for the selection, employment, and release of employees;
- Developing new methods of management for the company and analyzing the competing market to discover methods of increasing profitability;
- Developing different channels of promotion to ensure effective marketing; and
- Negotiating and entering into contracts with suppliers and customers.

The petitioner also provided a list of 30 duties for the "manager of the online store." The duties include the following: operational and strategic management; management of the company, activities, and projects; management and development of social network and company promotion; monitoring of competitors and inventory; analysis of sales and inventory and effectiveness of promotions; supervise the implementation of the sales of service and commodities; control of the main economic indicators ("plan financial revenue, the average check, the filling of the check"), commodity assortment, and development, implementation, and launch of additional services; develop management and business processes and logistic scheme; prepare technical specifications for programmers and designers; hiring new employees; management of Search Engine Optimization ("SEO") site promotion company; define direction of personnel selection, training, dismissal, and work schedules; and define and approve the product range of the online store and the prices of the goods.

The petitioner submitted an organization chart for the U.S. entity. The chart places the beneficiary, in his position of director, at the highest level of the organization. The chart depicts six departments under the director: technical; marketing; procurement; storage; internet marketing; and content formation. The beneficiary and three additional individuals are identified on the organization chart. In addition to his role as director, the beneficiary is identified in the marketing position, which has subordinate positions identified as "SEO" and "SMO". The chart identifies [redacted] as the procurement and technical department employee; [redacted] as the internet marketing department and storage employee; and [redacted] as the content formation department employee. According to the chart, the technical department oversees an IT department and web-design. There are no individuals identified in the SEO, SMO, IT, or web-design positions.

In addition to the position description provided for the beneficiary, the petitioner provided position descriptions for the subordinate positions. The petitioner states that the service content formation department is in charge of the internal content of the website and works in accordance with the instructions of the SEO-Optimizer and sales manager to create and arrange texts, photos, and descriptions of goods. The petitioner states that the storage position examines the goods and answers questions that the buyer might have, accounts for the stock, and keeps the stock in order. The petitioner describes the procurement department as monitoring the availability of the goods with the suppliers, keeping track of the popularity of items in the store, and negotiating to reduce cost and improve the conditions of the supply. The description divides the technical department into IT and web-design. The petitioner states that the IT department is responsible for configuring servers, peripheral computers, PBX, and the accounting system, and the web-design department designs the website, banners, and mailings. The petitioner states that the internet marketing division markets and promotes the company using various internet resources, analyzes the external environment of the site including the competition, develops marketing strategies to increase traffic, and controls the website's usability and quality of content.

The petitioner submitted evidence of wages paid during the first three quarters of 2013. In a letter dated March 7, 2014, the petitioner indicated that it was engaged in the operation of a spa until November 13, 2013. The petitioner states that it changed the focus of its business from a spa to jewelry retail store due to unpredictable changes in the business environment and the inability to find qualified employees to work at the spa.

The director issued a Notice of Intent to Deny ("NOID"). The director stated that based on the petitioner's organizational structure, it appears that the beneficiary is primarily assisting with the day-to-day non-supervisory duties of the business. The director noted that eight employees listed on the payroll register were not identified on the organization chart, while three employees on the organization chart were not identified on the company's payroll.

In response to the NOID, the petitioner stated that the beneficiary his time to the following duties:

1. Operational and strategic management of Internet Store 22%;
2. Management of the company to meet its plans for an online store and ensure the smooth operation of the site of the company 15%;
3. Control of the main economic indicators of the store 10%;
4. Develop a strategy [for] online store 8%;
5. Management of the activities and setting tasks for all departments within the structure of the online store 7%;
6. Building management, business procedures from scratch and furthering their development 9.5%;
7. Monitoring of the competitors 4%;
8. Hiring new employees .5%;
9. Creation of guide to running a computer program in accounting and warehouse accounting for financial and commodity flows 3%;
10. Construction of logistic schemes of store 8%;
11. Control of commodity assortment filling online store 4%;
12. Sale of some commodity directions 3%;
13. Definition and approval of the product range of the online store and pricing of goods 3.5%;
14. Preparation of technical specifications for programmers and designers 2.5%

The petitioner also submitted a twenty-one page statement from the beneficiary with a description of the petitioner's operations within each of the fourteen categories of duties outlined above. The description provides specific examples of the tasks the beneficiary assigns to his subordinate employees. The description indicates that the subordinate employees complete the assigned tasks and report directly to the beneficiary. The beneficiary approves and corrects his subordinates' work. The beneficiary also uses the information from his subordinates to make decisions and assign additional tasks. The description indicates that the SEO and accounting duties are outsourced to third party companies. The petitioner indicates that a company identified as '[redacted]' performs technical support of office equipment, optimization and promotion of the website, and "the expansion of functional possibilities." The petitioner indicates that a company identified as '[redacted]" performs accounting services such as: payroll, taxes, technical and economic indicators, profit/costs, and document storage. The petitioner states that the third party companies are under the beneficiary's control.

Beyond assigning tasks to his subordinate employees, the beneficiary's duties as described in the twenty-one page statement include the following: hiring employees; searching for suppliers; negotiating with suppliers; signing contracts; representing the company in business circles; formulating applications for purchase from suppliers; determining pricing; and monitoring of special groups of goods. The beneficiary is identified on the organization chart as the petitioner's marketing department employee. The description indicates that the marketing department is responsible for the delivery of essential goods to the buyer and returns, through the U.S. postal service. The marketing department is also responsible for the submission of all advertising. The petitioner explained that the inconsistencies in the payroll and the organization chart are the result of its change in business operations. The petitioner explained that the tax documents provided with the initial petition reflect the employment levels of the spa it operated through the third quarter of 2013, but that the company changed business its operations in November 2013 and now operates an online jewelry store. The petitioner provided copies of checks paid to the beneficiary, [redacted] and [redacted] for the period of time between January 2014 and April 2014. The petitioner also provided a check indicating that it paid $300 to an accounting service.

The director ultimately denied the petition finding that the evidence was insufficient to establish that the beneficiary is employed in a qualifying managerial or executive capacity. The director again noted the discrepancy in the initial payroll documents and concluded that the beneficiary appeared to primarily assist with the day-to-day non-supervisory duties of the business. Likewise, the director added that the evidence indicated that the beneficiary performs routine operational activities rather than the management of a function.

On appeal, the petitioner asserts that the evidence is sufficient to establish that the beneficiary is employed in a qualifying managerial or executive capacity. The petitioner states that the beneficiary's executive authority is evidenced by his decision to pursue a change in business operations from a spa to an online jewelry store. The petitioner states that he directs the company's senior management in the day to day operations of the company's accounting, budgeting, negotiating, and personnel policies, and that the beneficiary has autonomous decision-making authority over operations in the United States. The petitioner claims that the beneficiary "supervises and controls the work of senior officers who in turn carry out the policies and procedures of the business by relaying these business decisions to the subordinate staff at the company" and that "the employees that the company staffs represent a hierarchy that starts with [the beneficiary] at the top, goes to his officers as the middle management, and then further extends to third line employees to carry out the day-to-day operations of the online retail business."

The petitioner also explains that the beneficiary, as director of the company, has additional fiduciary duties under California corporate law. Finally, the petitioner cites to an April 23, 2004 USCIS policy memorandum which states that in matters related to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts, deference should be given to an adjudicator's prior determination of eligibility.[1] In support of the appeal, the petitioner submits a copy of the California Corporations Code.

B. Analysis

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary is employed in a managerial or executive capacity.

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[1] Memorandum of William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity*, (April 23, 2004).

We do not doubt that the beneficiary exercises discretion over the petitioning entity and has the appropriate level of authority as director and sole owner of the organization, however, the petitioner has failed to show that his actual day-to-day duties, as of the time of filing, were primarily managerial or executive in nature. The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). The 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 functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

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.*

Some of the described duties suggest the beneficiary's direct involvement in the day-to-day operations of the company. Specifically, the petitioner stated that the beneficiary's duties include: "negotiating and entering into contracts with suppliers and customers," "developing different channels of promotion to ensure effective marketing," "maintain official record and documents," "monitoring of competitors and inventory," "control the main economic indicators of the store," "control of commodity assortment filling online store," "sale of some commodity directions," and "preparation of technical specifications for programmers and designers." The petitioner has not explained how the beneficiary's performance of the company's sales, marketing, financial, and administrative functions rises to the level of managerial or executive capacity. 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; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008).

Here, the petitioner indicates that the beneficiary spends at least 44% of his time on "management" duties, but fails to provide a meaningful description of the beneficiary's activities to support its assertion. For example, the petitioner states that the beneficiary spends his time as follows: 22% of his time on "operational and strategic management"; 15% of his time on "management of the company"; and 7% of his time on "management... of all departments." For the instant purpose, the petitioner must provide specific details to support that the beneficiary's claimed "management" responsibilities meet the statutory definitions. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although the petitioner provided a supplemental 21-page narrative description intended to explain the beneficiary's specific duties, it fails to demonstrate the amount of time the beneficiary spends performing qualifying versus non-qualifying duties. Moreover, the lengthy description does not correspond to the list of 14 duties described in the petitioner's letter, which are claimed to require 100% of the beneficiary's time. For example, while the petitioner indicates that the beneficiary spends 7% of his time on "management of the activities and setting tasks for all departments within the structure of the online store"; the detailed position description indicates that the beneficiary spends the majority of his time assigning tasks to his subordinate employees. In addition, the 21-page narrative description suggests that the beneficiary performs non-qualifying duties that are not included in the list of 14 duties provided previous, such as negotiating with suppliers and involvement in purchasing. Finally, the petitioner indicates that the beneficiary is currently serving a dual role in the petitioner's marketing department, but it has not identified what specific tasks he performs in this regard or the amount of time he allocates to marketing and related tasks. For example, the petitioner states that the marketing department, in which the beneficiary is the only employee, is responsible for all advertising, as well as delivery of goods to buyers and returns. Without a further breakdown of the percentage of time the beneficiary spends performing his specific duties, the petitioner cannot establish that the beneficiary spends the majority of his time on qualifying duties.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed employment in a managerial or executive capacity, 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 understanding a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve the supervision of employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act. The job descriptions submitted by the petitioner do not establish that the beneficiary's subordinates are professional-level employees.[2]

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is

The petitioner explained that the employment levels in the quarterly tax returns are inconsistent with the organization chart because the quarterly tax documents reflect employees of the petitioner's spa operation, while the organization chart reflects the company's employment levels after changing its business operations to an online jewelry store in November 2013. The petitioner submitted copies of checks to demonstrate the wages it paid from January 2014 until April 2014. The checks indicate that the petitioner paid wages to the beneficiary and two additional individuals. There is no evidence that the petitioner paid wages to the individual identified as the procurement and technical department employee. Although the foreign payroll includes the procurement and technical department employee, the foreign payroll documents are only provided through December 2013. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the petitioner has established that the beneficiary's subordinates include only a procurement department and storage employee and a content formation department employee.

The petitioner also failed to establish that the beneficiary's subordinates are supervisory or managerial employees. There is no evidence that the beneficiary's subordinate employees supervise additional employees or manage a function of the company. Although the organization chart depicts subordinate positions under the technical department and marketing department; no employees are identified in these subordinate positions and there is no evidence of payments to any employees beyond the beneficiary's direct subordinates. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

In response to the NOID, the petitioner indicates that it outsources SEO, technical, and accounting services to third party companies. However, the petitioner fails to provide a specific description of how the technical, financial, and web design duties are divided between third party companies, the beneficiary, and his subordinate employees. The petitioner has not provided a service agreement, contracts, invoices, or a detailed explanation of the work provided by any third party companies to demonstrate that the beneficiary or his subordinate employees have the requisite authority and control over any third party employees. 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)). While the petitioner provided a single check for $300 paid to the company's accounting services provider; without service agreements, contracts, or evidence of work performed it cannot be determined that the company relieved the beneficiary or his subordinates from performing the routine non-qualifying financial duties required by the online retail store or to establish that the beneficiary had the requisite control and authority over the third party employees.

The petitioner has not provided evidence to establish the beneficiary's subordinates are supervisors or managers. The evidence indicates that the beneficiary primarily functions as a first-line supervisor, directly overseeing non-managerial employees in their performance of the tasks required for the day-to-day operation of the online retail store. The petitioner has not provided evidence of an organizational structure sufficient to

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defined above. In the instant case, the petitioner has not established that a bachelor's degree is required for any of the positions subordinate to the beneficiary's.

elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The position description indicates that the beneficiary spends at least 75% of his time on duties that largely involve the beneficiary's supervision of his direct subordinates. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

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 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). 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, or other non-qualifying duties, is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

In the present matter, the petitioner has not established that it employs the beneficiary as a function manager. The petitioner has not identified or articulated an essential function that the beneficiary manages. The beneficiary's position description indicates his involvement in marketing, procurement, content formation, administration and financial operations. A petitioner cannot satisfy the regulatory requirements by making a blanket claim that the beneficiary is responsible for management of all functions of the business and therefore qualifies as a function manager. Although the organization chart identifies the beneficiary in a marketing department position, the petitioner has not provided sufficient detail regarding the beneficiary's marketing duties. The beneficiary's position description indicates that the beneficiary manages the SEO; however, as discussed above, the petitioner has not established that it employed the subordinate SEO or SMO positions depicted on the organization chart or that it employs a third party to perform the services. Furthermore, the petitioner did not indicate the percentage of time that the beneficiary spends on marketing duties, although the beneficiary is identified as the sole marketing employee. Without a clear description of the beneficiary's duties and evidence of staff to perform the non-qualifying marketing duties; the petitioner has failed to establish that the beneficiary manages the function, rather than provides the marketing services directly. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections

101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner has also not established that the beneficiary is employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex 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.*

Here, it appears that the beneficiary has executive level authority; however, the petitioner has not demonstrated that the beneficiary would be primarily focused on the broad goals and policies of the organization. The petitioner has not established that it has the subordinate staff in place to relieve the beneficiary from many day-to-day non-executive tasks associated with operating the business. Instead, many of the tasks attributed to the beneficiary, as discussed above, indicate that he is involved in the day-to-day operations of the company. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 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").

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations for the extension of a "new office" petition require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).[3] 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

[3] Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. *See* 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel refers to a 2004 USCIS memorandum to support the assertion that it is USCIS policy to give deference to prior approvals of petitions involving the same parties. However, the Yates memorandum specifically states, at page 2, fn.1, that it does not apply to L-1 new office extension petitions, which are subject to the evidentiary requirements at 8 C.F.R. § 214.2(l)(14)(ii).

It is noted that the petitioner intends to expand its online retail business. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.,* 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm'r. 1971). For this reason, the petitioner's plans for future expansion are not considered in determining eligibility for the instant petition.

Here, the record indicates that the beneficiary and his subordinates perform the actual day-to-day tasks of operating the online retail store, and the petitioner has not established that the staff in place at the time of filing to relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

III. Financial Status

Beyond the decision of the director, the petitioner has not provided sufficient evidence of the financial status of the United States operation, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). The petitioner provided its 2012 Internal Revenue Service "(IRS) Form 1120, U.S. Corporation Income Tax Return, and bank statements from January 2013 through April 2013. The petitioner filed the instant petition in November 2013. The petitioner did not provide evidence of the company's financial status at the time the petition was filed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, 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 the AAO reviews appeals on a *de novo* basis).

IV. Conclusion

In visa petition proceedings, the petitioner bears the burden of proving eligibility for the benefit. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (the petitioner must prove eligibility by a preponderance of evidence). Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.