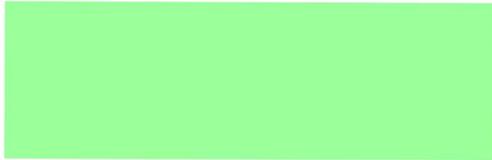


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U.S. Citizenship  
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Services

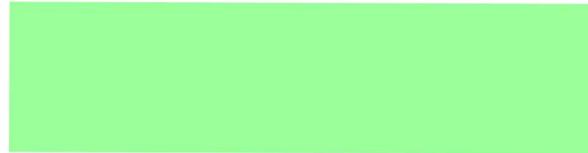


DATE: **JAN 02 2015** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:



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, 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 a Form I-129 Petition for a Nonimmigrant Worker seeking to extend the beneficiary's status as an L-1A 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 limited liability company established in [REDACTED] states that it is engaged in the design, construction, and operation of residential and commercial properties. The petitioner indicates that it is a subsidiary of [REDACTED] located in Spain. The beneficiary was previously granted one year as an L-1A intracompany transferee in order to open a "new office" in the United States as the petitioner's general manager. The petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary is employed in a qualifying managerial or executive capacity. Further, the director found that the petitioner did not demonstrate that the petitioner is doing business as defined in the regulations.

On appeal, the petitioner contends that the beneficiary acts as a qualifying manager based upon his supervision and control of professional subordinates. The petitioner further states that the petitioner is doing business as defined by the regulations. The petitioner submits additional evidence on appeal to establish that the beneficiary acts in a qualifying managerial or executive capacity and that the petitioner is doing business as defined by the regulations.

## 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(1)(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 (1)(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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a "new office" petition must submit 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.

## II. ISSUES ON APPEAL

### A. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES)

The first issue addressed by the director is whether the petitioner has established that the beneficiary is employed in a qualifying managerial or executive capacity.

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.

#### 1. Facts and Procedural History

The petitioner filed the Form I-129 on January 10, 2014. The petitioner states that it provides "one stop shopping in the area of residential and commercial construction, remodeling, wiring and electronic systems, as well as energy conservation design and technologies." The petitioner indicated that it has two employees and evidence submitted on the record reflects that it did not earn any income in 2013.

In a letter dated January 7, 2014, the petitioner explained that it had purchased a lot in [REDACTED], FL, the proposed site of a residential construction and development project known as [REDACTED]. The petitioner stated that it engaged a construction company to perform a survey of the property and that it had contracted with a "certified building contractor" to prepare a proposal for the construction of a six bedroom single family home on the property. The petitioner stated that it anticipated that it would soon be entering the second phase of the project involving "obtaining construction permits, approving budgets and bids for contractors, approving expenses of vendors involved in the construction of the [REDACTED]" including the commencement of marketing activities through real estate brokers. The petitioner further indicated that

it was "in the initial stages of developing a potential second project" in [REDACTED] with a projected completion date of 18-24 months.

The petitioner explained that as general manager the beneficiary "has discretionary authority to implement policies and quality standards" for the petitioner. The petitioner stated that the beneficiary would "oversee the selection and placement of all corporate staff and contracts in order for the company to continue to develop and manage its US projects." The petitioner indicated that the beneficiary has already made "key placements for the management team," including hiring a technical director and that it anticipated hiring a director of sales and marketing within the next twelve months. The petitioner explained that the beneficiary has been "instrumental in implementing the initial stages of the [REDACTED] project," that he is "essential to the management and control of budget and operating expenses, purchase approval, marketing strategies and technical grounds," and that he will be responsible for "determining future projects."

The petitioner further explained the beneficiary's duties as follows:

[S]ince his arrival in the United States, [the beneficiary] has effectively contributed ideas and foundations to realize the goals of the expansion of the [foreign entity's] brand in the United States; completed the purchase of land for [REDACTED]; recruited an architect[sic], reviewed and approved final project drawings for [REDACTED]; searched and negotiated with general contractor for [REDACTED] requested budgets for the manufacturers, suppliers and installers of materials, submitted plans to the appropriate homeowners association for their approval, and continued the search for new projects for [the petitioner].

During the period of requested extension of his status, [the beneficiary] will complete and supervise the process of obtaining construction permits and commencing the construction of [REDACTED]. His duties will include, but not be limited to, the review, selection and acceptance of all necessary bids and budgets, control of any change orders or similar issues during the construction, and negotiating and closing agreements for future projects.

The petitioner submitted a construction estimate dated February 5, 2013 for the completion of a survey at the [REDACTED] property for approximately \$900. The petitioner provided a deed from the property and a sales history indicating that it had purchased the lot for \$67,500 on February 27, 2013. The petitioner further submitted another estimate from a [REDACTED] for \$1,225,460 in construction services relating to the construction of a six-bedroom, 7,000 square foot home on the [REDACTED] property. The petitioner provided pictures and drawings relating to another proposed residential project in [REDACTED] that would commence in "18 to 24 months."

The petitioner submitted an organizational chart reflecting that the beneficiary supervises a technical director, the aforementioned Mr. [REDACTED] and a vice president/director of sales and marketing. The chart indicated that the technical director would be responsible for "control of work, shipping inspection from the county, [and the] processing of permits and licenses," and that he would oversee "employees construction." The chart depicted a vacant administration and accounting position that would report to the vice president/director of sales and marketing.

The petitioner provided a copy of its 2012 IRS Form 1120 U.S. Corporation Income Tax Return reflecting that it did not earn any revenue or pay any salaries or wages during that year. The petitioner submitted audited financials indicating that the petitioner had not earned any revenue and paid \$21,000 in payroll expenses through [REDACTED] 2013. The supporting evidence reflected that the beneficiary and the vice president/director of sales and marketing were the only employees paid in 2013.

The director later issued a request for evidence (RFE) advising the petitioner that its initial evidence was insufficient to establish that the beneficiary would act in a qualifying managerial or executive capacity or that it was doing business as defined by the regulations. The director noted that the petitioner had claimed to hire a contractor, Mr. [REDACTED] but had failed to substantiate any payments to this contractor. The director requested that the petitioner provide evidence that it is doing business, including audited financial statements, invoices, shipping documentation, bank statements and/or contracts. The director also noted that the petitioner had provided insufficient explanation of the duties of the claimed vice president/director of sales and marketing and requested that the petitioner provide an organizational chart reflecting its employees by name and job title along with a summary of their duties and salaries. The petitioner asked the petitioner to submit quarterly wage reports for the last four quarters and/or IRS Forms W-2 or W-3 as evidence of wages paid to employees.

In response, the petitioner stated that it "retained [Mr. [REDACTED]] as contractor to complete all blueprints, designs, and seek all permits related to the acquisition and development of real estate," noting that he would fulfill "all pertinent and customary responsibilities of a project manager" such as "managing the phases of the projects, inspections, technical rigors, and required documentation to complete the projects." With respect to the beneficiary, the petitioner explained that he would continue "to operate as the senior executive in charge of the opening of the company's new offices taking the lead on all real estate development projects" and that he "will be making investment, administrative, and executive decisions in all new projects." The petitioner stated that the beneficiary had "decided to seek real estate project in [REDACTED] and had moved the company's office to this area from [REDACTED]. The petitioner indicated that it had a new project in [REDACTED] known as [REDACTED] that would involve the construction of a three bedroom 7,000 square feet residential property. The petitioner stated that it "expects to invest \$400,000 into the project" and that it "should be completed within twelve (12) months and require financing of \$280,000."

The petitioner provided further explanation of the duties performed by the beneficiary's subordinates, stating that the vice president/director of sales and marketing would establish "agreements with real estate brokerage companies to analyze, acquire, and sell real estate developed by [the petitioner]." The petitioner stated that this employee was paid \$14,000 during 2013, but also submitted her pay statement dated December 31, 2013 indicating that her year to date earnings totaled \$6,000. Further, the petitioner stated that the technical director, Mr. [REDACTED] had been retained as an independent contractor and had received \$2,250 in professional fees. The petitioner indicated that "we expect him to have a more permanent position once these first projects are completed." The petitioner explained that it had also hired an administrative assistant subordinate to the vice president/director of sales and marketing. An IRS Form W-4 indicated that she was hired on February 3, 2014.

The petitioner provided a contract dated July 7, 2013 between it and Mr. [REDACTED] relating to [REDACTED] reflecting that he had been hired to create construction drawings for the project. The petitioner submitted a "Vacant Land Contract" specific to the aforementioned [REDACTED] indicating that it proposed to purchase this property for \$30,000. However, this agreement was not executed by the seller and it indicated that this land required surveying to confirm its feasibility for residential development. The petitioner provided a "statement of income" through December 2013 indicating that it had earned \$179.26 in revenue and had paid \$26,000 in wages during that year. Lastly, the petitioner's most recent IRS Form 941 for the third quarter of 2013 reflected that it had paid \$5,000 to two employees during that quarter.

In denying the petition, the director emphasized that the petitioner had only one employee in addition to the beneficiary. The director stated that the petitioner had failed to substantiate the payment of its claimed employees and independent contractors with supporting documentation, including state quarterly wage reports. The director concluded that the evidence did not demonstrate that the beneficiary supervised, or would supervise, managerial, supervisory or professional subordinates.

On appeal, the petitioner contends that the beneficiary supervises and controls the work of other professionals in the Florida construction industry and that he has set the company's "ambitious and attainable goals." The petitioner states that it sold the property it previously planned to develop as [REDACTED] for \$170,000. The petitioner further indicates that it has a "particular interest" in three projects, including the aforementioned property in [REDACTED] the [REDACTED] property, and another referenced as "[REDACTED]"

The petitioner provides additional evidence on appeal in support its assertions. For instance, the petitioner provides a contract for the rental of a pallet truck and an appliance dolly for \$77.76 in April 2013 listing the beneficiary as the petitioner's contact, as well as a construction contract for the survey of the proposed [REDACTED] property for \$920 dated February 2013. The petitioner also submits a letter from the foreign entity dated February 15, 2014 stating that it had recently sold a property in Spain and that it "will allocate part of the proceeds...to current and new projects in the United States." The petitioner provides a proposal from an architect for design services dated December 18, 2013 relating to the refurbishment of an apartment unit in [REDACTED], FL. However, this proposal was not countersigned by the petitioner.

In addition, the petitioner submits 2013 IRS Forms W-2 Wage and Tax Statements indicating that it had paid \$40,000 to the beneficiary and \$16,000 to the vice president/director of sales and marketing. The petitioner provides its Florida Department of Revenue quarterly report for the fourth quarter of 2013 indicating that it paid \$4,000 to the beneficiary and \$1,000 the vice president/director of sales and marketing. The petitioner submits a 2013 IRS Form 1120 reflecting that it earned no revenue, but paid \$56,000 in "compensation to officers" during that year.

The petitioner also provides an updated organizational chart indicating that it had added a project superintendent reporting to Mr. [REDACTED] whose title is now listed as 'project manager/general contractor.' The chart stated that this new employee "is in charge of supervising all projects in detail," including "job costing, budgeting, and the coordination of employees and subcontractors at the job sites."

The petitioner submitted proposed real estate sales contracts for various properties, including those relevant to the aforementioned projects in [REDACTED] and [REDACTED] none of which were countersigned by sellers. The petitioner further provided the first page of a "Settlement Statement" indicating that it had sold the [REDACTED] property for \$170,000 on December 6, 2013. The petitioner submitted a business plan indicating that it would need nearly \$800,000 to complete the three proposed projects previously referenced herein, which had interest in pursuing, including those aforementioned in [REDACTED], the [REDACTED] parcel, and [REDACTED]. The plan indicated that these projects would take anywhere from four to sixteen months to complete. Further, the plan stated that the vice president/director of sales and marketing was responsible for identifying properties, performing due diligence on properties and completing appraisals. The petitioner stated that following the performance of these duties it will "begin hiring subcontractors" for construction, noting that the project superintendent will keep track of these personnel.

## 2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The definitions of executive and managerial capacity 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 prove 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).

The petitioner has submitted duties for the beneficiary indicating that he is likely primarily performing non-qualifying operational tasks. The petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, including being directly involved in all aspects of the petitioner's proposed residential construction projects such as renting equipment, arranging for small scale services, and providing photos, designs and proposed materials to contractors do not fall directly under traditional managerial duties as defined in the statute. 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. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a qualifying manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 is not clear that the beneficiary could primarily perform qualifying duties in light of the petitioner's limited operations. The petitioner has not provided specifics or supporting documentation to substantiate that the beneficiary primarily performs qualifying executive or managerial duties. For instance, the petitioner indicates that the beneficiary will implement policies, quality standards, and marketing strategies. However, given the petitioner's limited operations, the record does not support a finding that these higher level executive level duties could encompass a majority of his time. Further, the petitioner has not submitted evidence to substantiate that the beneficiary is primarily engaged in implementing policies, standards and other such qualifying duties and not primarily engaged in the performance of non-qualifying operational duties. 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)).

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 company'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 business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The petitioner has not established that the staffing and organizational structure in place at the time of filing is sufficient to support the beneficiary in a qualifying managerial or executive capacity. At the time of the filing, the petitioner asserted that the beneficiary supervises a technical director and a vice president/director of sales and marketing. Although the petitioner provides evidence that it compensated the asserted vice president/director of sales and marketing, the petitioner has not substantiated that the claimed technical director/project manager, Mr. [REDACTED] is regularly engaged as a subordinate of the beneficiary. This employee is not shown in payroll records and the petitioner has only provided evidence indicating that he was hired as a contractor to perform a site survey at the [REDACTED] location for \$2,250. Otherwise, the petitioner has not supported the assertion that Mr. [REDACTED] acts as a regular project manager for the petitioner and that he relieves the beneficiary from performing non-qualifying duties relating to its proposed residential construction projects. Further, the petitioner has not demonstrated that it has any current construction projects for this employee to manage and states on the record that he will not be engaged in this role until the referenced "first projects are completed."

Likewise, the petitioner has not demonstrated that it has sufficient operations to employ a fulltime vice president/director of sales and marketing. In fact, the evidence indicates that the petitioner has no properties or homes to market and sell and the petitioner states on appeal that this employee will be hiring subcontractors relevant to its projects, but has not done this to date, thereby leaving question as to the duties

performed by this subordinate. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Subsequent to the initial petition filing, the petitioner asserted that it hired an administrative assistant subordinate to the vice president of sales and marketing and a project superintendent reporting to Mr. [REDACTED]. In addition, the petitioner provided substantial evidence related to its plans and proposed projects that it intends to commence and/or complete in the future. However, these future employees and projects are not relevant to establishing that the petitioner had sufficient employees and operations as of the date of the filing of the petition. Despite the petitioner's assertions, it may not be granted a second "new office" L-1A visa approval based on these plans for the future. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow a beneficiary a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position.

Regardless, the petitioner has not presented any evidence to indicate that the petitioner employs the aforementioned administrative assistant or project superintendent, even if these employees were considered relevant to the beneficiary's eligibility. The petitioner's most recent Florida quarterly wage report for the fourth quarter of 2013 reflects that the petitioner paid only two employees. In fact, as noted, the petitioner has had little or no revenue to date and has not established that it currently has projects for a project superintendent to oversee.

On appeal, the petitioner submits evidence indicating that it has earned approximately \$170,000 resulting from the sale of the property that was to be the site of the claimed [REDACTED] project. The petitioner does not submit sufficient supporting evidence to substantiate the sale of this property, beyond a "Settlement Statement" reflecting the petitioner as the seller of the property as of December 6, 2013. However, the petition was filed in January 2014 and the petitioner responded to the director's RFE in February 2014. The petitioner stated at the time of filing and in response to the director's RFE that it is moving forward with the [REDACTED] project and that this project is central to the petitioner's proposed operations. Further, there are several references to this project in the petitioner's description of the beneficiary's proposed duties under the extended petition and the petitioner's 2013 Form 1120 reflects no income, thus suggesting that the sale was not completed in 2013. Likewise, the petitioner provides documentation reflecting that it has offered to purchase various properties, but none of these documents indicate that it currently has moved forward with any of its proposed construction contracts. These discrepancies leave question as to whether the petitioner has sufficient operations to support the beneficiary in a qualifying managerial or executive capacity. 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). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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

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

In the current matter, the petitioner has not substantiated that the beneficiary primarily oversees and controls other supervisory or professional employees. First, as noted previously, the petitioner did not demonstrate, as of the date of the petition, that the beneficiary oversees other supervisory employees. Further, even when considering the evidence later submitted in response to the RFE and on appeal, the petitioner does not provide supporting evidence to corroborate the assertion that it employs its claimed administrative assistant or project superintendent. As noted, the petitioner's most recent quarterly wage report reflects no wages paid to these employees and the petitioner has provided no other evidence to indicate that they are being regularly paid as contractors. As such, the evidence reflects that the beneficiary does not supervise subordinate supervisors or managers.

Therefore, the question is whether the beneficiary oversees professional subordinates, as that term is defined by case law. The petitioner has not provided any evidence to establish that the beneficiary's subordinates hold baccalaureate degrees or knowledge of an advanced type gained by a prolonged course of specialized instruction and study of at least baccalaureate level. Indeed, the petitioner has submitted supporting documentation suggesting that the petitioner has earned little or no revenue and very limited operations and that it can support a vice president/director of sales and marketing and a technical/project manager subordinate to the beneficiary. Based on these deficiencies in the evidence, the beneficiary has not demonstrated that the beneficiary acts as a personnel manager based upon the supervision of professional subordinates. Once again, 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)).

Based on the foregoing, the petitioner has not established that the beneficiary is, or will be, employed in a qualifying managerial or executive capacity. Therefore, the appeal will be dismissed.

#### B. DOING BUSINESS

The next issue to address is whether the petitioner has established that it is doing business. "Doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. 8 C.F.R. § 214.2(l)(1)(ii)(H).

The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

In the facts and procedural history of the previous section, we have provided a detailed narrative of the petitioner's asserted business operations. Based on this evidence, the petitioner has not established that it was doing business as of the date of the filing of the petition. The petitioner has submitted tax and financial documentation indicating that it generated no income during 2012 or 2013. The petitioner asserts that it is engaged in the development, construction and sale of residential properties, but the evidence submitted indicates that it has yet to initiate any actual residential construction projects. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Regardless, the petitioner has not demonstrated that the petitioner is doing business as of the date of this appeal. The petitioner asserts on appeal that it earned \$170,000 in revenue from the sale of property in [REDACTED], FL, referred to on the record as [REDACTED]. However, as discussed previously, the petitioner questionably submits documentation on appeal indicating that the petitioner sold this property in December 2013, prior to filing the petition, despite previously asserting on the record that the development of this property was central to its proposed operations. In addition, the petitioner provides property sales documentation reflecting that it is contemplating the purchase of additional properties, but none of this documentation indicates that the petitioner has actually moved forward with any of its proposed residential construction projects or garnered any revenue from the sale or development of purchased properties. 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. 582, 591-92 (BIA 1988). Otherwise, the petitioner has submitted little evidence to establish that it is doing business in a regular, systematic, and continuous manner. 8 C.F.R. § 214.2(l)(14)(ii). Indeed, the evidence submitted indicates that the petitioner's business activities remain prospective. For this additional reason, the appeal must be dismissed.

## C. QUALIFYING RELATIONSHIP

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

The petitioner stated in support of the Form I-129 that the foreign entity "owns 100% of [the petitioner]." The petitioner submitted "Articles of Incorporation of Commercial Limited Liability Corporation" dated in September 1996 reflecting that the foreign entity is jointly owned by [REDACTED] (500 shares) and the beneficiary (500 shares). Further, the petitioner provided its Articles of Incorporation dated November 13, 2012 stating in Article VI that it "will be a manager-managed company" and listing the managers as the beneficiary and [REDACTED]. In addition, when the petitioner was asked in its 2012 IRS Form 1120 whether it was more than 25% owned by a foreign person the petitioner answered "no." On appeal, the petitioner provides a business plan stating that "the ownership of [the petitioner] is the same as [the foreign entity]," noting that it is owned 50% by the beneficiary and 50% by the aforementioned Ms. [REDACTED].

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Based on the evidence presented, the actual ownership in the petitioner and the foreign entity cannot be determined, and as a result, the petitioner has not established that the two companies have a qualifying relationship. First, the petitioner indicated that it was wholly owned by the foreign entity, but later asserted, and provided documentation suggesting, that it was equally owned by the beneficiary and Ms. [REDACTED]. Further, the petitioner provides documentation reflecting that the foreign entity is equally owned between the beneficiary and [REDACTED]. Now, on appeal, the petitioner states in its business plan that the foreign entity is owned by the beneficiary and Ms. [REDACTED]. As such, even if we are to accept that the petitioner is owned by the beneficiary and Ms. [REDACTED] the petitioner has failed to demonstrate that the foreign entity is also owned in this manner. In fact, it has submitted foreign articles of incorporation in direct contradiction to this assertion and has otherwise provided no other evidence to support that the foreign entity is owned by the beneficiary and Ms. [REDACTED]. Once 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. 582, 591-92 (BIA 1988).

The petitioner has not submitted copies of its membership certificates, operating agreement or other corporate documents to corroborate its claimed ownership, nor has the petitioner submitted any updated evidence of the ownership of the foreign entity beyond its articles of incorporation from 1996. Therefore, the petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

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).

### III. CONCLUSION

The appeal will be dismissed and the petition will remain denied 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.