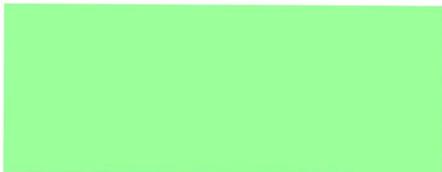
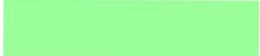


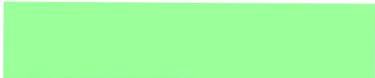


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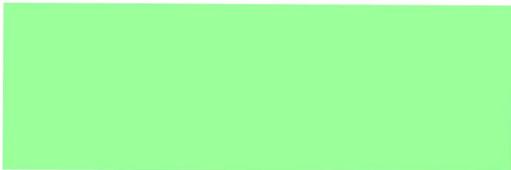


DATE: **JAN 26 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

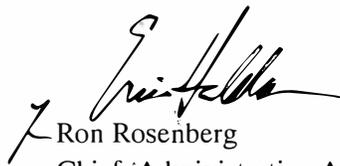


INSTRUCTIONS:

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, California Service Center (the "director"), 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 the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Delaware corporation organized on February [REDACTED] indicates on the Form I-129, that it is engaged in software development. On the Form I-129, Supplement L, the petitioner claims to have a qualifying relationship with [REDACTED] an entity located in the Ukraine. The petitioner seeks to employ the beneficiary as its chief operating officer.

The director denied the petition finding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to this office. On appeal, the petitioner submits a brief and additional documentation and requests that the petition be approved.

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's grounds for denying this petition. In addition, we find additional grounds for denial that preclude the approval of the petition.¹ Accordingly, the appeal will be dismissed and the petition will remain denied.

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.

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). It was in this appellate review that we found additional reasons for denying the petition.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

II. QUALIFYING RELATIONSHIP

The issue addressed by the director in the denial decision is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer.

A. Regulatory Definitions Pertinent to a Qualifying Relationship

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides the following pertinent definitions:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, . . .

B. Facts

On the Form I-129, Supplement L, the petitioner stated that the petitioner and the beneficiary's Ukrainian foreign employer are both owned by [REDACTED] each owning 50

percent of each entity. The petitioner provided its Certificate of Formation in Delaware as a limited liability company. The petitioner also submitted a Statement of Authorized Persons identifying [REDACTED] as the petitioner's managing members. The initial record included a bank letter, dated March 10, 2014, certifying that the petitioner maintains a business account and had maintained the account since August 2013. The bank letter noted that the average balance for the last three billing cycles was in the low \$200,000s. The petitioner's business plan, dated March 4, 2014, identified the petitioner's total start-up expenses as approximately \$120,000 and indicated the funds would be financed through owner investment.

The petitioner also provided a translated copy of the foreign entity's charter showing two participants in the foreign entity limited liability company. The charter identified the two participants as [REDACTED] and [REDACTED] and indicated that each participant held 50,000 of the 100,000 units issued.

In response to the director's request for further evidence (RFE) [REDACTED] submitted a statement and supporting documentation showing that [REDACTED] had transferred funds to the petitioner beginning in November 2013 and continuing to March 2014. The funds transferred totaled \$1,097,788.

The director denied the petition finding that the petitioner had not demonstrated that either of the petitioner's claimed members had contributed capital to the petitioner. Accordingly, the director determined that the petitioner had not established that both the petitioner and the foreign entity were owned and controlled by the same individual or group of individuals, each owning a proportionate share.

On appeal, the petitioner asserts that no capital contribution is required in the L-1 context to establish a qualifying relationship with a foreign entity. The petitioner also submits its operating agreement. The operating agreement, dated February 13, 2013, states that each managing member shall contribute \$500 to the capital of the limited liability company and identifies the managing members as [REDACTED] and [REDACTED]. The operating agreement notes that the managing members shall not be required to make additional capital contributions. The petitioner also submits photocopies of two transactions, each dated August 1, 2014, showing [REDACTED] had each deposited \$500 to the petitioner's bank account.

C. Analysis

In this matter, we concur that the record, including the evidence submitted on appeal, does not include sufficient evidence to establish the ownership and control of the petitioner and thus the qualifying relationship between the petitioner and the foreign entity.

General evidence of a petitioner's claimed qualifying relationship, such as a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership

interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, U.S. Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control.

The regulations also specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(1)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In this matter, the record before the director did not include consistent supporting documentation establishing the ownership and control of the petitioner. 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). 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)).

The petitioner's business plan, dated March 4, 2014, indicated that the petitioner's total start-up expenses would be approximately \$120,000, all of which would be financed through owner investment. Although the petitioner submitted a bank letter, dated March 10, 2014, noting the petitioner's "account's average balance for the past three billing cycles was in the low \$200,000s," the record did not include evidence of the source these funds. The petitioner did not submit any supporting documentation showing the petitioner's owners purchased or otherwise invested in the petitioner. On appeal, the petitioner submits its operating agreement, which is dated February 13, 2013, a date prior to filing the petition and thus appears to have been available to submit in response to the director's RFE. Here, we observe that the wire transfers from the two claimed managing members supporting their required capital contribution, as set out in the February 13, 2013 operating agreement, were not made until August 1, 2014, after the director's decision denying the petition.

Thus, the petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency, however, the petitioner only offered the evidence, the operating agreement and evidence of the claimed members' capital contribution, on appeal. In such circumstances we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for

evidence. *Id.* Moreover, it appears the claimed members of the petitioner made their capital contributions, required by the petitioner's own operating agreement, more than a year after the formation of the petitioner and after the petition had been filed. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Based on the evidence before her, the director properly determined that the record did not include sufficient probative evidence establishing the petitioner's ownership and control.

The petitioner's attempts to substantiate its ownership and control with evidence previously requested and not submitted and evidence created subsequent to filing the petition, as set out above, is not probative. In addition, we observe that the petitioner has not offered any clarification between its business plan, which noted that the petitioner's total start-up expenses of approximately \$120,000 would be financed by owner investment, and the wire transfers from the two claimed managing members showing only an investment of \$500 each.

Upon review of the totality of the record, the record is insufficient to establish that the petitioner is owned, managed, and controlled by [REDACTED] and thus has a qualifying relationship with the beneficiary's foreign employer, [REDACTED] as an affiliated company. The petitioner, therefore, has not established a qualifying relationship with the foreign entity as that term is defined above. Accordingly, the appeal will be dismissed.

III. BEYOND THE DIRECTOR'S DECISION²

As set out above, a beneficiary coming to the United States as a manager or executive to open or be employed in a new office in the United States must submit specific evidence showing that it has secured sufficient physical premises, that the beneficiary had been employed abroad in an executive or managerial capacity, and that the intended United States operation, within one year of the approval of the petition will support an executive or managerial position according to the applicable definitions.

In this matter, upon review of the totality of the record, we find that the petitioner has not established the beneficiary was employed in an executive or managerial capacity abroad and has not sufficiently described the scope of the U.S. operation, its organizational structure, and its financial goals, such that it is possible to conclude that the U.S. operation will support an executive or managerial position, within one year of the approval of the petition.

² 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).

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. The Beneficiary's Foreign Employment

On the Form I-129, Supplement L, the petitioner stated that the beneficiary's duties for the foreign entity included:

- Managing [REDACTED] Quality Assurance Department which consists of 14 Test Engineers with control over professional development, promotions, hiring and dismissal of employees;
- Supervising implementation of Testing Framework project for our client [REDACTED]
- Supervising Quality Assurance competency center for [REDACTED] covering delivery office in [REDACTED], Ukraine;

- Supervising coordination of operations of Offshore Development Center organized for [REDACTED] largest customer, [REDACTED] ensuring adherence to client and [REDACTED] best practices, helping to resolve project issues, being an escalation point of contact for Project Managers and customer's peers.

In the foreign entity's letter in support of the petition, the foreign entity's co-founder noted that in March 2013, the beneficiary had been promoted to the position of project manager for its Consumer Portal project for [REDACTED]. The foreign entity indicated that as a project manager for [REDACTED] the beneficiary was responsible for the following:

- Managing a team of 14 developers and testing engineers;
- Supervising setting up development and testing process;
- Supervising gathering and digesting customer requirements and running project from scratch;
- Supervising researching and choosing appropriate framework for server side application;
- Supervising storing project documentation in client's task management tool and maintaining version control;
- Supervising setting up communication between [REDACTED] and client teams;
- Supervising development and storing of project documentation;
- Supervising Product defects analysis and prioritization;
- Supervising hiring and dismissing of Software Testing engineers; [and,]
- Conducting semi-annual Performance Reviews for Testing Competence resources, authorizing promotions and leaves.

In response to the director's RFE, the foreign entity repeated the previously submitted description of duties almost verbatim. The foreign entity deleted the responsibility of supervising product defects analysis and prioritization, without explanation. The foreign entity added the percentage of time the beneficiary spent performing his responsibilities as follows:

- Managing a team of 14 developers and testing engineers; 20% of time spent
- Supervising setting up development and testing process; 15% of time spent
- Supervising gathering and digesting customer requirements and running project from scratch; 20% of time spent
- Supervising researching and choosing appropriate framework for server side application; 5% of time spent
- Supervising storing project documentation in client's task management tool and maintaining version control; 15% of time spent
- Supervising setting up communication between [REDACTED] and client teams; 10% of time spent
- Supervising development and storing of project documentation; 10% of time spent

³ The foreign entity also noted that in December 2013, the beneficiary became responsible for its Testing Framework project for [REDACTED]. As the December 2013 start date for these responsibilities does not include a full year prior to the filing of the petition, these duties will not be considered.

- Conducting semi-annual Performance Reviews for Testing Competence resources, authorizing promotions and leaves. 5% of time spent.

The foreign entity also identified 14 individuals by name, position title, and degree held as the beneficiary's subordinates. The narrative also included a brief description of duties performed by the subordinates. The positions held were identified as software testing engineers. The brief description of duties did not include software developing duties. The foreign entity's organizational chart depicted the beneficiary as a project manager responsible for an automation project and for QA Competence. The organizational chart showed one technical lead and four developers for the automation project and 14 testing engineers for the QA Competence project.

Upon our review of the totality of the evidence submitted, we find that the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

First, when examining the executive or managerial capacity of the beneficiary, USCIS will look first to the 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 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 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 company's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Next, we note that 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). Here, the foreign entity has provided a broad overview of the beneficiary's duties. When examining the general description of duties for the beneficiary and the brief job descriptions provided for 14 of the beneficiary's subordinate testing engineers, it appears the beneficiary spends only 20 to 25 percent of his time performing supervisory or managerial duties relating to his subordinates. The remainder of the beneficiary's time is spent setting up the development of the testing process, gathering and digesting customer requirements, researching and choosing the appropriate framework for server side applications, storing project documentation in client's task management tool, and setting up communication between Datamart and client teams, etc. Although the foreign entity inserts the word "supervising" in front of each of these tasks, the foreign entity does not offer evidence that any of the individuals under the beneficiary's supervision carry out these tasks, thus relieving the beneficiary from performing the actual operational and administrative duties related to the tasks.

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. Here, the petitioner fails to submit supporting documentation demonstrating what proportion of the beneficiary's duties would actually be managerial functions and

what proportion would be non-managerial. For this reason, we cannot conclude that the beneficiary performs duties primarily in a managerial capacity. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In addition, even if the beneficiary spent the majority of his time supervising his subordinates, which has not been demonstrated, the record does not include evidence demonstrating that the beneficiary's subordinates are managerial, supervisory or professional employees. Although the record includes the foreign entity's narrative regarding the beneficiary's subordinates' degrees, the record does not include the supporting documentation, such as diplomas, transcripts, etc., establishing that the subordinates hold these degrees. Further, even if the beneficiary's subordinates hold professional degrees, again which has not been demonstrated, neither the foreign entity nor the petitioner has established that the positions held require a professional degree in order to perform the duties associated with the position.⁴

Upon review, the record is deficient in probative evidence establishing the beneficiary's actual duties abroad. The petitioner does not include sufficient consistent evidence of the foreign entity's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, and any other factors that might contribute to understanding the beneficiary's actual duties and role in the foreign entity. Based on these deficiencies, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. Accordingly, for this additional reason the appeal will be dismissed.

B. The Petitioner's Proposed New Office

The petitioner has not sufficiently described the scope of the proposed U.S. operation, the beneficiary's proposed duties, or its proposed organizational structure, and financial goals, such that it is possible to conclude that the petitioner will support an executive or managerial position, within one year of the approval of the petition.

In support of the petition, the petitioner submitted its business plan which identifies the petitioner's "initial primary service" as "time&material [*sic*] based custom solutions development, IT-consulting, as well as Customer's teams augmentation." The business plan identifies the beneficiary as the chief operating officer and depicts a part-time AR/AP coordinator and two sales representatives as reporting to the

⁴ 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 this matter, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties of the positions labeled testing engineer.

beneficiary. The petitioner does not provide a timeline regarding the hiring of any employees and does not project that any more employees will be hired other than the part-time AR/AP coordinator and the two sales representatives. The initial record does include two internet advertisements for the position of sales representative but does not include evidence that sales representatives have been hired.

The petitioner also described the beneficiary's proposed duties for the U.S. petitioner indicating the beneficiary's position will include the following:

- Provide day-to-day leadership and manage the Consultant and Sales team based in US, with the rest of the team based in Ukraine;
- Driving the Sales managers in identifying and closing opportunities to increase sales and revenue;
- Being responsible for the measurement and effectiveness of all processes, internal and external;
- Collaborating with and managing the Ukrainian team to develop and implement plans for the operational infrastructure of systems, processes, and personnel designed to accommodate the rapid growth objectives of our firm;
- Being responsible for attracting, hiring, promotions and dismissals of US office employees;
- Working with US-based Accountant on US office infrastructure support and development; [and,]
- Provide timely, accurate and complete reports on the operating condition of the company.

In response to the director's RFE, the petitioner provided the same job description and allocated percentages of time the beneficiary would spend performing the responsibilities described.

Upon review, we find that the record is insufficient to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in the statute and regulations

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it

will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office, and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Here, the petitioner initially provided an abstract description of the beneficiary's proposed duties. Providing leadership and being responsible for the measurement and effectiveness of all processes does not convey an understanding of the duties the beneficiary will actually perform in carrying out these broadly stated objectives. In addition, the petitioner indicates that the beneficiary will manage a consultant and the rest of the team (10 software development professionals) in the Ukraine. However, the petitioner's business plan does not include information regarding a "consultant" and does not detail the Ukrainian team's duties for the petitioner, if any. Although the petitioner identified these proposed positions by title, the petitioner did not detail the duties the current or prospective employees would be expected to perform and did not provide a timeline showing when the prospective employees would be hired.

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. Again, it is the petitioner's burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must also be considered in analyzing whether the proposed duties, general as they are, are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

In this matter, we observe that the petitioner's business plan does not provide a realistic description of the actual duties the beneficiary will be expected to perform the first year of the new office operations and does not include a credible staffing plan. The petitioner does not provide sufficient probative evidence that the beneficiary will be relieved from performing non-executive and non-managerial duties within one year. The record does not include a business plan that explains the petitioner's timetable for hiring and details job descriptions for all proposed positions. The record does not include information regarding how many and which positions will be filled at the petitioner during the first year of operations. The petitioner has not detailed how its goals and financial projections for the petitioner will be achieved. The record does not include sufficient consistent and probative evidence establishing that the petitioner will develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year.

Based on the evidentiary deficiencies addressed above, we find that the petitioner has not explained how it would develop over one year so that it would plausibly support the beneficiary in a qualifying managerial or executive capacity. 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. at 165.

III. CONCLUSION

In this matter, upon review of the totality of the record, the record does not establish a qualifying relationship between the petitioner and the beneficiary's foreign employer, the record does not demonstrate that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, and the record does not show that the U.S. company will develop to the point where it will require the beneficiary to perform duties that are primarily managerial or executive in nature within one year.

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.

ORDER: The appeal is dismissed.