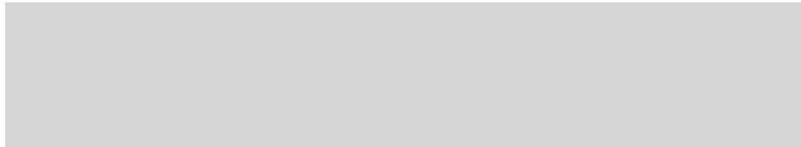




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JUL 31 2015**

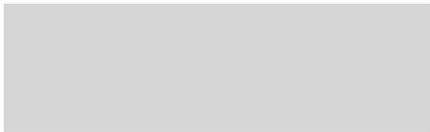
PETITION RECEIPT #: 

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



Enclosed is the *non-precedent* decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, 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 Texas limited liability company established in October [REDACTED], claims to be an affiliate of [REDACTED], located in [REDACTED], Mexico. The petitioner operates a child day care and education center. It seeks to employ the beneficiary as its general manager for a period of two years.

The director denied the petition concluding that the evidence of record did not establish that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office for review. On appeal, the petitioner asserts that the director erred and that the record establishes that the beneficiary will be employed in a managerial capacity. The petitioner submits a brief in support of the appeal.

#### I. THE LAW

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

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

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.

## II. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States, as required by 8 C.F.R. § 214.2(l)(3)(ii).

### A. Facts

The petitioner filed the Form I-129 on September 9, 2014. The petitioner states that it is a licensed day care and learning center with 22 current employees and a gross income of \$538,987. The petitioner intends to employ the beneficiary as the general manager for its existing day care location in order to allow its majority owner and director to focus on the opening of a new day care center. The petitioner states that the beneficiary will continue to serve as the general manager of two schools operated by the petitioner's affiliate in Mexico.

The petitioner's Form I-129 included the beneficiary's proposed description in the United States as follows:

Beneficiary will be General Manager of the petitioner's existing U.S. school, reporting to the Director whose responsibilities in developing and starting a second school require this

additional position. Beneficiary's current duties managing the two affiliated day care and learning centers in the nearby town of [REDACTED], Mexico, will be partially assumed by two School Directors located at each campus, however beneficiary will continue to manage both schools through the two School Directors.

The petitioner submitted its proposed organizational chart depicting [REDACTED] as the director with two subordinates: the beneficiary and [REDACTED] administrator, who supervises three cooks. The chart indicates that the beneficiary would supervise an assistant director, [REDACTED]. In turn, the assistant director supervises 13 childcare/instructional staff. The chart also depicts the beneficiary's supervision of the directors of the affiliate company's day care locations in [REDACTED] Mexico. The chart depicts a total of 19 current U.S. staff, and the petitioner submitted copies of its state and federal quarterly tax returns confirming that it employed 19-21 staff during the second quarter of 2014.

On September 22, 2014, the director issued a Request for Evidence (RFE) advising the petitioner that the submitted evidence was insufficient to establish that the beneficiary will be employed in a qualifying managerial or executive capacity, or as a function manager. The director instructed the petitioner to submit additional evidence, such as a letter describing the beneficiary's proposed daily duties and the percentage of time that the beneficiary would spend on each duty.

In response, the petitioner submitted a letter dated October 7, 2014 from Ms. [REDACTED], its director. She stated that the beneficiary would take over her current responsibility for overseeing the petitioner's original day care center in [REDACTED], Texas, which has 20 employees and 110 students enrolled. Ms. [REDACTED] stated "it is difficult to be precise about the percentage of time spent on each activity because while managing a school there are frequent exceptional circumstances that take priority over more routine activities." Nevertheless, Ms. [REDACTED] provided the following job description for the beneficiary:

The General Manager will continue to retain responsibility for financial records and student records and to supervise the independent Medical Doctor who supports the two day care and learning centers in [REDACTED] and will continue to direct the two school principals who manage the two centers in [REDACTED]. The activities at the two centers in [REDACTED] are subject to continuous video and audio surveillance with 15 cameras in one center and 12 cameras in the other center, such that all activities at these centers can be monitored directly by the General Manager.

The General Manager will report to the Director and all school personnel will report under the General Manager. The General Manager functions as a school principal, with all teaching staff reporting to the General Manager. It should be noted that there are sixteen cameras with audio that allow the General Manager to monitor any activity at the Original Center in [REDACTED] – as well as at the two [REDACTED] centers as described above. This complete surveillance system permits frequent review and audit of employee performance as well as an archive which the General Manager may review after incidents are reported.

The General Manager will be responsible to recruit and select all personnel employed at the original day care center, including both teaching and non-teaching personnel. The General Manager will be responsible for staff training, staff scheduling and work place assignments of staff. The General Manager is responsible for evaluation of the development of each child, updating documentation of the children's development and informing parents of progress and issues related to the development of each child.

The General Manager is responsible for safety of the children and staff with authority and responsibility for immediate action to resolve any issue which may arise affecting the safety and security of the children and staff. This is the prime responsibility which the General Manager must be capable of taking decisions affecting the security and wellbeing of 120 children, from age 2 months to 12 years, immediately and to the satisfaction of parents and staff, with the children's interest always paramount.

The General Manager will supervise the food services supervisor and maintenance services. This includes supervision of the [redacted] program and nutrition provision to all children.

The General Manager will be responsible for compliance with all school policies and state regulations of the centers. The General Manager is responsible for provision and control of supplies and materials, procurement and control of waste and assets of the company.

The petitioner also provided the following chart listing the beneficiary's proposed daily activities and time to be spent on each activity:

<u>Percent Time</u>	<u>Activity</u>
14.00%	Monitor school opening and children's activities directly and via surveillance systems
3.75%	Monitor food service and children lunch period daily directly and via surveillance systems
12.50%	Review and approve daily lesson plans for each classroom
2.50%	Supervise and revise security arrangements, and policy of the facility
12.50%	Review and approve food and nutrition program and Daily menus
5.00%	Participate in Parent Conferences as needed
5.00%	Make decisions to resolve issues of teachers with children
2.50%	Review and assist with implement programs of school publicity and Marketing
4.00%	Direct school assessments of students' Psychometricty [sic] level
4.00%	Conduct Daily Conference on-line with both Daycares in [redacted]
3.75%	Handle Phone conferences with Daycares in [redacted] as exceptions require
3.00%	Review and approve payments for providers in [redacted] i centers
1.20%	Review and Revise online updates to the Public Education Agency for

	Daycares in [REDACTED]
2.00%	Inspect and review food service kitchen
2.50%	Plan Teachers Schedules
1.25%	Review and respond to changes and requirements of the State Licensing Department
5.00%	Attend/Assess teacher performance in the Center
2.80%	Administer Employee payroll
3.00%	Review and plan budgets
2.50%	Plan and implement Training of staff on children's development
3.75%	Review Food Purchasing and services, set policies for the food service operations
1.50%	Plan and Supervise evacuation programs and emergency preparedness
2.00%	Plan and direct of Afterschool and Pick up program routes
100.00%	

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in a managerial or executive capacity in the United States.

On appeal, the petitioner asserts that the director erred in concluding that the beneficiary will not be employed in a managerial capacity. The petitioner stated that the director discussed only three of the beneficiary's 23 listed tasks. The petitioner asserts that the director's decision does not clearly explain why the beneficiary's duties are not considered managerial. Further, the petitioner asserts that the director did not sufficiently consider the managerial nature of the beneficiary's continued responsibility for overseeing the foreign entity's two school locations while concurrently serving as the petitioner's general manager.

The petitioner also submits a revised organizational chart in support of the appeal and clarifies that the day care center's instructional staff will report to the beneficiary and not to the assistant director as depicted on the previous chart. The petitioner also changed the reporting line for the administrator but does not provide an explanation for this change.

#### B. Analysis

Upon review, the petitioner has not established that the beneficiary will be employed in a qualifying managerial capacity in the United States. The petitioner does not claim that the beneficiary will be employed in an executive capacity.

When examining the executive or managerial capacity of the beneficiary, we look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the

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

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

In this matter, the petitioner's director described the beneficiary's proposed position as similar to that of a school principal who is responsible for the day-to-day duties of operating a school such as staff training, staff scheduling and making staff assignments. The beneficiary's duties also included daily operational tasks such as updating documentation for each child's development and informing parents of their child's progress, supervising maintenance services, managing supplies, procuring assets, waste control, and security. Therefore, the record shows that the beneficiary will be performing a number of administrative, operational and first-line supervisory tasks which, while necessary to the operation of the day care center, are not managerial or executive in nature. 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 International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner's chart specifically listing the beneficiary's duties does not further support the petitioner's assertion that the beneficiary will be primarily performing managerial duties. First, the director's narrative description of the beneficiary's duties, as discussed above, included a number of non-managerial duties that are not included in the submitted chart, thus calling into question whether the assigned percentages accurately reflect how the beneficiary would allocate her time. In addition, the chart includes at least ten non-qualifying duties accounting for over 45% of the beneficiary's time such as reviewing daily lesson plans, reviewing and approving the nutrition program and daily menus, participating in parent conferences, inspecting and reviewing the food service kitchen, planning teacher schedules, administering payroll, planning budgets, implementing training, and planning evacuation programs and program routes. Further, the chart indicates that another 17% of the beneficiary's time will be spent monitoring different activities within the three centers either directly, or indirectly, via surveillance systems. Specifically, the petitioner states that the beneficiary would monitor school opening, children's activities, food service, and the children's lunch period. However, not only is this duty not managerial but it is vague, as it is not clear who or what the beneficiary is actually monitoring. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Finally, the chart indicates that the beneficiary will devote time to supervising and revising security arrangements, and reviewing and assisting with implementing of school publicity and marketing. However, the petitioner provided insufficient evidence to demonstrate that it has personnel on staff to perform security and marketing type duties in order to relieve the beneficiary from performing those duties herself. 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. See section 101(a)(44) of the Act.

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). 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."<sup>1</sup> Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). 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 this matter, the petitioner has submitted two different organizational charts, one which shows that the beneficiary directly supervises only the assistant director and indirectly supervises the instructional staff, and one which shows that she directly supervises the assistant director, the administrator and all instructional staff, and indirectly supervises the cooks. The petitioner provided an explanation for some, but not all, of the changes made to the chart. Nevertheless, even presuming that the beneficiary will directly supervise all employees listed on the latest chart, the petitioner provided no duty descriptions or information regarding the educational level obtained by its employees, nor did it provide the educational requirements for the assistant director or teacher positions to establish that these directly supervised employees are professionals. Due to the nature of the school as a daycare and learning center primarily for infants, toddlers and preschool-aged

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<sup>1</sup> In evaluating whether the beneficiary manages professional employees, we 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, we focus on the level of education required by the position, rather than the degree held by a 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 defined above.

children, we cannot conclude that the instructional staff are professionals without evidence to establish the claim. 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)). Further, the latest organizational chart does not show that the beneficiary will supervise subordinate managers or supervisors. Although it appears to show that the beneficiary would supervise the co-owner and administrator of the day care center, his duties have not been defined, and the petitioner did not explain why it previously indicated that this employee would report to the director.

Regarding the assistant director, the petitioner provided conflicting information regarding this position and did not describe the duties or requirements for the position. Based on the lack of evidence together with the inconsistencies in the record we cannot determine that the assistant director is a supervisor or manager, in turn, supervised by the beneficiary. 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 term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided evidence that the beneficiary primarily manages an essential function. While the petitioner's director emphasized that the beneficiary is responsible for the safety and security of the children enrolled in the center, it has not provided established that she primarily performs managerial duties associated with this function.

On appeal, the petitioner asserts that the director did not sufficiently consider the beneficiary's concurrent duties overseeing two schools in Mexico. We acknowledge the beneficiary's level of authority within the organization and oversight authority; however, after reviewing of the record as a whole, the petitioner has not established that the beneficiary would be sufficient relieved from performing non-qualifying duties associated with the daily operation of the petitioner's day care center. The petitioner must establish that the duties the beneficiary performs on behalf of the U.S. employer are primarily managerial and that she has sufficient support staff to perform the non-managerial functions associated with operating the Texas-based center, including not only caring for and instructing enrolled students, but also performing day-to-day administrative



and record-keeping tasks and first-line supervision of the center's staff. The petitioner has not claimed or provided evidence that its Mexican affiliate's staff contributes in any way to the day-to-day operations of the petitioner's [REDACTED], Texas day care center, and therefore her responsibility for continued oversight of the centers in Mexico has no bearing on whether she will perform managerial duties for the petitioner. As discussed above, the petitioner has not established that the beneficiary's proposed U.S. duties are primarily managerial in nature.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed in a qualifying managerial capacity. Accordingly, the appeal will be dismissed.

III. CONCLUSION

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.