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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 0 2 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) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 a Petition for a Nonimmigrant Worker (Form I-129) 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 (LLC) registered to do business in California, is engaged in the production and marketing of skin care products. It claims to be an affiliate of , located in Lebanon. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's employment as its vice president and marketing director

The director denied the petition on July 3, 2014, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity. On September 10, 2014, the director affirmed the denial of the petition after considering the petitioner's motion to reopen and reconsider.

The petitioner subsequently filed this appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us. On appeal, the petitioner submits a brief and contends that it has established that the beneficiary is employed in managerial or executive capacity.

I. THE LAW

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

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

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

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

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

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

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:[1]

(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. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The sole issue addressed by the director is whether the petitioner established that the beneficiary is employed in a 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:

[1] Although the petitioning company was organized as a Florida limited liability company in , the record reflects that the petitioner was treated as a new office, as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), at the time it filed its initial petition in January 2013.

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

A. Facts

The petitioner filed the Form I-129 on April 17, 2014. The petitioner stated on the Form I-129 that it is engaged in the production and marketing of skin care products, has three employees, and achieved gross annual income of $181,501 in the previous year.

In a letter dated April 15, 2014, the petitioner described the beneficiary's duties as Vice President and Marketing Director as follows:

(The beneficiary) has had fairly absolute discretion over the operations of the company, including the authority of making decisions regarding corporate strategy,

investments, marketing, purchasing and staffing. He is in charge of defining strategies for new markets, complete budgetary authority, spending most of his time performing managerial duties and functions at a senior level within the organization reporting only to the President of the Company. Specifically, among other things, [the beneficiary] presently:

- Structures and conducts business development process, establishes overall direction, develops sales goals and works with network companies in connection with specific sales objectives.

- Determines and directs relationships with strategic partners, negotiates alliances and implements the overall business strategy of the company;

- Supervises financial and accounting reports of the company, takes decisions with respect to accounts payables, accounts receivables, invoicing and credit problems and engaging with the CPAs of the company;

- Reviews activity reports and financial statements, hire staff, evaluates their performance and report to the owners of the company on a quarterly basis with respect to such activities.

- Coordinates the production processes with respect to potential projects and with potential manufacturers to increase the product line (Business Development).

- Develops teamwork and strategic distributors.

The petitioner provided an organizational chart illustrating the structure of the company as of January 2, 2014. The chart shows the beneficiary in the senior position and indicates that he directly supervises , whose title is not stated. The chart indicates that Ms. supervises , marketing manager, and a financial manager position. Ms in turn is depicted as supervisor to "marketing staff," , and of The chart also indicates that the financial manager position supervises analysts and a bookkeeper; however, the entire financial department appeared to be unstaffed at the time the chart was created, as no employees are identified.

The petitioner submitted employment agreements for Ms. and Ms. which identify their job titles as "Vice Director" and "Sales and Marketing Manager," respectively. According to the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, it had three employees at the end of 2013.

In addition, the petitioner submitted a copy of a distribution agreement with represented by which appoints as the distributor of the petitioner's Skin

Care products in the United States. The agreement indicates that " shall be responsible solely for all decisions concerning the distribution and sales of the Product in the Territory," and responsible for all selling, advertising and other business costs related to its performance under the agreement. The petitioner submitted a second exclusive distribution agreement with which appoints as the exclusive distributor of the petitioner's and Skin Care products in .

The petitioner further submitted a "Master Services Agreement" dated May 4, 2012 with Logistics Management, under which agreed to provide "storage space, material handling facilities, order processing and payment capability, call center facilities and personnel necessary for the receipt, storage, delivery of [the petitioner's] goods, as well as customer service." Finally, the petitioner submitted a proposal from to perform branding, website development, social media marketing and related services for the product. The beneficiary signed the proposal authorizing "Phase I" services in April 2013.

On May 23, 2014, the director issued a notice of intent to deny (NOID) instructing the petitioner to provide additional information to establish, among other things, that the beneficiary is employed in qualifying managerial or executive capacity. Specifically, the director emphasized that only four individuals were identified on the petitioner's organizational chart and noted that it was unclear how these employees are able to relieve the beneficiary from performing non-qualifying duties, especially when numerous positions in the company remain unstaffed. Accordingly, the director found that the beneficiary would more likely than not be involved in the day-to-day operations of the business.

In response to the NOID, the petitioner submitted a letter asserting that the beneficiary is employed in an executive capacity. The petitioner submitted a revised organizational chart dated June 2014. The new chart identifies the beneficiary as President/Acting CEO, overseeing Ms. , who is identified on this chart as Vice President. The chart indicates that Ms. supervises Marketing Manager, and , National Sales Manager. The chart shows that Ms. supervises – Sales Coordinator, and – Sales Representative. Finally, the chart indicates that , CPA/Finance, reports to Ms.

The petitioner provided a separate statement with brief job descriptions for the individuals named on the chart. The petitioner re-submitted Ms. and Ms. 's employment agreements and provided a copy of its employment agreement with Ms. , signed by her on June 11, 2014. The petitioner also submitted a copy of an undated sales representative agreement appointing of as the petitioner's broker. The agreement is signed by both and on behalf of and indicates that both Mr. and Ms. will receive commissions.

The director denied the petition on July 3, 2014, concluding that the petitioner failed to establish that the beneficiary is employed in a qualifying managerial or executive capacity. The director acknowledged that the beneficiary may be the petitioner's highest ranking employee with the highest salary, but he did not find those facts to be dispositive where the record failed to establish that the

remaining employees would sufficiently relieve the beneficiary from performing non-managerial duties. The director did not consider additional evidence reflecting facts not in existence at the time the petition was filed, such as the hiring of the national sales manager in June 2014. Finally, the director determined that the petitioner did not establish that the beneficiary primarily manages an essential function of the organization.

The petitioner subsequently filed a combined motion to reopen and reconsider the decision which included affidavits from the beneficiary and , an expert opinion, and an additional letter from the petitioner.

According to the beneficiary's statement he has "been in the United States for a little over a year as president, vice-president and marketing director" responsible for the following duties:

a. Establish goals and policies;
b. To formulate, direct, and coordinate marketing activities and policies to promote products and services;
c. Identifying, develop, or evaluate marketing strategy, based on objectives, market characteristics, and cost factors;
d. Direct the hiring, training, and performance or marketing staff;
e. Supervise and control the work of professional employees;
f. Evaluate financial aspects of product development, such as budgets, expenditures, research and development appropriations;
g. Develop pricing strategies, balance firm objectives and customer satisfaction;
h. Compile lists describing product or service offerings;
i. Initiate market research studies and analyze their findings;
j. Use sales forecasting or strategic planning to ensure the sale and profitability of products and monitoring market trends;
k. Coordinate or participate in promotional activities; and
l. Consult with buying personnel to gain advice regarding the types of products or services expected to be in demand.
m. Brand marketing and development.

In the same affidavit, the beneficiary further explained that he is not responsible for the manufacturing of products but he was mainly responsible to direct the management of the company. The beneficiary provided the following breakdown of his duties:

a. Supervise and have meetings to discuss marketing and sales goals and strategies with (vice-president), (marketing manager) and (sales manager)...approximately 30%
b. Meetings with the (foreign company) executives regarding strategic planning/goals and opportunities abroad... approximately 15%
c. Establishing goals and policies for (petitioner) marketing, branding and sales... approximately 10%

d. Personnel decision-making (hiring, firing, performance evaluations) …approximately 10%
e. Company representative (legal issues/contracts)…. approximately 10%
f. Review financial reports and make decisions related to accounts payable, accounts receivable, invoicing and credit matters after meetings with CPA….approximately 10%
g. Meetings with Medical Partners…. approximately 15%

The petitioner submitted an affidavit dated July 30, 2014, from stating that she reports directly to the beneficiary as vice president. She asserts that the beneficiary does not perform day-to-day duties. She explains that since was not hired until June 2014, she was previously responsible for the sales staff.

The petitioner provided an expert opinion from an independent business consultant, who is employed as executive vice president for Mr. opined that the beneficiary's duties are consistent with those duties expected of a similarly situated executive. According to Mr. , his evaluation was based on his review of the petitioner's "organizational documents, contracts and sales agreements that identify (the beneficiary) as president."

The director affirmed the denial of the petition on September 10, 2014 after concluding that the expanded duty description provided on motion did not establish the beneficiary's eligibility as a manager or executive.

On appeal, the petitioner asserts that the director failed to consider the evidence submitted on motion and provided no explanation for denying the petition. The petitioner requests deference to the beneficiary's prior L-1A approval. The petitioner asserts that the record is sufficient to establish the beneficiary's eligibility for an extension of his L-1A status.

B. Analysis

Upon review of the entire record, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, we look first 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 either in an executive or managerial capacity. *Id.*

In this matter, the petitioner initially provided a broad duty description for the beneficiary that offered little insight into his actual day-to-day duties. The six responsibilities listed in the petitioner's initial letter included "establishes overall direction," "coordinates the production process with respect to potential projects," "develops team work," "takes decisions with respect to accounts payable. . . invoicing and credit problems," "determines and directs relationships with strategic

partners," and "works with network companies in connection with specific sales objectives." While some of these duties emphasize the beneficiary's seniority and decision-making authority within the petitioning company, they do not clearly define his role with respect to the company's day-to-day sales, marketing, product development, production, distribution, and routine financial matters or clearly indicate that he performs primarily managerial duties. Further, the petitioner's response to the NOID provided little additional insight regarding the beneficiary's actual duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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).

On motion, the petitioner provided an affidavit from the beneficiary in which he elaborated upon his duty description. However, the affidavit's probative value is diminished by the beneficiary's inclusion of two entirely different lists of responsibilities within the same document. The beneficiary indicates that he spends 30 percent of his time discussing marketing and sales goals and strategies with his subordinates, 15 percent of his time meeting with the foreign entity's executives, 10 percent of his time establishing marketing, sales and branding goals and policies, 10 percent of his time on personnel decision-making, 10 percent of his time representing the company in legal and contract matters, 10 percent of his time reviewing and making decisions related to accounts payable and receivable, invoicing and credit matters, and 15 percent of his time meeting with "medical partners." We note that only one of these seven duties was attributed to the beneficiary at the time of filing, notwithstanding the beneficiary's assertion that his duties have not changed since his arrival in the United States. This description was no more detailed than that provided at the time of filing. Rather, it was simply different in that it does not include the beneficiary's previously stated responsibilities for developing distributors, coordinating production processes, or working with network companies in pursuit of specific sales objectives.

Further, despite indicating that he allocates 100% of his time to the seven duties listed above, the beneficiary's affidavit also includes a separate list of 13 duties, many of which are not included in the submitted breakdown with percentages. This longer list of duties includes non-managerial responsibilities such as developing pricing strategies, compiling lists, describing products and services, initiating and analyzing market research studies, participating in promotional activities, consulting with buying personnel, and brand marketing and development. Overall, while the petitioner has consistently stated that the beneficiary has the discretionary authority to establish company goals and policies, hire personnel, and develop marketing strategies, the petitioner has provided several different lists of responsibilities for the beneficiary and has failed to resolve the inconsistencies among them. Therefore, based on the current record, we are unable to determine whether the claimed managerial duties are the beneficiary's primary duties. The petitioner's shifting descriptions of the beneficiary's job duties do not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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 a beneficiary's actual duties and role in a business.

At the time of filing in April 2014, the petitioner claimed to employ the beneficiary as its vice president and marketing director and two subordinate employees. The petitioner's initial organizational chart reflected that it had vacancies for "marketing staff" and for an entire financial department (consisting of a financial manager, bookkeeper and analysts), which had yet to be staffed. 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).

The petitioner did not explain why the planned financial department was entirely absent from the updated organizational chart submitted in response to the NOID. While the petitioner indicated that it was using the services of a CPA, it did not provide evidence of any payments made to this employee, describe the nature or scope of his services, or indicate that he has taken on the roles of financial manager, analyst and bookkeeper which were included on the original organizational chart. Thus while the petitioner indicates that the beneficiary allocates a portion of his time to reviewing financial reports, and other financial matters such as approving invoicing, credit, and accounts payable and receivable, the record does not establish that the company had anyone available at the time of filing to relieve the beneficiary from these routine finance-related tasks.

Further, while the petitioner submitted two exclusive distribution agreements and a master services agreement with a third-party logistics management services provider, the record contains no evidence of payments to these third-party providers and thus does not establish to what extent the company relied on these contracted parties for routine sales, logistics, warehousing, order fulfillment and other functions at the time the petition was filed. 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)).

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have

sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.[2]

At the time of filing, the petitioner employed the beneficiary as its highest ranking employee, plus two additional employees who were focused primarily on marketing. The petitioner did not submit evidence that it actually employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company other than marketing. The petitioner's assertions that it has hired independent contractors and third party companies to provide other services including payroll and accounting services had not been adequately established and would not resolve the fact that this company had no employees at the time the petition was filed to perform many of the non-managerial functions required to operate the business. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as vice president and marketing director and two marketing staff. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On appeal, the petitioner asserts that the director focused on "one non-descript organizational chart" and ignored evidence that established the beneficiary in his current position as the petitioner's president. Further, the petitioner asserts that the director erred in failing to adequately consider its updated organizational chart, current staffing levels, and other documentation demonstrating its company's growth in response to the director's NOID. However, 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 cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1574 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, we note that the petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in

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

National Hand Tool Corp., where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to Mars Jewelers, we are not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. We have long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

The petitioner further refers to an unpublished decision in which we determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

We acknowledge the petitioner's expert opinion concluding that the beneficiary qualifies as an executive for the petitioner. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. 791, 795.

Here, the expert opinion appears to be based on a review of "organizational documents, contracts, and sales agreements," though it is not clear exactly which documents were considered. The opinion does not appear to be based on firsthand knowledge or direct observation and it offers the general opinion that an executive or manager would not realistically have any time for day-to-day tasks and that the allocation of time the beneficiary allocated to his duties is consistent with that of an executive or manager. Regarding the changes on the company's organizational chart, the expert states that the changing nature of a new company's structure is anticipated and reasonable. While

we do not necessarily disagree with the conclusion, it is broad based and general. Further, 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).

We note that on appeal the petitioner claimed that the beneficiary would continue to perform in a primarily managerial role but claims on appeal that he is an executive. 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.* In this matter, in addition to being inconsistent with its initial claim, the petitioner has not established that it has the required subordinate level of managerial employees necessary to support the beneficiary in a primarily executive role, nor has the petitioner established that the company had subordinate staff at the time of filing to relieve the beneficiary from significant involvement in the day-to-day operations of the company.

We agree with the director's finding that the petitioner did not establish that the beneficiary would perform as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Rather, its claim appears to be based on the beneficiary's position as the senior employee within the U.S. operations, rather than on his management of a specific function or evidence that he performs primarily managerial duties associated with a defined function.

Finally, we acknowledge the petitioner's assertion that the director should have given deference to the beneficiary's previously approved L-1A petition. The mere fact that USCIS approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Coram. 1988). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Further, the record reflects that the previous petition was approved for an initial one-year period under the regulations governing new offices at 8 C.F.R. § 214.2(l)(3)(v)(C). The beneficiary's L-1A status was granted on the condition that within one year of the approval of that petition, the new office would grow to the point where the beneficiary's services would be required in a qualifying managerial or executive capacity. After one year, USCIS will extend the validity of the new office petition only if the petitioner meets its burden to establish that the beneficiary is employed in a qualifying capacity at the time the request for an extension is filed. *See generally*, 8 C.F.R. § 214.2(l)(14)(ii).

Based on the totality of the record we find that the petitioner has not established that the beneficiary is employed in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

III. BEYOND THE DIRECTOR'S DECISION

In our *de novo* review of this matter, we identified an additional issue that precludes approval of the petition. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petitioner has not established that it maintains a qualifying relationship with the beneficiary's foreign employer.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L) defines the term "affiliate" as

> *(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, . . .

On the Form I-129, the petitioner stated that it is an affiliate of the foreign entity. In its letter dated April 15, 2014, the petitioner stated that it is owned by the beneficiary (52%), [redacted][3] (24%) and [redacted] (24%), while the foreign entity is owned by [redacted] (50%), the beneficiary (25%) and [redacted] (25%). The petitioner explained that [redacted] "controls the U.S. affiliate company through a Voting Agreement with his partners."

With respect to the foreign entity's ownership, the petitioner submitted a stock ledger dated September 23, 2008 which indicates that [redacted] owns 50% of the foreign entity shares with the remaining 50% equally divided between [redacted] and [redacted]. The petitioner also submitted the foreign entity's audited annual reports from 2012 and 2013 which indicate the ownership of the foreign entity as follows: [redacted] (52%), [redacted] (24%) and [redacted] (24%).

Regarding the petitioner's ownership, the petitioner submitted its membership certificates number 1, 2, and 3, issued on September 14, 2010 indicating that the beneficiary owns 52% of the petitioning company and his brother and sister each owned 24%. The petitioner also submitted its IRS Form 1065, U.S. Return of Partnership Income for 2013 which indicates that the beneficiary owns 50% of the company while his siblings each own a 25% interest. In addition, in support of its claim that [redacted] controls the U.S. company, the petitioner provided a "Members Voting Agreement" dated January 2012 which indicates that "the affirmative vote of the issued and outstanding membership interests held by [redacted] shall be required for the Members or the board of directors of the Company to act or pass a resolution in any meeting of the Members. . . where a quorum exists" in connection with 20 enumerated matters.

In the NOID, the director observed that the petitioner's initial evidence indicated that the companies are not owned and controlled by the same individual or by an identical group of individuals who each own a proportionate share of each organization.

In response, petitioner stated that its counsel "made certain scrivener's errors in the documentation presented to USCIS primarily because of a communication problem between counsel and the petitioner." Specifically, the petitioner indicated that counsel relied on the foreign entity's stock register dated September 23, 2008, which indicates that the [redacted] owns only 25% of the foreign affiliate, when in fact, he has owned 52% of the foreign entity since acquiring additional shares in March 3013. The petitioner provided a copy of an Agreement of Purchase and Sale of Shares dated March 12, 2013. The petitioner also emphasized that the foreign entity's annual report and financial statements for 2013 show that the beneficiary owns 52% of the company's shares.

Overall, the record does not include consistent evidence establishing the petitioner's and the foreign entity's actual ownership and control. The petitioner initially claimed that [redacted] controls both the U.S. and foreign entities based on his majority ownership of the foreign entity and a voting agreement giving him a controlling voting interest in the U.S. company. However, the petitioner

[3] We note that certain documents in the record also refer to this individual as "[redacted]"

later claimed that the beneficiary is in fact majority owner of both the U.S. and foreign entities and now indicates that they are affiliates based on common ownership and control by the beneficiary. However, the petitioner has not indicated that the previously submitted voting agreement giving control of the U.S. entity was canceled or otherwise no longer in effect. 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). Here, the petitioner has submitted evidence to support both of its competing claims of ownership and control, making it impossible for us to determine where the truth lies.

Finally, while the record reflects that both entities are owned by three members of the same family, this familial relationship does not constitute a qualifying relationship under the regulations. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family"). For the foregoing reasons, the petitioner has not established that the petitioner and the foreign entity have a qualifying relationship.

IV. CONCLUSION

In this matter, upon review of the totality of the record, the record does not demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity for the U.S. petitioner. Accordingly, we will uphold the director's determination on this issue. In addition, the petitioner has not established a qualifying relationship with the beneficiary's claimed foreign employer.

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).

The petition will be denied and the appeal dismissed for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 136; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.