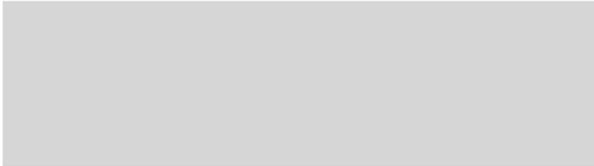


(b)(6)

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



U.S. Citizenship
and Immigration
Services



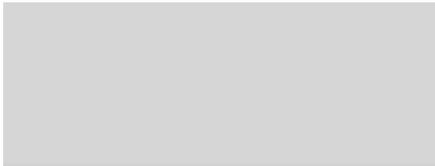
DATE: **JUN 02 2015**

Petition Receipt #: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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,

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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner filed a 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 Pennsylvania corporation established in [REDACTED] is engaged in the manufacturing and sale of mining equipment. The petitioner is the parent company of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as an export sales manager for a period of three years.

The director denied the petition, finding the petitioner did not establish that the beneficiary is employed in a qualifying managerial or executive capacity with the foreign employer. Further, the director concluded that the petitioner did not demonstrate 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 the AAO. On appeal, the petitioner contends that the beneficiary has been and will be employed as a function manager, and, as such, the director erred in concluding that the petitioner must demonstrate that the beneficiary supervises subordinate managerial and professional staff. The petitioner asserts that the beneficiary primarily performs, and will perform in the United States, qualifying managerial duties, and states that the director was mistaken in overemphasizing her performance of some non-qualifying operational tasks.

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, Petition for a Nonimmigrant Worker (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.

II. THE ISSUES ON APPEAL

A. MANAGERIAL OR EXECUTIVE CAPACITY (FOREIGN EMPLOYMENT)

The first issue to be addressed is whether the petitioner has established that the beneficiary is employed in a managerial or executive capacity with the foreign employer.

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.

Finally, 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. Section 101(a)(44)(C) of the Act.

1. Facts

The petitioner filed the Form I-129 on March 26, 2014. The petitioner indicates that it is a manufacturer and servicer of mining equipment that established the foreign entity in China in order to expand its sales abroad. The foreign entity's financials reflect that the company earned 354,513.02 Chinese Yuan in 2014. In a letter submitted in support of the petition, the petitioner stated that the beneficiary has been employed with the foreign entity as an office manager since August 2010. The petitioner indicated that the beneficiary's duties included "managing [the] company's finances, purchasing, and logistics; liaising with U.S. operations and project management; and supervising personnel and recommending personnel decisions to management in the United States."

The petitioner submitted the beneficiary's resume, in which she describes her duties as the foreign entity's office manager as follows:

- Interpreter to the President;
- Maintaining office services by organizing office operations and procedures;
- Managing bank accounts and keeping record of cash flow sheet;
- Managing purchasing;
- Supporting in controlling and reporting to headquarter;
- Supporting the commercial operations and customer relationship management & quoting customers;
- Supporting the logistics and trading operations and project management;
- Maintaining company's files and data according to local laws and regulations;
- Maintaining office staff by recruiting, selecting, orienting, and training employees;
- Accomplish what is required or assigned by President

The beneficiary's resume further reflected that the beneficiary previously worked for a Chinese shipping company from 2005 through 2010 as an executive secretary and settlement clerk "handling daily office issues," "calculating shipping expenses," and "paying bills and receiving payments." The resume stated that

the beneficiary completed training in "office operation and management" with the petitioner in the United States from December 2012 through February 2013. The petitioner also provided foreign payroll documentation indicating that the beneficiary earned 12,000 Chinese Yuan per month from December 2011 through January 2013.

Further, the petitioner submitted two labor contracts between the beneficiary and the foreign entity, the first covering the period from December 1, 2010 through November 30, 2013, and the latter relevant to November 13, 2013 through November 13, 2016. Both contracts indicate that the beneficiary was employed as the foreign entity's "office manager," and were signed by the petitioner's president in his capacity as the foreign entity's representative. The contracts stated that the beneficiary would be responsible for "all administrative support" and "supervise and train others to do the same" and indicated that the beneficiary would report directly to the president of the petitioner. The contracts further indicated that the beneficiary would earn 12,000 Chinese Yuan per month. The agreements listed the beneficiary's duties and responsibilities as follows:

- handling accounts receivable,
- handling accounts payable,
- invoicing,
- customer relations,
- fielding phone calls,
- receiving paperwork,
- taking phone orders,
- contract preparation,
- advertising support
- translating
- other duties assigned by [the president of the petitioner] from time to time.

The petitioner did not submit an organizational chart for the foreign entity or otherwise describe the Chinese company's structure.

The director later issued a request for evidence (RFE) advising the petitioner that its initial evidence was insufficient to establish that the beneficiary acts in a qualifying managerial or executive capacity. The director noted that the beneficiary was claimed to supervise personnel and recommend personnel decisions, but the petitioner did not provide evidence relevant to her claimed subordinates and managerial duties. As such, the director requested that the petitioner submit a detailed foreign entity organizational chart including the names, job titles, duties, education levels, and salaries for each of its employees. Further, the director asked that the petitioner provide a letter from the foreign entity describing the beneficiary's managerial decisions and duties in detail, including the percentage of time she spends on each of her tasks.

In response, the petitioner stated that the beneficiary has been "filling the dual roles of office manager and general manager for over a year since the latter position became vacant." The petitioner indicated that based on this modified role the beneficiary "has been charged with all responsibility for managing the [foreign entity], including overseeing the design, sales, business development, and personnel and logistics

matters for [the foreign entity]." The petitioner asserted that the beneficiary "oversees the professional engineering staff in China" and that she is "charged with formulating goals and policies for the company and has complete and broad discretion to execute those goals."

The petitioner submitted updated duty descriptions for the beneficiary's two asserted positions and another relevant to the "president/legal representative" of the foreign entity. The general manager duty description stated that the beneficiary was responsible for providing leadership to the company; directing and coordinating all department activities "to carry out the design, sales, and business development goals"; conferring with the president of the foreign entity and other administrative personnel to review achievements and change goals and objectives; and overseeing the service and manufacturing departments.

In addition, the petitioner provided a new duty description relevant to the beneficiary's capacity as office manager, as follows:

- o Organize and coordinate office operations and procedures for effectiveness and efficiency
- o Supervise staff including sales and engineering staff in accordance with company policies and procedures
- o Review and approve requisitions and purchases
- o Maintains office staff job results by coaching, counseling and disciplining employees; planning; monitoring and appraising job results
- o Oversees accounts payable and receivable
- o Conducts interviews, hire new staff and provide employee orientation and training
- o Conducting employee performance reviews
- o Administer sales activities for all customers
- o Attend select industry trade shows as needed
- o Ensure customer satisfaction with company policies and procedures
- o Identify new business opportunities
- o Develop and maintain professional relationships with all clients
- o Other duties as directed by President

The petitioner also submitted an organizational chart for the foreign entity reflecting that the beneficiary holds the position of office manager, overseeing "administrative assistants" and "sales representatives" pursuant to this role. The chart also indicated a dotted line from the beneficiary to the "vacant" general manager position and reflected that this role is responsible for supervising a production manager, an engineer, a shop lead man, and production personnel.

In denying the petition, the director found that the beneficiary's duty descriptions were overly vague. The director concluded that the petitioner's purported role as general manager was not supported by the evidence. The director noted that the petitioner failed to provide job descriptions relevant to the beneficiary's asserted subordinates and did not submit evidence to support their employment and qualifications, as requested by the director. The director concluded that the petitioner had not demonstrated that the beneficiary would act as more than a first line supervisor of non-professional employees.

On appeal, the petitioner contends that the director's requirement that the beneficiary's foreign position be managerial is not found in the statute, but rather "contained entirely within the regulations" and that this ground for denial is therefore inapplicable. The petitioner states that the regulation "promulgated by USCIS" requiring that a petitioner demonstrate that a beneficiary acts in a managerial or executive capacity abroad is "contrary to Congressional intent." Nevertheless, the petitioner asserts that the beneficiary oversees an essential function of the organization, and therefore, it is not required to establish that the beneficiary oversees subordinates. The petitioner alternatively states that the beneficiary supervises professional employees abroad, and in this respect, qualifies as a personnel manager. The petitioner contends that the director's conclusion that the beneficiary does not act as general manager of the foreign entity is argumentative and not properly based on the submitted evidence. The petitioner states that although the beneficiary performs certain non-qualifying tasks, these do not make up a majority of her duties.

2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary is employed in a qualifying managerial or executive capacity with the foreign entity.

First, we will address the petitioner's contention that USCIS erred in denying the petitioner on "inapplicable" grounds, namely, that the petitioner did not establish that the beneficiary acts in a managerial or executive capacity abroad. The petitioner's assertion is not persuasive. The Secretary of the Department of Homeland Security is delegated authority to promulgate regulations specific to the enforcement of immigration laws. *See* 8 U.S.C. § 1103. We note that the regulations are the codification of the general and permanent rules published in the federal register by all executive departments and agencies of the federal government. As such, regulations have the effect of law once they have navigated the rulemaking process, through which they are published for comment in the federal register and further acknowledged by Congress. *See* 5 U.S.C. § 551. In the present matter, the AAO will not consider the legislative history of the applicable law or the related floor statements. Where the language of a statute or regulation is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984). Regardless, even if we were to consider the petitioner's asserted intent of Congress, the petitioner has not specifically articulated this intent through citations to the Congressional record to make this possible.

The language of 8 C.F.R. § 214.2(l)(3) is clear, stating that the petitioner must provide "evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge." As such, the director did not act in error in denying the petition based on the petitioner's failure to establish that the beneficiary acts in a managerial or executive capacity abroad, as this is an explicit requirement for eligibility pursuant to the regulations. Therefore, we will analyze whether the petitioner has established this requirement.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In the current matter, the petitioner submits varying duty descriptions, most of which include many non-qualifying operational duties, suggesting that the beneficiary is not primarily engaged in qualifying tasks. The beneficiary's resume indicates that she performs a number of non-qualifying operational tasks as office manager, including acting as an interpreter, maintaining office services, managing bank accounts and purchasing, supporting logistics, and maintaining company files and data. Labor contracts between the beneficiary and the foreign entity further supported the conclusion that the beneficiary was primarily performing non-qualifying administrative and operational tasks, such as handling accounts receivable and payable, handling invoicing, fielding phone calls, receiving paperwork, taking phone orders, preparing contracts, translating, and performing other duties assigned by the petitioner's president "from time to time." In the RFE, the director requested that the petitioner describe the beneficiary's managerial decisions and duties in detail, including the percentage of time she spends on each of her tasks. However, in response, the petitioner did not specifically describe the beneficiary's managerial tasks or submit percentages of time the beneficiary devotes to her various duties. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As noted, 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 document what proportion of the beneficiary's duties are managerial functions and what proportion is non-managerial, despite the direct request of the director. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as indicated above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, we cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the RFE, the petitioner asserted that the beneficiary had been acting as the foreign entity's general manager for the previous year, but did not explain why neither this job title nor the duties attributed to the general manager role were mentioned at the time of filing. In addition, the petitioner provided a revised version of the beneficiary's office manager duties emphasizing managerial functions, such as supervising sales and engineering staff, disciplining employees, conducting interviews and hiring staff, and completing performance reviews, none of which were included in the previous duty descriptions provided on the record. Indeed, as indicated by the director, the evidence provided contradicts the beneficiary's assertion that the beneficiary has acted as the general manager of the foreign entity for the last year. The petitioner has provided no supporting evidence to substantiate that the beneficiary has acted in this capacity. 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 beneficiary's payroll records indicate that she did not receive any additional income for her claimed promotion and the latest labor contract between her and the foreign entity, executed well after the she is asserted to have risen to her "dual role" as general manager, makes no mention of this position, her additional responsibilities, or any further compensation. Similarly, the beneficiary's resume, apparently prepared after June 2013 based on the dates provided therein, makes no mention of her dual role as the foreign entity's general manager. 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).

In sum, the petitioner has not submitted a consistent and credible description of the beneficiary as necessary to establish that the beneficiary is primarily engaged in qualifying tasks. In fact, the preponderance of the evidence indicates that the beneficiary is primarily performing administrative and operational tasks for the petitioner's president abroad and not acting as general manager of the foreign entity, as reflected in her labor contract, her resume, and by the "office operation" training she completed in the United States at the behest of the petitioner. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

On appeal, the petitioner contends that the director unfairly required that it demonstrate that the beneficiary has managerial or professional subordinates. However, the petitioner asserted in response to the RFE, and now on appeal, that the beneficiary supervises professional subordinates, including "professional engineering staff." The submitted organizational chart also reflects that the beneficiary oversees other subordinates, including administrative assistants, sales representatives, a production manager, shop lead man and "production personnel." Therefore, the petitioner's assertion that the director improperly considered whether the beneficiary has managerial or professional subordinates is not persuasive, since it directly attempted to qualify the beneficiary on this basis. The petitioner cannot simply avoid discussion and analysis of this evidence simply because the beneficiary may qualify as a function manager without subordinates. The consideration of this evidence is central to assessing the credibility of the petition in its totality. When examining the managerial or executive capacity of a beneficiary, United States Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

Regardless, even when considered, the petitioner has not demonstrated that the beneficiary acts as a personnel manager. The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. §

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

Here, the petitioner has not demonstrated that the beneficiary acts as a personnel manager. In fact, the evidence presented relevant to the beneficiary's claimed subordinates leaves question as to the beneficiary's actual role abroad. In the RFE, the director requested that the petitioner provide a detailed organizational chart reflecting all of the members of the foreign entity's organizational chart (or the beneficiary's immediate department), including names, duty descriptions, education levels, and salaries. However, although the petitioner submitted names and position titles for some of his asserted subordinates, the petitioner did not indicate all of their names, duties, educational backgrounds, or salaries. In fact, in some cases, the petitioner vaguely described them as administrative assistants, sales representatives, or production personnel, without indicating how many of each of these employees report to the beneficiary. The petitioner contends that the beneficiary oversees "engineers," but the submitted organizational chart listing only one engineer. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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. at 591-92. Regardless, as discussed, the petitioner has not adequately supported its claim that the beneficiary current acts as the foreign entity's general manager.

Further, the petitioner has provided no evidence to corroborate that the foreign entity employs anyone beyond the beneficiary. Although the beneficiary's labor contract suggests that she has the discretion to hire subordinates to relieve her from her stated non-qualifying operational tasks, the petitioner has provided no supporting evidence to corroborate their existence. 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 also asserts that the beneficiary qualifies through her supervision of professional subordinates, despite indicating that the director improperly considered whether the beneficiary had such subordinates. In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into

the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In the current matter, the petitioner has provided no evidence to indicate that the beneficiary supervises professional subordinates. As noted, the petitioner has not corroborated the foreign entity's employment of the beneficiary's subordinates, including the claimed professional engineers. Indeed, the petitioner has listed only one engineer subordinate to the beneficiary, despite suggesting her oversight of various engineers abroad. The petitioner has also provided no evidence to support that any of her subordinates hold, or are required to hold, specific baccalaureate level degrees. Therefore, the petitioner has failed to establish that the beneficiary acts as a personnel manager through her supervision of professional subordinates.

The petitioner primarily contends on appeal that the beneficiary qualifies as a function manager by managing the Chinese subsidiary in its entirety in her claimed role as general 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. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

Here, the petitioner has not provided sufficient evidence that the beneficiary manages an essential function. In fact, as discussed herein, the petitioner has provided varying duty descriptions and position titles that leave doubt as to the beneficiary's actual day-to-day duties. A majority of these duties consist of non-qualifying operational tasks, and the petitioner fails to articulate the time the beneficiary devotes to her various duties to substantiate her primary performance of qualifying activities. The petitioner further provides no details or supporting evidence regarding the beneficiary's qualifying tasks. In addition, the petitioner has not properly and specifically described the function managed by the beneficiary, but provided a confusing mix of duties and roles abroad that fail to demonstrate with clarity the function managed by the beneficiary. Because of these inconsistencies, the record does not support a finding that the beneficiary actually manages the Chinese subsidiary or all company inventory in China as claimed. As previously noted, the petitioner has likewise not substantiated that the beneficiary manages the foreign entity as its general manager. Therefore, due to the inconsistencies and lack of evidence on the record, the petitioner has not established that the beneficiary qualifies as a function manager.

For the foregoing reasons, the petitioner has not established that the beneficiary is employed in a qualifying managerial capacity with the foreign entity. For this reason, the appeal will be dismissed.

B. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES EMPLOYMENT)

The next issue to be addressed is whether the petitioner has demonstrated that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

1. Facts

In support of the petition, the petitioner's president and chief executive officer explained the beneficiary's proposed employment in the United States as follows:

[The beneficiary] will be given the position of Export Sales Manager at [the petitioner]; the positions duties include primary responsibility for the export market customer base; building relationship with current and prospective customers, buyers, engineers, and distributors; coordinating with purchasing and marketing to develop new products; and presenting new products to global clients.

The petitioner indicated that the export business represents "an essential function for the continued expansion of the company," and that the beneficiary "will continue to liaise with [the foreign entity] and assist with its management from the United States." The petitioner submitted an organizational chart indicating that the beneficiary would have no subordinates in the United States and would report directly to the company president.

The director later issued an RFE indicating that the evidence submitted by the petitioner was insufficient to establish that the beneficiary would act in a qualifying managerial or executive capacity in the United States. As such, the director requested that the petitioner submit a detailed organizational chart including the names, job titles, duties, education levels, and salaries for each of its employees or the beneficiary's immediate department. Further, the director asked that the petitioner provide a letter from the petitioner describing the beneficiary's expected managerial decisions and duties in detail, including the percentage of time she would spend on each of her tasks.

In response, the petitioner stated that it "maintains substantial export business to China," and that the beneficiary will oversee all aspects of foreign sales in her U.S. based position, "including custom product design for clients, marketing, and delivery logistics (including customs clearance)." The petitioner indicated that these aforementioned responsibilities would represent approximately equal percentages of her duties in the United States. The petitioner explained that the beneficiary would manage staff both in the United States and abroad, including "professional engineering staff whom she will direct to create custom equipment designs for our clients abroad." The petitioner stated that the beneficiary would hold wide discretion to manage and recommend the hiring of personnel in the export sales portion of the business. The petitioner emphasized that twenty percent of its worldwide inventory is being sold in China, and therefore its export sales component qualifies as an essential function.

Further, the petitioner submitted a duty description relevant to the beneficiary's proposed employment in the United States, which read as follows:

- Manages the export process and ensures compliance with U.S. and foreign government laws and regulations including export and customs laws
- Oversees the completion of paperwork and monetary transactions associated with international distribution
- Handle issues with customs officials
- Administer sales activities for all export products of [the petitioner], putting strategic decisions into practice.
- Coordinate international operations between the different functions of the company and external partners
- Maintain knowledge on overseas market customers
- Assist in development of objectives and goals for market sales
- Identify new business opportunities to expand corporation
- Develop and maintain professional relationships with all overseas clients
- Supervise achievement of all overseas sales targets
- Analyze all customer requirements to prepare appropriate sales strategies for the same
- Attend overseas industry sales shows as needed
- Work with and oversee Engineering and Service personnel to design and deliver products
- Supervise staff including engineers and sales staff in accordance with company policies and procedures
- Conduct interviews, hire new staff and provide employee orientation
- Conduct employee performance reviews
- Other duties as directed by President/CEO

The petitioner provided another U.S. organizational chart reflecting that the beneficiary would oversee an engineer and the whole of the foreign entity.

In denying the petition based on the petitioner's failure to demonstrate that the beneficiary would act in a qualifying managerial or executive capacity in the United States, the director stated that the petitioner had made material changes to the U.S. organizational chart in an effort to make the petition compliant with the regulations. The director noted that the petitioner did not submit duties, educations, and qualifications for the beneficiary's asserted subordinates, as requested. The director concluded that the record did not demonstrate that the beneficiary would manage professional or managerial personnel as necessary to relieve her from primarily performing non-qualifying operational duties.

On appeal, the petitioner contends that the director erred by requiring that the petitioner demonstrate that the beneficiary acts as a supervisor, since she may qualify as a function manager without any subordinates. The petitioner states that the change to its organizational chart in response to the RFE did not represent a

material change, but only further elaboration as to the company's organizational structure. The petitioner asserts that the beneficiary will act as a function manager, operating at a senior level within the petitioner's organization and liaising between executives in the United States and foreign sales outlets, and therefore, is not required to have subordinates to qualify.

2. Analysis

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

As previously stated, when examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Again, 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 duties offered for the beneficiary in her capacity in the United States, such as managing the export process, ensuring compliance, administering sales activities, putting strategic decisions into practice, assisting in the development of goals and objectives, and overseeing personnel to design and deliver products are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The evidence of record includes no specific examples or documentation to substantiate the beneficiary's proposed duties. For instance, the petitioner provides no specific examples of how the beneficiary will manage the export process, regulations with which she will ensure compliance, goals or objectives she may be tasked with or formulate, personnel she will oversee, or products she will design. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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).

Indeed, the petitioner was asked by the director to specifically describe the beneficiary's proposed managerial decisions and duties, and to provide a breakdown of the percentages of time she would spend on specific tasks. However, the petitioner did not provide this level of detail and only vaguely indicated that the beneficiary would spend equal amounts of time on "custom product design, marketing, and delivery logistics." As such, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Once again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). This failure of documentation is important because several of the beneficiary's daily tasks, such as completing paperwork and monetary transactions, ensuring compliance with laws during regular deliveries, analyzing customer requirements, and assisting in the design and delivery of

products do not fall directly under traditional managerial duties as defined in the statute. For this reason, we cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Further, the petitioner contends that the beneficiary will continue to perform many of her current duties through her claimed oversight of the foreign entity. However, as previously discussed herein, the petitioner has provided inconsistent and insufficient evidence relevant to the beneficiary's foreign employment leaving question as to whether she has been primarily performing qualifying tasks abroad, thereby casting the same doubt on whether the beneficiary will primarily perform these tasks when transferred to the United States to a role presented as materially similar to her previous capacity. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Beyond the required description of the job duties, United States Citizenship and Immigration Service (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Although the petitioner contends that the director improperly required that it provide evidence regarding the beneficiary's claimed subordinates, it asserts, in apparent contradiction, that the beneficiary qualifies as a personnel manager, or one who oversees professional or managerial subordinates. Once again, the statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner has not demonstrated that the beneficiary will act as a personnel manager in the United States. In the RFE the director requested that the petitioner submit duty descriptions, education levels, and salaries relevant to the beneficiary's subordinates. However, the petitioner has not submitted this evidence. The petitioner initially submitted an organizational chart which reflected that the beneficiary would have no subordinates. As discussed, the petitioner later added a subordinate engineer reporting to the beneficiary chart in its revised chart, but failed to substantiate that this employee reports to the beneficiary through a duty description or other supporting evidence. In fact, the chart shows that this employee directly reports to the petitioner's engineering manager. In addition, as noted previously, the petitioner has provided minimal evidence with respect to the beneficiary's claimed subordinates abroad as well, who are listed as reporting

to him in the petitioner organizational chart through his continued oversight of the foreign entity. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, the petitioner contends that the beneficiary will oversee "professional engineering staff." 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).

However, the petitioner has not identified these engineers, beyond the one engineer listed in the petitioner organizational chart. It has failed to provide duty descriptions or other supporting evidence to corroborate that these claimed professional level employees report to the beneficiary, or that they are performing professional level duties. In addition, much like the beneficiary's foreign employment, the petitioner has not submitted any evidence to establish that the beneficiary has subordinates holding baccalaureate degrees, or that are required to hold specific degrees to qualify for these positions. As such, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary will qualify as a personnel manager through his supervision of professional subordinates. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Lastly, the petitioner asserts that the beneficiary will qualify as a function manager through her authority over the export sales function and the foreign entity. As noted, 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 petitioner has not demonstrated that the beneficiary will act as a function manager. As previously discussed, the beneficiary has submitted a vague duty description that fails to demonstrate that the beneficiary will devote a majority of her time to qualifying duties. Although we acknowledge that the petitioner could establish the beneficiary as a function manager if she directed twenty percent of the business through a foreign subsidiary, the petitioner has not corroborated that the beneficiary has been acting as the general manager of the foreign entity, leaving question as to whether she will be tasked with this responsibility in the United States. Further, the petitioner has not specifically identified or documented who would relieve the beneficiary from duties associated with the export of the petitioner's products and foreign sales tasks associated with this function. Based on the evidence presented, it appears more likely than not that the beneficiary will be working directly with foreign clients and providing goods and services,

as this is prominently highlighted by the petitioner. However, the petitioner has not submitted evidence to substantiate that the beneficiary will be relieved from performing non-qualifying tasks by her claimed engineers and other administrative staff. As indicated above, 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).

For the foregoing reasons, the record does not support a finding that the beneficiary will be employed in a qualifying managerial capacity with the petitioner. For this reason, the appeal will be dismissed.

III. CONCLUSION

The appeal will be 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, that burden has not been met.

ORDER: The appeal is dismissed.