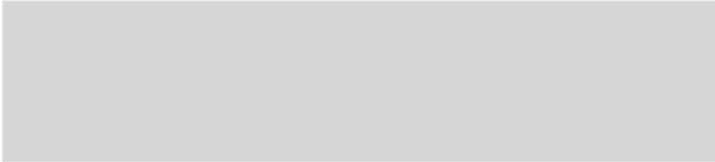




U.S. Citizenship  
and Immigration  
Services

(b)(6)



**JUN 17 2015**

DATE:

PETITION RECEIPT #: 

IN RE:

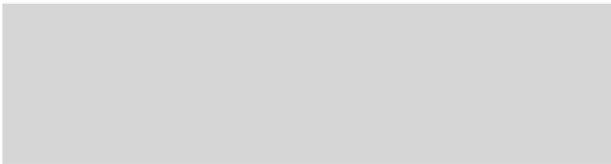
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation established in [REDACTED], states that it engages in the distribution of Brazilian food products. The petitioner claims to be a subsidiary of [REDACTED] located in [REDACTED] Brazil. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States.

The director denied the petition on two alternate grounds, concluding that the petitioner did not establish that (1) a qualifying relationship exists between the U.S. and foreign entities, and (2) the beneficiary will be employed primarily in a qualifying managerial or executive capacity in the United.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office. On appeal, the petitioner asserts that it submitted sufficient evidence to establish that it has a qualifying parent/subsidiary relationship with the foreign entity and that the beneficiary will be employed in a primarily executive capacity in the United States within one year of the approval of the petition. The petitioner submits a brief and additional evidence in support of the appeal.

#### I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

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

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

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

## II. THE ISSUES ON APPEAL

### A. Qualifying Relationship

The first issue addressed by the director is whether the petitioner established that the United States and foreign entities are qualifying organizations. 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 pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

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

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

\* \* \*

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

\* \* \*

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

(L) *Affiliate* means

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

1. Facts

The petitioner filed the Form I-129 on July 7, 2014. On the Form I-129, the petitioner indicated that the U.S. company is a subsidiary of the foreign entity. Where asked to explain the company stock ownership and managerial control of each company, the petitioner stated the following:

[The petitioner] is 60% owned by [the foreign entity], 40% by [the beneficiary].  
[The foreign entity] is 50% owned by [redacted] and 50% owned by [the beneficiary].

The petitioner's letter of support stated that its U.S. company was sold to the foreign entity for \$200,000 and as of April 2014, is 60% owned by the foreign entity and 40% owned by the beneficiary.

The petitioner submitted the foreign entity's Articles of Organization and 2012 Brazilian Income Tax Return, both demonstrating that the foreign entity is 50% owned by [REDACTED] and 50% owned by the beneficiary.

The petitioner submitted copies of cashier's checks paid to its U.S. company, one dated June 19, 2014 for \$125,000, and another dated June 30, 2014 for \$40,000. The purchaser of both cashier's checks is listed as [REDACTED] and the comment on the \$125,000 check states "investment."

The petitioner submitted its Articles of Incorporation, clearly indicating that it is authorized to issue a total of 1,500 shares of stock. The petitioner submitted its 2013 Internal Revenue Service ("IRS") Form 1120S, U.S. Income Tax Return for an S Corporation, indicating at Schedule K-1, that [REDACTED] owned 50% of its shares of stock and [REDACTED] owned the remaining 50% of its shares of stock in 2013.

The petitioner submitted a document titled Sale Agreement, between [REDACTED] as seller and the beneficiary, together with the foreign entity, as buyers for the sale of "the entire seller's shares of stock" in the U.S. company for \$200,000 dated April 22, 2014. The agreement specifically states that [REDACTED], seller, is the "sole owner of the shares of stock in [the petitioner]." The signature page of the agreement specifically lists the beneficiary at 40% and the foreign entity at 60%.

The petitioner submitted copies of cashier's checks paid to [REDACTED] one dated April 22, 2014 for \$150,000, and another dated July 1, 2014 for \$50,000. The purchaser of the \$150,000 check is listed as [REDACTED] and the remitter of the \$50,000 check is the petitioning U.S. company.

The petitioner submitted a document titled Shareholder Agreement, dated June 18, 2014, between the foreign entity and the beneficiary as shareholders and the petitioning U.S. company. The agreement states that the foreign entity and the beneficiary, together, purchased the petitioning U.S. company on April 22, 2014 and specifically, the foreign entity owns 900 shares of stock at 60% of the company, and the beneficiary owns 600 shares of stock at 40% of the company, which "constitute all of the issued and outstanding capital stock of the corporation."

The director issued a request for evidence ("RFE") on July 29, 2014, advising the petitioner of contradictory information contained in the evidence submitted. The director also specifically advised the petitioner that it failed to submit any information on the 50% of the shares owned by [REDACTED] or her agreement to sell said shares. The director specifically instructed the petitioner to submit evidence of ownership and control for the petitioning U.S. company.

In response to the RFE, the petitioner submitted a document titled Sale Contract Addendum, stating that the original Sale Agreement between [REDACTED] as seller and the beneficiary, together with the foreign entity, as buyers is changed as of August 15, 2014 to reflect that [REDACTED] also agrees to sell her 50% of shares of the petitioning U.S. company to the beneficiary and the foreign entity together.

The petitioner submitted a statement from the foreign entity, dated August 11, 2014, declaring to be in accordance with the purchase of the petitioning U.S. company for \$200,000. The statement further states that

the sum of \$200,000 was withdrawn from the sale of a property in Brazil owned by both partners of the foreign entity.

The petitioner also submitted a document reflecting a certificate number [REDACTED] dated June 15, 2014, certifying that the beneficiary owns 100 shares of "preferred stock" in the petitioning U.S. company. The document further states that [REDACTED] and [REDACTED]<sup>1</sup> transfer 50 shares of stock each to the beneficiary, for a total of 100 shares, on June 15, 2014. The document is notarized by a notary public in California on August 28, 2014.

The director denied the petition on October 15, 2014, concluding, in part, that the petitioner failed to establish that a qualifying relationship exists between the U.S. and foreign entities. In denying the petition, the director found that the evidence presented does not establish that the foreign entity is the parent of the U.S. company because the petitioner did not demonstrate that it is a majority-owner of the U.S. company's shares. The director found numerous contradictions in the evidence presented, such as the number of shares actually bought and sold, the actual purchaser of the shares considering the name on the cashier's checks, and the lack of share certificates issued by its U.S. company to the actual owners of the shares. The director noted that the petitioner did submit specific evidence, but the evidence was not clear or contradicted other evidence in the record.

On appeal, the petitioner asserts that the foreign entity owns 60% of the petitioning U.S. company and the beneficiary owns the remaining 40%. The petitioner asserts that it submitted sufficient evidence to demonstrate the claimed ownership structure and that the director is wrong in her decision. The petitioner contends that the director is incorrectly focused on the beneficiary and the foreign entity each owning 50% of the petitioning U.S. company due to the joint purchase of the shares. However, as owners, the beneficiary and [REDACTED] decided that the foreign entity would own 60% of the shares and the beneficiary would own 40%.

The petitioner also explains that the beneficiary and [REDACTED] are husband and wife and each own 50% of the foreign entity. As such, any monies transferred for the purchase of the petitioning U.S. company should be considered as monies remitted by the beneficiary and the foreign entity even if [REDACTED] is the only named person on the check. The petitioner submits, on appeal, copies of bank statements reflecting both [REDACTED] and the beneficiary's names on the account where the monies for the purchase of shares were withdrawn.

## 2. Analysis

Upon review, and for the reasons stated herein, the evidence in the record is not persuasive in establishing that the foreign entity is a majority shareholder of the petitioning U.S. company.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289

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<sup>1</sup> We note that the body of the document referencing the transfer of shares lists the name [REDACTED] but the signature line lists the name [REDACTED].

(Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the instant matter, the petitioner was authorized to issue 1,500 shares of the same class of stock. According to its 2013 IRS Form 1120S, [REDACTED] and [REDACTED] each owned 50% of the petitioning U.S. company's shares; however, the actual number of shares owned remains unknown as share certificates or a ledger were not submitted. On the Sale Agreement, signed April 22, 2014, [REDACTED] is listed as the "sole owner of the shares of stock" of the petitioning U.S. company; however, the actual number of shares owned is not listed within the document. Upon notification of the discrepancy concerning [REDACTED] 50% ownership of the petitioning U.S. company, the petitioner submitted a Sale Contract Addendum, signed August 16, 2014, changing the original contract to reflect that [REDACTED] sells her 50% of the shares and [REDACTED] also sells her 50% of the shares of the petitioning U.S. company for a total of \$200,000, effective August 15, 2014. Again, the actual number of shares owned by each of the sellers is not listed within the document.

Here, the petitioner has not shown that the foreign entity is a majority owner of its petitioning U.S. company. Despite the Sale Agreement signature page that lists the foreign entity at 60% and the beneficiary at 40%, and the Shareholder Agreement that lists the foreign entity owning 900 shares at 60% and the beneficiary owning 600 shares at 40%, the petitioner has not demonstrated the actual number of shares purchased or that the shares have in fact been distributed in such a manner.<sup>2</sup> The petitioner has not indicated the actual number of shares owned by the sellers to demonstrate that the distribution listed in its Shareholder Agreement is accurate. 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 petitioner has not established that this ownership structure, even if it were found to be valid, was accurate on the date of filing the instant petition. The Sale Agreement contains different dates for the closing of the sale, such as, April 22, 2014 at part 5 and September 25, 2014 at part 12, which is after the date of filing the instant petition. Furthermore, the Sale Contract Addendum is signed August 16, 2014 and shows an effective date of August 15, 2014, which is also after the date of filing the petition. Additionally, although the share certificate shows that [REDACTED] and [REDACTED] transferred 50 shares each, and the beneficiary was issued 100 shares of preferred stock of the petitioning U.S. company on June 15, 2014, the

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<sup>2</sup> We note that the petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S) as well as a copy of its IRS Form 2553, Election by a Small Business Corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. See Internal Revenue Code, § 1361(b), 26 U.S.C. § 1361(b)(1) (2011). Accordingly, since the petitioner would not be eligible to elect S-corporation status being 60% owned by the foreign entity, as is the petitioner's claim here, there is further reason to question whether the petitioner is owned as asserted. 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).

document was notarized on August 28, 2014, which presumably should be the date on which it was signed by [REDACTED] for the transfer of shares. 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). 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 not established that the foreign entity majority owns and controls the petitioning U.S. company such that a qualifying relationship between the two entities exists. The petitioner has failed to submit share certificates, a ledger, or even valid information concerning the actual number of shares issued within the submitted documents. As such, the actual ownership and control of the petitioning U.S. company cannot be determined at this time. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

Based on the deficiencies and inconsistencies discussed above, the evidence on record does not support the petitioner's claim that the U.S. and foreign entities have a parent-subsidiary relationship. As such, the petitioner has not met its burden to establish that the U.S. and foreign entities have a qualifying relationship. Accordingly, the appeal will be dismissed.

#### B. Employment in a Qualifying Managerial or Executive Position in the United States

The second issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity in the United States within one year of approval of the petition.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

#### 1. Facts

On the Form I-129, the petitioner indicated that it had three current employees in the United States and a gross annual income of \$1,017,764.00. In its letter of support dated June 30, 2014, the petitioner stated that the beneficiary will be responsible for the overall supervision of the company and management, hiring and firing of personnel, negotiating with clients, indirect supervision of day-to-day activities, creation and implementation of internal norms and procedures, and training and forming the staff in the United States.

The petitioner's business plan does not discuss a staffing plan but includes an organizational chart depicting the beneficiary at the top tier as CEO, directly supervising two drivers and an operations manager. The manager of operations supervises two sales representatives.

The petitioner also submitted an organizational chart for 2014, which is identical to the one in the business plan, except that the beneficiary's title is general manager instead of CEO, an organizational chart for 2015, which adds a secretary and "loader assistant" to the beneficiary's direct subordinates and a third sales representative to the operations manager's subordinates, and an organizational chart for 2016, which adds a third driver and a "housekeeping" position to the beneficiary's direct subordinates and a fourth sales representative and inventory associate to the operations manager's subordinates.

The petitioner submitted a document titled Description of Duties and Breakdown of Hours per Week, describing the beneficiary's proposed duties in the United States as follows:

- Define monthly Sales Goals (3 hours)
- Keep Inventory Updated (5 hours)
- Submit Purchase Orders as needed and arrange transportation for such orders (3 hours)
- Coordinate availability of products in both warehouses (10 hours)
- Maximize workers time (3 hours)

- Track Invoices and Payments (5 hours)
- Seek New Contracts (3 hours)
- Keep Company Financially Stable and Current with all Financial Responsibilities (5 hours)
- Seek New Lines of Products to Better Serve our Clients (3 hours)

The document goes on to list brief job duties for the beneficiary's subordinates: operations manager, sales representative, and warehouse supervisor/driver. The petitioner also provided employment contracts for three employees listed on the organizational chart as the operations manager, sales representative, and driver.

In the RFE, the director advised the petitioner that the description of duties provided for the beneficiary's proposed position in the United States is not sufficient to show that she will be primarily employed in a managerial or executive capacity within one year of approval of the petition. The director instructed the petitioner to submit evidence demonstrating that the proposed position in the United States will be managerial or executive.

In response to the RFE, the petitioner submitted a letter from counsel, dated August 8, 2014, stating that the beneficiary will occupy an executive position in the United States and described her duties as follows:

- Overseeing and managing all aspects of the day-to-day operations of the company and ensuring operations are in sync with strategy.
- Taking a leadership role in the establishment of performance indicators, and monitoring of performance against goals.
- Developing and administering operational and administrative policies, standards and practices.
- Develop and administer financial systems and effective internal controls including budget setting and tracking, expenditure approvals processes, record-keeping and reporting, and the preparation of accurate and timely monthly financial statements. Assure safeguarding of assets. Lead capital planning and budgetary activities. Ensure preparation for quarterly financial audit. Review all receipts and disbursements.
- Develop and administer revenue generation activities, including fundraising, business development and grant applications.
- Develop and administer personnel-related policies and practices. Take a lead role in the development of staff performance objectives and in the evaluation of performance against organizational goals. Provide coaching and counseling where necessary. Foster a staff culture that supports the Foundation's strategy.
- Ensure compliance with any and all requirements for funders and regulatory bodies.
- Lead internal communications efforts through active communications to all staff including meetings, announcements, reports and bulletins.
- Provide assistance and information for the Board as requested.

The petitioner submitted the same document titled Description of Duties and Breakdown of Hours per Week, listing the same duties for the general manager, operations manager, sales representative, and warehouse supervisor/driver positions as previously submitted with the petition. The petitioner also submitted a new document titled Job Description, describing the general manager position as follows:

Take care of purchases and transportation of products, assure the company finances are all taken care of. Delegate the jobs of other company workers. Define sales goals for every month. Coordinate shipping and receiving of warehouses.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the beneficiary's proposed duties do not appear to be consistent with those typically performed by someone in a managerial or executive position, but rather of an employee who will be performing the necessary tasks to provide a service or produce a product. The director further found that the organizational structure suggests that the position of general manager is primarily assisting with the day to day non-supervisory duties of the business, which precludes the beneficiary from being considered a manager or executive. The director finally found that it appears the beneficiary is primarily involved in the performance of routine operational activities of the entity rather than in the management of a function of that business.

On appeal, the petitioner asserts that the beneficiary will be employed in an executive capacity, as evidenced by the description submitted in response to the RFE. The petitioner contends that it submitted a "sufficiently detailed duty description along with percentages of time the beneficiary will devote to her tasks." The petitioner further contends that the beneficiary will be responsible for overseeing a sufficiently complex organization where services of a higher level manager or executive are required.

## 2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, or as a function manager, in the United States.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial/executive responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

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

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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews 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 a complete understanding of a beneficiary's actual duties and role in a business.

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

In the instant matter, the petitioner first characterized the beneficiary's role as general manager and briefly described her proposed duties in very broad terms: overall supervision of the company and management; hiring and firing of personnel; negotiating with clients; indirect supervision of day-to-day activities; creation and implementation of internal norms and procedures; and training and forming the staff in the United States. The petitioner also submitted a document outlining specific duties and the amount of time the beneficiary will devote to them per week, such as keep inventory updated (5 hours); coordinate availability of products in both warehouses (10 hours); track invoices and payments (5 hours); and keep company financially stable and current with all financial responsibilities (5 hours). In allocating the hours devoted to specific duties per week, the petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the RFE, the petitioner submitted the same documentation previously submitted with the petition, but counsel provided a new list of duties in his letter, such as overseeing and managing all aspects of the day-to-day operations of the company; ensuring operations are in sync with strategy; developing and administering operational and administrative policies, standards, and practices; developing and administering personnel-related policies and practices; leading internal communications efforts through active communications to all staff including meetings, announcements, reports and bulletins; and providing assistance and information to the Board. While we do not doubt that the beneficiary exercises authority over the petitioner as a partial owner, this position description was inconsistent with the information provided at the time of filing, which indicated that the beneficiary performed a combination of managerial and non-managerial duties, including several duties that overlap with those performed by the company's subordinate staff and are consistent with directly providing the services of the business. Further, the

petitioner's evidence does not match the information in counsel's letter. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's proposed duties at the U.S. company to demonstrate that these duties will qualify her as a manager or executive. 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's description of the proposed duties does not provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See sections 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

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).

Here, although the petitioner states that the operations manager has a "degree in tourism," the actual job duties listed for the position do not demonstrate that the position itself requires a professional degree. Further, the brief list of job duties for the operations manager, sales representative, and warehouse supervisor/driver positions does not show that the positions are managerial, professional, or supervisory in nature. The petitioner has not demonstrated that the beneficiary's duties primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the foreign entity. As noted above, the petitioner did not

submit a detailed description of the beneficiary's position sufficient to establish that her daily routine consists of primarily managerial duties. Finally, the petitioner has not submitted evidence that the beneficiary's subordinate employees will relieve her from performing non-qualifying operational duties in the United States.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily 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 position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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. Here, the petitioner did not indicate that the beneficiary is a function manager. The petitioner did not describe an essential function to be managed by the beneficiary or provide a breakdown of the beneficiary's job duties to support such a claim.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, the petitioner asserts that the beneficiary will be an executive; however, the beneficiary's proposed position has not been shown to be primarily executive in nature. The petitioner has not demonstrated that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the beneficiary and her subordinates do not demonstrate

that the beneficiary will focus 51% of her time on executive duties rather than the day-to-day operations of the business.

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As previously noted, when a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. For the reasons set forth above, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity, or that the petitioner will grow to the point where it will require the services of a full-time manager or executive, at the end of its first year of operations. For this reason, the petition may not be approved.

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In nonimmigrant visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012). Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.