



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 23 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:



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

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

Thank you,

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

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant petition. The petitioner filed a motion to reopen and reconsider with the service center. The director granted the motion to reopen the petition and subsequently affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Maryland limited liability company established in [REDACTED] states that it operates a travel agency, management service, and import/export business. It claims to be an affiliate of [REDACTED], the beneficiary's employer in India. The beneficiary was previously granted one year as an L-1A intracompany transferee in order to open a "new office" in the United States as the petitioner's managing member. The petitioner now seeks to extend the beneficiary's status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary is employed in a primarily managerial or executive capacity. The petitioner filed a motion to reopen and reconsider the denied petition. The director granted the motion to reopen and reconsider and affirmed the denial on the same grounds.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office for review. On appeal, the petitioner asserts that it has established by a preponderance of the evidence that the beneficiary is employed in a qualifying managerial capacity. 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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

## **II. Managerial or Executive Capacity**

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as

promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

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

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

#### A. Facts

The petitioner filed the Form I-129 to extend the beneficiary's L-1A status on March 27, 2014. The petitioner indicated on the Form I-129 that it has three employees and an estimated gross annual income of \$364,055.

In a March 24, 2014 support letter, the petitioner described the beneficiary's key duties, as follows:

- Manage the Maryland office by controlling all day-to-day business operations including: directing assignment of projects; supervising banking; authorizing payroll; managing corporate accounts; setting corporate goals; and creating and controlling the financial planning.
- Actively pursue new business development opportunities with American businesses.
- Contract authority.
- Budgetary authority.
- Responsible for all strategic decision making; including matters of real estate and office equipment leases and purchases.
- Establish all corporate policies based on the prototype of those he developed and established at the parent company, [REDACTED]
- Manage and control all personnel issues- all employees and sub-contractors, artists, designers will report to him and work under his authority.

- He will report to all directors of the India parent, as well as to the HR Director of Parent company on periodic basis.
- Responsible for hiring new employees and contractors.
- Manage the outsourcing of various administrative and support functions.
- Maintain authority over all personnel and may hire and fire employees/contractors as necessary.
- Establish marketing scheme with marketing director.
- Recommend promotions to top-performing employees/contractors and will have signing authority for leave-authorization.
- Direct the preparation and submittal of financial reports to Board Members and conduct annual business meetings.
- Supervise and direct all other Members of the Maryland company.
- Provide ongoing advice and direction to India management team when required.
- Prepare periodic reports to India parent.

The petitioner also indicated that the beneficiary is actively marketing his business management and business consulting services to other entrepreneurs from India. The petitioner stated that the beneficiary and his team are "actively researching products that are in demand by the Indian community."

The support letter indicated the petitioner's staffing levels had fluctuated during the previous year and that the petitioner employed the beneficiary, a management accountant, and a senior travel agent at the time of filing. The petitioner described the management accountant's duties as producing the financial reports and forecasts for the company's budgeting and fiscal tax planning issues and supervising an account manager. The petitioner indicated that the senior travel agent "is heading up the Travel Section of the [petitioner] until a replacement for the Travel Director can be found." The petitioner also indicated that the senior travel agent "is able to work independently and leads the travel section at present." The petitioner stated that the beneficiary defers to the judgment of the management accountant and senior travel agent and looks to them to provide the expertise.

The petitioner submitted organization charts for the U.S. entity for 2013 and 2014. The 2013 organization chart depicts a director of travel, a management accountant, and an office manager subordinate to the beneficiary. The chart demonstrates that the director of travel has a subordinate senior travel agent; the management accountant has a subordinate senior accounts manager; and the office manager has a subordinate administrative employee. The 2014 organization chart indicates that the beneficiary has a subordinate management accountant and senior travel agent. The 2014 chart shows that the senior travel agent is subordinate to a director of travel that is "to be hired." The 2014 chart also contains positions identified as: sales and marketing director, junior travel agents, accounts manager, and sales and marketing associate; however, the chart indicates that these positions are vacant.

The petitioner provided tax documents to corroborate its claimed staffing levels. The petitioner submitted IRS Form W-3 and W-2s from 2013 establishing that the petitioner paid a total of \$58,432.79 to the employees identified as: the managing director (the beneficiary); management accountant; senior travel agent; and office manager. The petitioner also submitted IRS Form 1099s for the individuals identified as the

accounts manager and administrative employee. The petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, indicated that the petitioner paid wages to four individuals in the fourth quarter of 2013 and to two individuals in the first quarter of 2014.

The petitioner also submitted numerous invoices for import and export products, consulting services, and travel products and services.

The director issued a request for evidence ("RFE") informing the petitioner that the evidence was insufficient to demonstrate that the beneficiary's proposed position in the United States qualifies as managerial. The director informed the petitioner that it must submit a statement describing the beneficiary's duties for the previous year and the duties the beneficiary is intended to perform under the extended position. The director also requested additional evidence of the new operation's staffing.

In response to the RFE, the petitioner submitted a letter dated May 15, 2014. The letter included the previously provided list of duties for the beneficiary and added that the beneficiary's duties would also include: "actively grow the travel and tourism department and develop the [I]ndian import distributorship over the next three year period"; "lead R&D for new products and service lines"; "establish strong networking connections and actively pursue business development opportunities"; and "grow marketshare in all product and service heads."

The petitioner also submitted a letter from the beneficiary, dated May 27, 2014. The letter includes a three-page description of the beneficiary's duties during the first year of operations and a two-page description of the beneficiary's intended duties for the next three years.

A copy of the petitioner's business plan from 2013 states that the petitioner had hired a senior travel director and management accountant and intended to hire a sales and marketing director, travel agent, and senior project management by the end of the company's first year of operation. However, the petitioner explained that the beneficiary replaced its initial employees because they were ineffective and not driven to commit business at the level he desired. The petitioner indicated that it has replaced the management accountant, and hired an office manager and two regional sales and marketing managers since the date the petition was filed. The petitioner indicated that the individual identified as its initial director of travel was replaced by the senior travel agent.

The petitioner also stated that it has temporarily detailed its foreign director of travel and promotions to serve as the petitioner's director of travel. The petitioner stated that the director of travel and promotions performs his duties remotely from India and is reimbursed by the foreign entity. The resume for the director of travel and promotions indicates that he has been employed by the foreign entity since January 2014 and worked for [REDACTED] since April 2009. His duties are described as:

- Plan and execute all travel incentives for [the petitioner's] managers, sales and marketing executives throughout India
- Create travel incentives for Company
- Lead corporate travel groups

- Supervise and manage travel positions staff

The petitioner submitted salary certificates from the foreign entity stating that this employee has been working for them without interruption since December 1, 2013. The salary certificates indicate that the travel director earned RS 30,000 in December and January; RS 60,000 from February to April; and RS 1,11,000 in May. An Indian tax form indicates that the travel director's salary from April 1, 2013-March 31, 2014 is RS 210,000.

In addition, the petitioner provided payroll documents and a revised organization chart, and also provided resumes for the senior travel agent and former management accountant positions, the director of travel and promotion, and the newly hired management accountant, office manager, and regional sales and marketing managers.

The petitioner submitted a lease agreement and invoices for its rented office space. The rental agreement indicates that the petitioner will be billed separately for administrative services described as "the total time to produce or spent performing administrative tasks such as copying, taking messages, preparing documents, spreadsheets and/or presentations and basic administrative support during the sale dates" and for the "total amount" of printing and copying, scanned documents, and shipping services and postage. The invoices show that the petitioner was billed for scanning, photocopies, and incoming faxes.

As evidence of its business operations, the petitioner submitted a letter from [REDACTED] and [REDACTED]. The letter from [REDACTED] states that the beneficiary has an impressive record of booking upscale luxury trips as an authorized representative for the company. The letter from [REDACTED] extends the beneficiary's appointment as its authorized representative for business development activity and indicates that he "has shown a commendable professional performance in the USA business development, generating sizeable travel related business for us."

The director denied the petition finding that the evidence was insufficient to establish that the beneficiary is employed in the United States in a qualifying managerial or executive capacity. The director specifically found that the evidence was insufficient to demonstrate that the beneficiary has been and will be involved in the supervision and control of the work of managers or professional-level employees. The director stated that the evidence indicated that the petitioner employed between one and four employees and is insufficient to establish that the beneficiary is relieved from performing non-qualifying operational duties. The director further found that the petitioner's description of the beneficiary's duties simply paraphrases the statute and that it appears the beneficiary is performing the services of the petitioner's travel agency.

The petitioner filed a motion to reopen and reconsider the evidence. The director granted the motion and reaffirmed the denial. The director again concluded that the petitioner failed to establish that the beneficiary is employed in a managerial or executive capacity. Specifically, the director found that the petitioner's description of the beneficiary's position is vague and fails to indicate that the beneficiary will primarily perform managerial functions. The director also found that the petitioner failed to provide evidence to establish that the subordinate staffing is sufficient to relieve the beneficiary from performing non-qualifying sales, business development, or marketing services. The director notes that the petitioner failed to submit

documentation to demonstrate that contractors and other employees support the beneficiary and provide services. Finally, the director found that the beneficiary's duties overlapped with those of his subordinate employees and determined that the beneficiary is primarily engaged in non-managerial operational tasks.

On appeal, the petitioner asserts that the director failed to take into account the petitioner's reasonable needs and stage of development. The petitioner claims that the beneficiary currently supervises and controls a Director of Travel, Accounting Manager, and Manager. The petitioner asserts that because the beneficiary's subordinates are working as department heads, the beneficiary oversees the work of managers, and further asserts that the position descriptions and resumes provided for the beneficiary's subordinates establish that he manages professional employees. The petitioner indicates that it intends to gradually hire more employees as it moves towards full operations as contemplated in its business plan.

The petitioner restates the beneficiary's duties and indicates that since his arrival to the United States, the beneficiary has exclusively performed managerial functions. The petitioner also provides the following breakdown of the amount of time the beneficiary spends performing his duties:

- Manage and direct travel, management and sales agency in [REDACTED] Maryland. (15% of the time).
- Provide global management to the US affiliate utilizing knowledge and experience of the India parent company (12% of the time).
- Direct the start-up and make all management and financial decisions (20% of the time).
- Supervise the management team, and have absolute authority to hire and fire managerial personnel (23% of the time).
- Develop sound marketing strategies and work with the Sales Director to garner market share (20% of the time).
- Provide leadership for business development utilizing wealth of contacts in the Indian diaspora that exists in the Tri-state area that is Washington DC, Maryland, and Virginia. (10% of the time).

The petitioner submits a revised resume for the foreign entity's travel director. The resume indicates that the travel director stopped working at [REDACTED] in December 2013, and started working at the foreign entity. The resume indicates that the travel director's duties are: increase in numbers for visitors arrivals and revenue; research and develop new market growth and suitable sales action plans for the West Asian market; review and analyze the effectiveness of the marketing plans; and product development and training.

The petitioner also submits an appointment letter for the travel director, dated November 30, 2013. The letter states that the travel director will be "responsible for overall efficient functioning of entire travel set up in India and USA" and that he will be paid RS 60,000 on a monthly basis from December 2013-June 2014 and 1,11,000 from July 2014-December 2015.

## B. Analysis

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a qualifying managerial capacity under the extended petition.

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.* 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 and 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").

Although the petitioner indicated that the beneficiary has exclusively performed managerial functions, several of the beneficiary's duties are not typically qualifying duties. For example, the petitioner stated that the beneficiary spends a portion of his time on the following tasks: negotiating leases and contracts; actively pursuing and forging U.S. distributorships; creating exportation of cheese and almonds; identifying new product lines and service offerings; creating marketing and sales campaigns; creating initial products and service offerings; negotiating group travel; negotiating contracts with U.S. hotel chains to book online accommodations; negotiating with [REDACTED] to act as authorized seller; and booking cruise line orders. The described duties suggest the beneficiary's involvement in non-qualifying routine sales and marketing activities and in the provision of the company's travel services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Moreover, the petitioner described several of the beneficiary's activities in broad language that potentially encompasses qualifying and non-qualifying duties. The petitioner stated that the beneficiary: grows and develops business; grows the travel and tourism department; develops the import distributorship; grows market share; leads all business development efforts; and implements the creation of technology, branding, and logos. These vague descriptors fail to explain the beneficiary's daily duties and activities with enough specificity to determine whether the activities qualify as managerial or executive in nature. *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). 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. *Id.*

While performing non-qualifying tasks necessary to produce a product or provide a service will not automatically disqualify the beneficiary, the petitioner still has the burden of establishing that those tasks are not the majority of the beneficiary's duties and that the beneficiary is "primarily" performing managerial or executive duties. See section 101(a)(44) of the Act. Here, the petitioner does not distinguish the beneficiary's managerial duties from his operational duties and has not established that the beneficiary is primarily performing managerial duties.

As discussed above, the petitioner uses overly broad language that does not distinguish the amount of time the beneficiary actually spends performing qualifying duties versus non-managerial duties. Although the beneficiary's position description contains several non-qualifying duties, the petitioner stated that "the beneficiary spends 100% of his time on senior level managerial functions of the company." The breakdown of how the beneficiary spends his time also does not distinguish the beneficiary's non-qualifying duties and paraphrases the statutory language. The petitioner indicated that the beneficiary spends his time managing and directing the travel, management, and sales agency (15%); providing global management to the U.S. affiliate utilizing knowledge and experience from the parent company (12%); directing the start-up and making all management and financial decisions (20%); and providing leadership for business development (10%). Conclusory assertions are insufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The position description fails to distinguish the beneficiary's managerial and executive duties from his operational duties and is insufficient to establish that the beneficiary's duties are primarily managerial or executive in nature.

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

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. See § 101(a)(44)(A)(ii) of the Act. 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 beneficiary's duties include oversight of a marketing team, sales directors, and marketing directors of distributorship; however, there is no evidence that the petitioner employed any sales and marketing employees at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971) *Matter of*

*Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner submitted evidence that it hired an office manager and two sales and marketing managers subsequent to the date the petition was filed; however, the petitioner has not demonstrated that it employed sufficient staff to relieve the beneficiary from performing routine administrative, sales, and marketing duties at the time of filing.

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

In response to the RFE, the petitioner claimed that the senior sales agent is subordinate to a travel director employed by the foreign entity. However, the organization charts and position descriptions from the initial support letter indicated that the travel director was "to be hired." The position description further stated that the senior travel agent replaced the previous travel director and was acting as the head of the travel department until a new travel director could be found. The petitioner did not state that employees of the foreign entity would provide support services for the U.S. company until the director informed the petitioner that it did not have sufficient staffing to relieve the beneficiary from performing non-qualifying duties. 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. at 176.

Although the petitioner submitted salary statements and a resume to establish the travel director's employment at the time of filing, the record contains unresolved inconsistencies regarding this position. The salary statements indicate that the India-based travel director was employed since December 2013; however, the travel director's initial resume indicated that he began working for the foreign entity in January 2014. The salary statements also do not match the salary listed on the tax document. On appeal, the petitioner provided the travel director's appointment letter and a revised resume. The appointment letter is inconsistent with the salary statements. The appointment letter indicates that the travel director will be paid a monthly salary of RS 60,000 from December until April and RS 1,11,000 from July until December; while the salary statements indicate that the travel director was paid RS 30,000 in December and January; RS 60,000 February through April; and RS 111,000 in May. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to provide consistent objective evidence to establish that the foreign entity travel director was providing support services for the petitioner at the time the petition was filed.

The petition, initial support letter, organization chart, and tax documents indicate that the petitioner employed the beneficiary, a senior travel agent, and a management accountant at the time the petition was filed. The petitioner has not provided evidence that any employee supervised by the beneficiary in turn supervises subordinate staff members. Although the beneficiary's subordinates are given managerial titles, the position descriptions and lack of subordinate employees to complete the non-managerial duties suggest that the senior travel agent and management accountant will be performing daily financial and operational activities, rather than managerial or supervisory tasks. An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee

must be shown to possess some significant degree of control or authority over the employment of subordinates. See generally *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)).

Even if the travel director is considered as part of the organization structure, the evidence does not establish that he supervises the subordinate senior travel agent. The position descriptions indicate that the beneficiary, travel director, and senior travel agent perform overlapping operational duties associated with the travel department. While the travel director's position description indicates that he supervises and manages travel positions staff; the senior travel agent's position description indicates that she is the head of the travel department. The position description provided in the revised resume includes duties that overlap with those of the beneficiary. Based on the position descriptions provided, it appears that the travel director performs the department's operational duties. It is also unclear that the travel director possesses the requisite control and authority over the senior travel agent to support his placement in the organization chart. On appeal, the petitioner submitted a revised resume for the travel director reflecting higher-level responsibilities. However, as previously discussed, 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. at 176.

On appeal, the petitioner suggests that its non-managerial financial, administrative, and marketing duties are performed by outside contractors. As evidence of the contracted services the petitioner provided its rental agreement and invoices with charges for scanning, photocopies, postal services, and faxes. The petitioner did not provide agreements for contracted marketing or financial services. Further, the evidence provided does not clearly describe the work to be performed or give the beneficiary the authority and control over the contracted employees to the extent he could be considered a personnel manager. 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)).

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). 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). Therefore, we must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

The petitioner asserts that the beneficiary manages professional employees. Although the petitioner submits resumes demonstrating that the subordinate travel director holds a Master of Tourism Administration, the petitioner has not provided evidence to demonstrate that a baccalaureate degree is typically required to perform the travel services described in the position description. Even if the management accountant qualifies as a professional level employee, the evidence is insufficient to establish that the beneficiary would spend a substantial proportion of his time supervising a single employee. Therefore, the petitioner has not established that the beneficiary is employed as a personnel manager.

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 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). 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, or other non-qualifying duties, is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. at 604.

In the present matter, the petitioner has not established that the beneficiary is employed as a function manager. The petitioner has not identified or articulated an essential function that the beneficiary manages. Although the petitioner states that the beneficiary performs the managerial functions, his position description indicates that he performs several non-qualifying sales and marketing tasks. As discussed above, the petitioner has not provided a sufficiently detailed description of the beneficiary's duties or the percentages of time he will spend on each duty. Absent a clear, consistent, and credible breakdown of the time spent by the beneficiary performing his duties, we cannot determine what proportion of his duties would be managerial or executive, and thus cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The petitioner indicates that it provides business consultancy services and operates an import and export business in addition to its travel services. In fact, the petitioner's profit and loss statement for 2013 shows that it derived \$168,201 of its approximately \$360,000 in first-year sales (46 percent) from consulting and import/export services. The petitioner provided invoices for its import business operations and consultant fees; however, the petitioner has not provided sufficient evidence to establish who performs the operational duties related to the import duties or business consultancy services. Without a clear description of the duties performed by the beneficiary and his subordinates to support these operations and a clear explanation of how the beneficiary and his subordinates divide the duties and responsibility, the record does not establish that the subordinate employees relieve the beneficiary from having to perform the majority of the company's non-managerial functions related to the provision of consulting services and importing and exporting goods from India.

Similarly, the petitioner has not established that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. 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 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.* For the same reasons indicated above, the petitioner has not established that the beneficiary will be acting in a qualifying executive capacity. As explained above, the beneficiary appears to be the first-line supervisor of two to three employees and the record shows that the beneficiary did not have the staff at the time of filing to relieve him from performing non-executive duties associated with the company's travel, consulting and import-export lines of business. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations for the extension of a "new office" petition require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D).<sup>1</sup> The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

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<sup>1</sup> Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. 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. 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.