



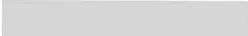
U.S. Citizenship  
and Immigration  
Services

(b)(6)



**JUN 25 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, Vermont 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, 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], claims to be a branch of [REDACTED], located in Russia. The petitioner states that it engages in consulting on metallurgical engineering. It seeks to employ the beneficiary in the position of Chairman of the Board of Directors/Treasurer for an undetermined period.

The director denied the petition on three alternate grounds, concluding that the evidence of record did not establish that (1) its U.S. company has been doing business in the United States; (2) the beneficiary will be employed in a primarily managerial or executive capacity in the United States; and (3) the beneficiary has been employed in a qualifying managerial or executive capacity abroad.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office for review. On appeal, the petitioner asserts that the U.S. company is doing business in the United States and that the beneficiary has been and will be employed in an executive capacity abroad and in the United States. Counsel 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.

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.

## II. THE ISSUES ON APPEAL

### A. Doing Business in the United States

The first issue addressed by the director is whether the petitioner established that it is a qualifying organization doing business in the United States. Specifically, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines that term as:

*Doing business* means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

#### 1. Facts

The petitioner filed the Form I-129 on December 24, 2013. Where asked to describe the "type of business" on the Form I-129, the petitioner indicated, "consulting in metallurgical engineering." The petitioner listed its company address as [REDACTED] Maryland and indicated that the beneficiary's work location would be the same.

The petitioner submitted its financial statement and accountant's compilation report, dated August 31, 2013, stating that it has not been audited by an accountant and the information contained therein is based solely on the representation made by the U.S. company's owners. The report shows that the petitioning U.S. company's year-to-date total sales were \$90,000, operating expenses were \$3,337, net income from operations was \$86,663, other net income was \$21,226, and member's capital was \$21,328.

The petitioner did not submit any information explaining or clarifying its actual business or day-to-day functions in the record. The petitioner also did not submit any lease agreements to demonstrate that it has acquired sufficient physical premises to conduct its business.

The director issued a request for evidence ("RFE") on March 21, 2014, advising the petitioner that the financial statement alone is insufficient to fully demonstrate that the U.S. company is doing business. The director instructed the petitioner to submit evidence to satisfy this requirement.

In response to the RFE, the petitioner submitted its 2013 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income. The IRS Form 1065 shows gross receipts or sales at \$135,000, salaries and wages at \$0, and guaranteed payments to partners at \$72,233.

The director denied the petition on August 25, 2014 concluding, in part, that the petitioner did not establish that its U.S. company is doing business. In denying the petition, the director simply stated that the 2013 tax documentation reflects that there were no salaries or wages paid for that fiscal year and therefore, it does not demonstrate that the company was doing business.

On appeal, the petitioner contends that the definition of "doing business" does not require that the U.S. entity be operating for a certain number of years, nor does it disqualify relatively new companies or those that are just starting operations from being deemed to be doing business in the United States. The petitioner contends that the filing of the IRS Form 1065 clearly indicates that the company is doing business in the United States.

In support of the appeal, the petitioner submits a letter describing the services offered by the U.S. company,

stating that it is "focused on providing consulting services to foreign companies [who] still do not have [the] experience of international co-operation, and to the companies which are seeking now to establish business relations and partnerships as well as to the companies which want to be presented on the American, European and Asian markets of the goods and services." The petitioner further states that it did not have any employees during its first year of operations, but conducted its business with three volunteers, the President & CEO's wife, son, and daughter. The petitioner states that the volunteers assisted the U.S. company for four months at two to three hours per week.

## 2. Analysis

Upon review, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States.

In the instant matter, the petitioner submitted an internally generated financial report and its IRS Form 1065 for 2013. According to those two documents, the U.S. company had total sales of \$90,000 as of August 31, 2013, and had gross receipts or sales of \$135,000 by the end of 2013, which means that it had to maintain sales of at least \$11,250 per month for the remainder of the year, i.e., September to December 2013. The petitioner did not submit any purchase orders, invoices, contracts, consulting agreements, or other documentation to demonstrate that it has been doing business and how it has been making the sales listed on the documentation provided. The petitioner did not have any sales employees or consultants to generate the revenues listed. The only presumed employee is Evgeny Ermakova, who is the only partner located in the United States at the U.S. company's listed business address. The petitioner has not claimed any additional employees or contractors, nor has it identified any employees of the foreign entity that are conducting the business of the U.S. company, other than the three volunteers it listed on appeal. As such, it cannot be determined that the petitioner is doing business in the United States.

Additionally, the petitioner has not established that it has acquired sufficient physical premises to conduct its business and the evidence presented in the record raises doubts as to the validity of the employment offered to the beneficiary with this petition. According to a public records search, the U.S. company's business address listed on all of the documentation submitted is a residential-use property owned by [REDACTED] and [REDACTED]. This address is listed as the physical location where the beneficiary will be employed and expected to conduct his work for the U.S. business.

We recognize that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). A petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business. In this case, the lack of evidence of sufficient business premises and the conflicting evidence of record does not establish that the petitioner has been and will be doing business in a manner that will support the beneficiary's claimed position.

Further, by misrepresenting or omitting the actual address of the petitioner's offices, the petitioner could prevent USCIS from verifying eligibility by conducting a site visit. The Department of Homeland Security and USCIS have the right to verify any information the petitioner submits to establish eligibility for the claimed immigration benefit. The legal right to verify this information is conferred by 8 U.S.C. §§ 1103, 1155, 1184, and 8 C.F.R. parts 103, 204, 205, and 214.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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.* at 591-92. Based on the deficiencies and inconsistencies discussed above and the lack of clear evidence of the petitioner's business premises, the petitioner has not established that it has been and will be doing business in a manner that will support the beneficiary's claimed position.

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

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

##### 1. Facts

On the Form I-129, the petitioner indicated that it engages in consulting on metallurgical engineering with four current employees and a gross annual income of \$200,000.00. In support of the petition, the petitioner submitted a description for the position of Business Development Senior Manager/Vice President. The petitioner did not specifically indicate that the beneficiary would be employed in this position; on the Form I-129, the petitioner listed the beneficiary's job title as Chairman of the Board of Directors/Treasurer. However, on the cover letter listing the contents of the evidence submitted with the petition, the document is listed as "description of the proposed job duties and qualification." The document lists the following duties for the Business Development Senior Manager/Vice President position:

- Build market position by locating, developing, and defining, negotiating and closing business relationships in Russian market.
- Screen potential business deals by analyzing market strategies, deal requirements, financials and resolving external priorities.
- Develop negotiating strategies and positioning by studying integration of new venture with company strategies and operations, examining risks and potentials.
- Will attend team meetings and share best practices with colleagues.
- Candidate will learn and maintain a thorough working knowledge of using software products, including Internet, MS Office Suite (MS Word, Excel, Access, and PowerPoint) and Adobe Acrobat. Also will be responsible for maintaining and tracking account data.
- Arrange meetings with potential customers to prospect for new business.

- Negotiating the terms of an agreement and closing sales.
- Gather Russian market and Russian, European and Asian customer's information.

The document goes on to list the requirements for this position, which include a bachelor's degree and a minimum of five years of experience in "industry Program Management and/or Project Engineering in metallurgical business development in the Russian market," and fluency in the Russian language.

The petitioner did not submit any additional information about the beneficiary's proposed position or job duties in the United States, its current or projected staff, or the organizational structure of its U.S. company.

In the RFE, the director advised the petitioner that the submitted evidence was insufficient to establish that the beneficiary will be employed in a qualifying managerial or executive capacity, or as a function manager. The director instructed the petitioner to submit evidence of this requirement.

In response to the RFE, the petitioner did not submit any evidence related to this particular element of eligibility.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a managerial or executive capacity in the United States. In denying the petition, the director simply stated that the petitioner failed to respond to the request for additional detail about the beneficiary's proposed duties in the proffered position.

On appeal, the petitioner asserts that the beneficiary will be employed in an executive capacity "to engage in tasks that are aimed at strategy development and company growth." The petitioner contends that the petition and supporting documentation clearly outline the prospective position to be held by the beneficiary along with his planned duties and obligations. The petitioner concedes that it did not provide any additional detail in response to the RFE beyond the documents originally submitted with the I-129, but now, on appeal, is submitting an additional letter from its U.S. company's president, as well as an organizational chart outlining the work to be accomplished by the beneficiary in his executive position.

The petitioner submits a letter, dated October 22, 2014, describing its current staff as follows:

In the first year of company operations, [the petitioner] did not plan to hire employee staff, based on information about economic crisis. . . . In this regard, for its initial operating period, [the petitioner] has used company's management relatives (President & CEO's son . . . daughter . . . and wife . . . on a voluntary basis. The volunteers, mentioned above, have assisted the company in the business operations within 4 months. They haven't spent more than 2 or 3 hours a week doing their duties.

The letter goes on to describe the beneficiary's major tasks and functions as the Director of the Company Business Development in European and Asian countries as follows:

- Represent the interests of [the petitioner] with the purposes of developing business on the international metal markets of European and Asian countries.

- Identify a category of the employees and determine their professional and technical preparation [*sic*] for researching and analysis of the situation in the European and Asian trade metal markets.
- Identify goals & objectives and to guide managers in order to achieve the best result for the effective of development of the business
- Manage employees who research of the situation [*sic*] and analysis of information on international metal trade markets, energy resources, and technological innovation.
- Supervise staff of studying, analyzing and searching of a new and [*sic*] expand existing trade markets for rolling steel and pipes products.
- Searching and establishing business relationships with new potential investors for developing business.
- Prepare of business proposals to expand the business on European and Asian markets.

[The petitioner] expects that [the beneficiary] will directly participate in the company's everyday business operations, that his management skills, business experience in the European and Asian markets, as well as knowledge of the mentality of the customers in those regions, will help the company to increase its customer database and expand a profitable business in new directions. It is assumed that [the beneficiary] would perform their functions and duties during the full-time and 40 hours per week.

The petitioner submits its organizational chart, indicating that the beneficiary's proposed position is Director of Business Development in European and Asian countries. The chart illustrates the Board of Directors at the top tier of the hierarchy, directly supervising a President, who supervises the Director of Business Development in North America and Canada, the Director of Business Development in European and Asian countries, and a "group of freelance and independent consultants." Each Director of Business Development supervises its own "group of research and analysis" for its respective area and its own "group of solutions and writing proposals."

## 2. Analysis

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

When examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) looks first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(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 an understanding of the beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary 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").

The petitioner initially stated that the beneficiary would be employed as the Chairman of the Board of Directors/Treasurer, but later characterized the beneficiary's role as Director of Business Development in European and Asian countries. The petitioner provided a very vague description of his proposed position that does not establish that he will be primarily employed in a managerial capacity, noting that he will build market position by locating, developing, defining, negotiating and closing business relationships in Russian market; screen potential business deals by analyzing market strategies, deal requirements, financials and resolving external priorities; develop negotiating strategies; attend team meetings and share best practices with colleagues; learn and maintain a thorough working knowledge of software products; be responsible for maintaining and tracking account data; arrange meetings with potential customers to prospect for new business; negotiate the terms of agreements and close sales; and gather Russian market and Russian, European, and Asian customers' information. The petitioner did not provide any additional information about the beneficiary's duties or how much time he will devote to each duty. Based on the current record, we are unable to determine whether the claimed managerial or executive duties would constitute the majority of the beneficiary's duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be managerial or executive in nature, and what proportion will be non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner did not include any additional details or specific tasks related to the beneficiary's briefly listed duties, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Further, the petitioner did not submit an organizational chart or any information relating to his current or projected subordinate employees who would carry out the tasks associated with the day-to-day activities of the company, such as producing a product or providing a service. This is particularly important because the petitioner's description of the beneficiary's proposed duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of his daily routine. 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.* at 1108.

In the RFE, the director specifically advised the petitioner that it must provide a description of the beneficiary's proposed duties in order to clarify whether his position will be managerial or executive in nature.

The petitioner failed to do so, and upon denial of the petition, provides a new list of proposed job duties for the beneficiary's position in the United States. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Moreover, we note that the petitioner's submission includes a new position title and new job duties for the beneficiary's proposed position that were not previously identified in the evidence of record. A petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary, when the petition was filed, merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Under the circumstances, we need not and do not consider the sufficiency of the evidence submitted on appeal.<sup>1</sup>

Regardless, even if we were to accept the petitioner's new list of job duties for the beneficiary's proposed position on appeal, it is not sufficient to demonstrate that he will be employed in a managerial or executive capacity in the United States. The petitioner still does not include any additional details or specific tasks related to his briefly listed duties, nor does the petitioner indicate how such duties qualify as managerial or executive in nature. The organizational chart submitted also does not indicate how many subordinate employees the beneficiary will have to relieve him from performing non-qualifying operational and administrative tasks.

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

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<sup>1</sup> If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner on appeal did not clarify or provide more specificity to the original duties of the position, but rather changed the title of the proffered position and added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

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. *See* 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* section 101(a)(44)(A)(ii) of the Act. Here, the petitioner did not provide any information about its current or projected staff and any subordinate staff to the beneficiary's current position. On appeal, the petitioner states that it does not currently have any employees, other than three volunteers who work two to three hours per week. The petitioner initially failed to submit its organizational chart and now submits it on appeal. However, the petitioner still has not identified who will perform the non-qualifying operational and administrative duties required in the United States. As such, the petitioner has not established that the beneficiary will supervise subordinate employees that are supervisory, professional, or managerial. *See id.*

The petitioner has not established, in the alternative, that the beneficiary has been and will be 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 qualifies as a function manager. The petitioner did not articulate the beneficiary's proposed duties at the U.S. company as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate that he will manage an essential function of the U.S. company.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed herein, the petitioner's vague description of the beneficiary's proposed duties at its U.S. company fails to establish that such duties are primarily managerial in nature.

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. *See* 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, although the petitioner states that the beneficiary will be employed in an executive capacity, it did not demonstrate that the beneficiary's proposed duties in the U.S. will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The vague description of the beneficiary's proposed position with the petitioner is insufficient to demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity, or as a function manager in the United States.

### C. Employment Abroad in a Managerial or Executive Capacity

The third issue addressed by the director is whether the petitioner has established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(1)(3)(iii).

#### 1. Facts

In support of the petition, the petitioner submitted a letter from the foreign entity, dated September 4, 2013, certifying that the beneficiary was hired on November 16, 2010 and is currently serving as a Director for Development. The petitioner submitted a document titled Letter Describing Functions and Responsibilities of the Director for Development, describing the beneficiary's functions in that position as follows:

- Study all of the company's production and business processes and evaluate company's overall potential
- Identify negative and positive trends in company's processes and plan activities to neutralize the former and promote the latter ones
- Set a goal for company's overall development
- Define the general concept of the company's development policy
- Create an efficient development strategy and main sections of the business development plan
- Make and implement strategic decisions and business development or business reorganization plans

The document goes on to list 15 tasks associated with the beneficiary's listed functions that will facilitate his performance of said functions.

The petitioner also submitted a letter stating that the beneficiary is responsible for the operational management and implementation of strategies aimed at turning the Russian company into a leader in the metallurgy, energy, and strategy-related industries in Russia and abroad. The letter also states that the beneficiary had the primary responsibility for the company's product strategy, met regularly with the company's senior managers and program managers, and was an active business strategy developer, particularly on the company's equipment and final products.

The petitioner submitted the beneficiary's resume listing his employment at the foreign entity as the Director for Business Development from November 2010 until the present. The resume describes the beneficiary's area of responsibility as follows:

Develop new lines of business; work with company's key customers including international ones; transition business with the most perspective customers to the vendor basis; create production strategy and plan; coordinate company's advertising policy; ensure compliance with licensing rules; promote the use of new payment methods and performance on contracts in customer relations; organize and prepare reference and analytical materials to assist in production planning and sales of new products; manage the process of expanding customer network overseas; manage company's process of studying and analyzing global markets of metals and finances.

The petitioner did not submit any additional information about the beneficiary's position or job duties abroad, its current staff, or the organizational structure of the foreign entity.

In the RFE, the director advised the petitioner that the information provided pertaining to the beneficiary's position abroad was insufficient. The director instructed the petitioner to submit evidence that the beneficiary's position abroad was in a managerial or executive capacity.

In response to the RFE, the petitioner did not submit any evidence related to this particular element of eligibility. The petitioner submitted translations of the beneficiary's diploma in Economics and Management in a Metallurgic Enterprise, received in December 2009.

The director denied the petition concluding, in part, that the petitioner did not establish that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. In denying the petition, the director simply stated that the documents in the record show the beneficiary's position abroad, but do not demonstrate any other details other than position titles to reflect the beneficiary's executive role with the parent company. The director does not reference the document titled Letter Describing Functions and Responsibilities of the Director for Development, the petitioner's letter, or the beneficiary's resume.

On appeal, the petitioner asserts that the beneficiary has been employed in an executive capacity at the foreign entity. The petitioner reiterates the beneficiary's responsibilities listed in its original letter and states that he directs the management and product development of the foreign entity, created a production strategy and plan

while coordinating the company's advertising policy, and accomplished all of this while working with a large amount of discretion, receiving little direction from those in supervisory roles.

## 2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

Again, when examining the executive or managerial capacity of the beneficiary, USCIS 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 company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the company's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The petitioner first characterized the beneficiary's role abroad as the Director of Business Development and described the beneficiary's duties in vague and very broad terms, noting that he studies all of the company's production and business processes to evaluate company's overall potential; identifies trends in the company's processes and plans activities to neutralize negative trends and promote positive trends; sets a goal for the company's overall development; defines the general concept of the company's development policy; creates an efficient development strategy and main sections of the business development plan; and makes and implements strategic decisions and business development or business reorganization plans. These general statements fail to offer any indication as to the beneficiary's actual duties at the foreign entity, and fall considerably short of demonstrating that that the beneficiary primarily manages the organization and supervises and controls the work of other supervisory, professional, or managerial employees. The petitioner further listed specific tasks that the beneficiary performed in order to complete the above listed functions, such as conduct comprehensive review, research, and analysis of the company's production and business processes; prepare specific programs for the company's development and reorganization; calculate efficiency of implementing the company's development projects; organize presentation of projects and implementation schedule to the company executives; handle the preparation of related paperwork and facilitate obtaining the appropriate permits and licenses for approved projects; assign employees to be in charge of project implementation, create general recommendations and instructions for assigned employees, and provide them with direct guidance and coordinate their work; and coordinate the project implementation process at all stages and make sure that all the decisions made and all the actions taken match the main concept of the company's development. However, the petitioner did not provide any additional information about the beneficiary's duties or how much time he will devote to each duty. Based on the current record, we are unable to determine whether the claimed managerial and executive duties would constitute the majority of the beneficiary's duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be managerial or executive in nature, and what proportion will be non-managerial or non-executive. See *Republic of Transkei v. INS*, 923 F.2d at 177. 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 has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In addition, the petitioner did not provide any information about the foreign entity's current staff and any subordinate staff to the beneficiary's current position, nor did it identify who performs the non-qualifying operational and administrative duties of the foreign company. The petitioner also did not submit an organizational chart for the foreign entity. As such, the petitioner has not established that the beneficiary supervises subordinate employees that are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act.

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. See 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, although the petitioner states that the beneficiary is an executive at the foreign entity, it has not demonstrated that the beneficiary's duties abroad are primarily focused on the broad goals and policies of the organization. The petitioner repeatedly states that the beneficiary is in an executive position, but does not define his duties and responsibilities in embodying an executive role. The petitioner never described the beneficiary's duties sufficiently to demonstrate that his routine daily activities are executive in nature. Although the director specifically advised the petitioner that the description of the beneficiary's duties abroad was insufficient and provided examples of evidence to be submitted in the RFE, the petitioner declined to submit a description of the beneficiary's duties at the foreign entity that would demonstrate that he primarily performs executive duties and that he is relieved from involvement in the non-executive, day-to-day operations of the company. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

## III. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The 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 (l)(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.
- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (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
- (I) 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.

#### A. Facts

The petitioner stated on the Form I-129 that it is a branch of the foreign entity. At the time of filing, the petitioner submitted its Articles of Organization, dated October 15, 2012, as a limited liability company. The petitioner submitted its Consent of Members, dated October 5, 2007 and signed on October 16, 2012 by each listed member, identifying its company ownership as [REDACTED] at 33.33%, [REDACTED] at 33.33%, and the beneficiary at 33.33%. The Consent of Members also identifies [REDACTED] as President/CEO, [REDACTED] as Director/Secretary, and the beneficiary as Chairman of the Board of Directors/Treasurer.

The petitioner did not submit any information regarding the foreign company's ownership and actual relation to the petitioning U.S. company.

In the RFE, the director advised the petitioner that it failed to submit evidence to determine ownership and control for each entity. The director instructed the petitioner to submit evidence to establish that it has a qualifying relationship with the foreign entity.

In response to the RFE, the petitioner submitted a translation of the foreign entity's Articles of Association, dated November 16, 2010, and an extracted translation of Minutes No. 1 of the Session of the General Meeting of Founders of the foreign entity, also dated November 16, 2010. The Minutes No. 1 states that the foreign entity's founders are [REDACTED] and the beneficiary, both with equal shares of ownership. The petitioner did not submit any additional information regarding its U.S. company's or the foreign entity's ownership and control.

#### B. Analysis

Upon review, the evidence in the record is insufficient to establish that the petitioning U.S. company has a qualifying relationship with the foreign entity.

At the time of filing, the petitioner claimed that it is a branch office of the foreign entity. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). USCIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm'r 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm'r 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm'r 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm'r 1982) (stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A

branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). If the claimed branch is incorporated in the United States, USCIS must examine the ownership and control of that entity to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

In the instant matter, the petitioning U.S. company has been organized as a limited liability company in the State of Maryland. As such, it is a separate legal entity and cannot be considered a branch office of the foreign entity. In evaluating the existence of a qualifying relationship between the petitioning U.S. company and the foreign entity, 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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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.

Here, it appears that the U.S. company is equally owned by three individuals and the foreign entity is equally owned by two individuals, with only the beneficiary as a common owner in both entities. As the ownership is equally divided three ways at the U.S. company and two ways at the foreign entity, no one individual has control over either entity. As such, it cannot be determined that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. For this additional reason, the petition cannot be approved.

#### IV. CERTIFICATION REGARDING THE RELEASE OF CONTROLLED TECHNOLOGY OR TECHNICAL DATA TO FOREIGN PERSONS IN THE UNITED STATES

Additionally, beyond the director's decision, we observe that the petitioner did not indicate whether an export license is required, as instructed on page 5, Part 6 of the Form I-129. The instructions state, "If you do not completely fill out the form . . . you will not establish a basis for eligibility and we may deny your petition." *See also* 8 C.F.R. § 103.2(a)(1) (incorporating the instructions into the regulations). By completing Part 6 of the form, the petitioner certifies that it has reviewed the Export Administration Regulations and the

International Traffic in Arms Regulations and determined whether it will require a U.S. Government export license to release controlled technology or technical data to the beneficiary.<sup>2</sup> By signing the Form I-129, the employer certifies under penalty of perjury that the information provided on the form is true and correct.

In the instant case, the petitioner failed to complete Part 6 of the Form I-129 and thus it did not comply with the Form I-129 instructions. Accordingly, the petition was not properly filed and for this additional reason the petition may not be approved.

#### V. CONCLUSION

We maintain discretionary authority to review each appeal on a *de novo* basis. Our *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9<sup>th</sup> Cir. 2003).

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 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, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> The Export Administration Regulations (15 C.F.R. § 770-774) and the International Traffic in Arms Regulations (22 C.F.R. § 120-130) require U.S. persons, including companies, to seek and receive authorization from the U.S. Government before releasing controlled technology or technical data to foreign persons in the United States. U.S. companies must seek and receive a license from the U.S. Government before releasing controlled technology or technical data to nonimmigrant workers employed as H-1B, H-1B1, L-1, or O-1A beneficiaries.