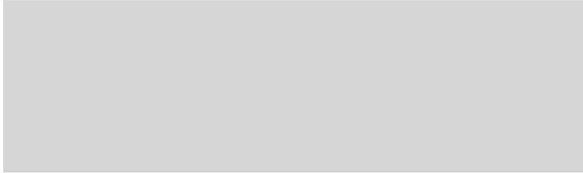


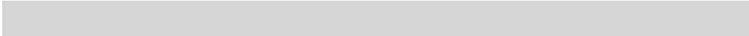


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 23 2015** OFFICE: VERMONT SERVICE CENTER FILE: 

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:


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with 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. We will dismiss the appeal.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, seeking to extend the beneficiary's status 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 Florida corporation established in [REDACTED], states that it operates a "handicrafts instruction center." The petitioner claims to be an affiliate of [REDACTED] located in [REDACTED] French West Indies. The petitioner seeks to continue to employ the beneficiary as the "general and operations manager" for a period of one year.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary has been or would be employed in a primarily managerial or executive capacity. The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the beneficiary has been and would be performing in a managerial capacity. The petitioner submits a brief 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.

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.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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

II. THE ISSUES ON APPEAL

A. Employment in a Qualifying Managerial Position in the United States

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity in the United States.

1. Facts

In its initial letter of support, the petitioner described the beneficiary's proposed position and duties in the United States as follows:

Therefore, to occupy the position of General and Operations Manager, [the beneficiary] will oversee activities directly related to making products or providing services; direct and coordinate activities of businesses or departments concerned with the production, pricing, sales, or distribution of products; review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas

needing cost reduction and program improvement; manage staff, preparing work schedules and assigning specific duties; direct and coordinate organization's financial and budget activities to fund operations, maximize investments, and increase efficiency; establish and implement departmental policies, goals, objectives, and procedures, conferring with owner, and staff members as necessary; determine staging requirements, and interview, hire and train new employees, or oversee those personnel processes; plan and direct activities such as sales promotions; coordinating with other department heads as required; determine goods and services to be sold, and set prices and credit terms, based on forecasts of customer demand; and locate, select, and procure merchandise for resale, representing management in purchase negotiations.

Also other duties will include planning, directing, or coordinating the operations of the corporation; formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one functional area of management or administration, such as personnel, purchasing, or administrative services.

The petitioner did not submit any additional information pertaining to the beneficiary's duties or responsibilities in the United States, nor did the petitioner submit information about the beneficiary's subordinate employees, other than stating that it is planning to hire staff in the future.

The petitioner submitted its organizational chart depicting the beneficiary as "General Operations Manager" at the highest tier, supervising a "Studio Director Trainee," [REDACTED] an unnamed "Business Development & Project Manager," who supervises an unnamed "secretary/receptionist," and an unnamed "Landscape Supervisor."

The director issued a request for additional evidence ("RFE") on April 14, 2014, advising the petitioner that the description of duties provided for the beneficiary's position at the U.S. company is not sufficient to show that she will be primarily employed in a managerial or executive capacity. The director instructed the petitioner to submit evidence demonstrating that the proposed position in the United States will be managerial or executive.

In response to the RFE, the petitioner expanded on the beneficiary's duties and submitted the following breakdown of duties for her position in the United States:

In [the beneficiary's] managerial role at [the petitioner], Bonifay:

- Organizing and synchronizing the combination of human, physical and financial resources
- Manage the essential departments and components of the [petitioner]
- Has the authority to hire and fire employees
- Establishes the existing and ongoing goals and policies of the new organization
- Exercises a wide latitude in discretionary decision making, while receiving only general direction and supervision of the owner
- 35% is designated to the set up & layout of the facility. [The beneficiary] [is] in the process of training the first studio art assistant, (hereafter known as Mrs. [REDACTED]), to

set up, the art gallery, boutique, ordering of materials and training in ceramic painting, clay molding, glass fusion, mosaic, acrylic canvas techniques, metal fabrication, metal art & up-cycled art, (all aspects of the multi media hands on interactive, educational art studio)

- 15% Administrative – [The beneficiary] is directing basic start up administration with Mrs. [REDACTED] As the business grows a receptionist hire will fulfill the administrative duties, leaving the studio assistant to focus on projects.
- 15% Financial and Accounting – [The beneficiary] oversees the management and basic financing which is submitted to a legal accountant, [REDACTED] CPA, PA.
- 20% Sales and Marketing – [The beneficiary] coordinates & directs all aspects of sales & marketing, to boost promotion of the new business.
- 20% Project Management – [The beneficiary] has brought strategic design guidance from The foreign entity. The studio relies on her leadership and expertise as an Art Director.

We note that the percentages above add up to 105% of the beneficiary's time.

The petitioner went on to list its staff, including a single sentence for each position description. The letter briefly described the general and operations manager position, the beneficiary, as “organizing and synchronizing the combination of human, physical and financial resources;” and the “studio assistant” position, [REDACTED] as “responsible for the daily activities, of the various media studios, by carrying out the various lessons, in the different mediums, taking stock of materials used and replenishing all materials required to carry out the lessons & sold.” The letter did not provide a description for the “owner” position of [REDACTED]. The petitioner further stated that it plans to hire the positions of “marketing assistant,” receptionist, “machinist,” and “sheet metal welder/fabricator” but did not address the timeline in which it plans to hire such positions. The petitioner submitted the same organizational chart for its U.S. company as previously submitted.

The petitioner also submitted an undated letter, signed by the beneficiary, stating that it does not have a wage report because all of its employees currently earn less than \$600 per year and therefore, it does not require a contract of any sort. The letter further states that [REDACTED] had earned \$50 for five hours of work during April 2014.

The director denied the petition on June 27, 2014, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the beneficiary's listed job duties are generalized and non-specific and do not sufficiently demonstrate that she will be primarily employed in a managerial capacity. The director also found that the beneficiary's single current subordinate's job description is not that of a position that is supervisory, professional, or managerial in nature. The director further found that it is evident the beneficiary will be primarily involved in non-L1A qualifying day to day activities of the organization as she does not have sufficient staff to relieve her from performing such non-qualifying activities.

On appeal, the petitioner states that the director has erred in her decision and explains that the beneficiary only had nine months to get the U.S. business operational, six of which were spent on construction of the metal studio. The petitioner resubmits ten letters of support from members of the community supporting the petitioner and beneficiary in acquiring the approval of the instant visa petition, along with state documents identifying the petitioner's physical location within a rural area of economic concern. The petitioner also cites

cases where the courts have held that a beneficiary need not necessarily manage subordinate staff if he is managing an essential function of the petitioning organization. The petitioner further states that USCIS is “overburdening” the petitioner by requesting evidence beyond what is required to show that the beneficiary primarily manages a function of the organization, without managing a single employee.

2. Analysis

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

a. Preliminary Matters

As a preliminary matter, we address the petitioner's submission of “letters of support” from members of its community, endorsing the beneficiary's transfer to the United States, as well as the documents identifying the petitioner's physical location within a rural area of economic concern. While it is noteworthy that the petitioner enjoys the community's backing in its endeavors, the letters of support are not relevant or material to the eligibility criteria that govern the instant petition. Nor is the fact that the petitioner is physically located within a rural area of economic concern. While both are commendable, they are not determining factors of whether the beneficiary's actual position and duties therein qualify as managerial (as a personnel manager or a function manager) or executive, as defined in sections 101(a)(44)(A) and (B) of the Act.

b. New Office

Second, the petitioner explains that although the beneficiary was granted an initial L-1A visa to open a new office in May 2012, she did not enter the U.S. until August 2012, thus only having nine months to commence operations. The petitioner also stated that the first six months were spent on construction of the facility and therefore the beneficiary had less than three months to get the business going.

Here, the petitioner has requested the extension of a petition that involved the opening of a new office. See 8 C.F.R. § 214.2(l)(3)(v). To warrant approval of an initial new office petition, the petitioner was required by regulation to show that it had already secured “sufficient physical premises” to house the operation and that the enterprise would support a managerial or executive position “within one year of the approval of the petition.” *Id.* at (A) and (C). The petitioner's admission that it did not have sufficient physical premises at the time of the initial approval casts doubt on whether the initial new office petition was properly approved. The fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequently filed petition. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988).

Although not specifically requested by the petitioner, we note that the petitioner may not request a second year as a new office. The one-year “new office” provision is an accommodation for newly established enterprises, provided for by USCIS regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner “for the previous year.” 8 C.F.R. § 214.2(l)(14)(ii)(B). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the “new office” regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

c. Managerial Job Duties

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

With respect to the beneficiary's job duties, the petitioner first characterized the beneficiary's role as general and operations manager and briefly described her duties in very broad terms: oversee activities directly related to making products or providing services; direct and coordinate activities of businesses or departments concerned with the production, pricing, sales, or distribution of products; review financial statements; manage staff; prepare work schedules and assign specific duties; direct and coordinate financial and budget activities; establish and implement departmental policies, goals, objectives, and procedures; interview, hire and train new employees; plan and direct activities such as sales promotions; coordinate with other department heads; determine goods and services to be sold; set prices and credit terms; locate, select, and procure merchandise for resale; represent management in purchase negotiations; and other duties that are too diverse and general in nature to be classified in any one functional area of management or administration.

This initial description is insufficient to show that the beneficiary will primarily perform qualifying duties. The petitioner failed to document what proportion of the beneficiary's duties would consist of managerial duties and what proportion would consist of non-managerial duties. The petitioner listed the beneficiary's duties but failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because the beneficiary's proposed daily tasks, as noted above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in either a managerial or executive capacity. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the RFE, the petitioner provided a brief and equally vague list of job duties for the beneficiary's proposed position, including an allocation of percentages of time the beneficiary would spend on specific duties. The petitioner indicated that the beneficiary will devote 35% of her time to the set-up and layout of the facility, including training the studio assistant, 15% of her time to administrative functions, 15% of her time to financial and accounting functions, 20% of her time to sales and marketing, and 20% of her time to project management, adding up to 105% of the beneficiary's time. While the mistake is not critical, it does

raise doubts as to the validity of the provided information since at least one item is off by five percent. 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).

More importantly, the petitioner listed several general duties outside of the allocated percentages and failed to quantify the amount of time the beneficiary will devote to those duties. On review, the additional listed duties merely paraphrase the statute, in part, for both managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103.

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify her as a manager or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*.

d. Subordinate Personnel

Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner indicated that the beneficiary currently manages one employee in the United States, Sharon Bush, a studio assistant or “studio director trainee,” according to its organizational chart. The

petitioner provided a single sentence describing the subordinate's role at its U.S. company, indicating that she will be an instructor at the studio and stock materials used and required to carry out lessons and sales. In the instant matter, the job duties provided by the petitioner for the beneficiary's only subordinate do not demonstrate that the position itself is supervisory or managerial, or requires a bachelor's degree, such that it could be classified as professional.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. In the instant matter, the petitioner failed to submit credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Furthermore, the petitioner has failed to submit evidence that the beneficiary's subordinate employee will relieve her from performing non-qualifying operational duties.

While the petitioner represents that it will hire additional staff in the future, this 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 Kaigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

e. Function Manager

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, we expect the position description to describe the duties to be performed in managing the essential function, i.e. identifying the function with specificity, articulating the essential nature of the function, and establishing 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 expressly state that the beneficiary would perform as a function manager. On appeal, the petitioner contends that the courts have held that a beneficiary need not supervise any employees, but may manage an essential function of the petitioner in order to qualify for L1A status. However, although the petitioner makes these statements on appeal, it does not clearly indicate that it intends to employ the beneficiary as a function manager, nor does it articulate the actual essential function managed by the beneficiary. Aside from this brief reference to the management of an essential function, the petitioner did not articulate the beneficiary's duties as a function manager or that she would manage an essential function of its U.S. company, rather than perform the duties related to the function.

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 will “primarily” perform 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 the beneficiary’s duties are “primarily” managerial. As discussed herein, the petitioner’s description of the beneficiary’s proposed day-to-day duties fails to establish that such duties would be primarily managerial in nature.

f. Executive Capacity

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, the petitioner has not demonstrated that the beneficiary’s duties will primarily focus on the broad goals and policies of the organization. Although the petitioner briefly lists duties identical to the statute for executive capacity for the beneficiary, it has not provided sufficient information about her duties to establish that she is an executive at the U.S. company. The list of job duties provided by the petitioner is not indicative of an executive position. In addition, as discussed, the petitioner’s lack of additional employees demonstrates that the beneficiary is not relieved from involvement in the day-to-day operations of the company.

g. “Reasonable Needs”

We note that a company’s size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS “may properly consider an organization’s small size as one factor in assessing whether its operations are substantial enough to support a manager.” *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

However, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be “primarily” employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his or her duties to managerial or executive tasks as opposed to 90

percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Here the petitioner has not established that the beneficiary's subordinate employees or any others relieve her from performing tasks related to providing the business' products and services. Furthermore, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. 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.

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

B. Employment Abroad in a Qualifying Managerial Capacity

The second issue to be addressed is whether the petitioner established that the beneficiary was employed full time by a qualifying foreign entity for one continuous year in a qualifying managerial capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

1. Facts

In its letter of support, the petitioner stated that the beneficiary commenced employment with the qualifying foreign entity on August 23, 2000, as its "General Manager Director." The petitioner further stated that the beneficiary was employed by a second, unaffiliated, foreign entity, [REDACTED] since [REDACTED] and as its General Manager Director from April 22, 2004 to the present. The petitioner described the beneficiary's foreign employment as follows:

In [the foreign entity], [the beneficiary] has been serving as General Manager Director . . . since August 23, 2000 and for [REDACTED] from April 22, 2004 through the present. As General Manager Director, [the beneficiary] has been fulfilling her duties by successfully designing, developing and implementing the strategic plan for his corporation in the most cost effective and time efficient manner. [The beneficiary] has been responsible for both the day-to-day running of the company and developing business plans for the long term future of the corporation. Also [the beneficiary] has been successfully leading the corporation, developing the corporate culture, managing the staff, the customers, the budget, the company's assets and all other corporate resources to make the best use of them and increase the corporation's profitability. Also [the beneficiary] has been establishing business model strategic marketing and financial plans, securing legal and contractual obligations and implementation of licensing and franchising agreements, supporting and liaising with general management, and effecting due diligence on joint ventures and expansion plans.

Also [the beneficiary] presently owns 36% of shares of stock of [REDACTED]

The petitioner submitted a bank statement from [REDACTED], listing transactions from July 30, 2012 to August 26, 2013. The bank statement does not indicate the name of the holder of the account, but simply states that it is a savings account and the account number has been redacted by hand. There are several handmade markings by specific transactions meant to indicate a salary payment to the beneficiary from the foreign entity; however, the petitioner failed to submit pay stubs or other evidence of such salary transactions.

The petitioner submitted a second letter from the foreign entity, dated April 1, 2013, listing its current employees. The petitioner further submitted an organizational chart for the foreign entity, depicting the president/owner at the top tier, supervising the general and operations manager, who in turn supervises the project manager and the fabricator.

In the RFE, the director advised the petitioner that the financial statement submitted as evidence of the beneficiary's wages for one year was insufficient as it did not identify the foreign employer or employee and the description of the beneficiary's duties abroad was generalized and non-specific. The director instructed the petitioner to submit evidence demonstrating that the beneficiary was employed for one year at the foreign entity and that her position at the foreign entity was managerial or executive.

In response to the RFE, the petitioner submitted an undated letter from the foreign entity describing the beneficiary's duties as follows:

- Maintain staff members by recruiting, orienting and training employees. Insuring a safe, secure, legal, comfortable working environment, with promotional and growth opportunity
- Employee results by expressing job expectations, planing [*sic*], monitoring, and appraising results 25%
- Coaching, counseling, well being and disciplining of employees 5%
- Cor-ordinate [*sic*], enforce and develop productivity standards, systems, policies, safety and procedures 25%
- Establishing goals by accumulating financial services, operation and business information Evaluating trends, choosing a plan of action, objectives and results. Financial goals by scheduling and planning expenditures, preparing an annual budget adjusting for financial trends 30%
- Customer service and quality control standard enforcement. Recommends and implements overall system improvements 15%
- Oversees all aspects of the day to day running of the business while staying updated with the trade e.g. seminars, publications, workshops, personal network etc.
- Operates the entire company with complete oversight and authority, with minimum input from the owner

The letter went on to list the staff of the foreign entity, including a single sentence for each position description. The letter stated that the beneficiary was the general and operations manager, subsequently replaced by another staff member, and briefly described the general and operations manager position as

“organizing and synchronizing the combination of human, physical and financial resources.” The petitioner submitted the same organizational chart for the foreign entity as previously submitted.

The petitioner submitted a copy of the same bank statement from [REDACTED] with the handwritten notes indicating the beneficiary's salary and an additional statement listing transactions from July 23, 2013 to March 31, 2014 also with handwritten notes indicating the beneficiary's salary during that time. The petitioner also submitted a letter from [REDACTED] dated April 22, 2014, stating that “the salary or compensation to the manager . . . in an [REDACTED] (Limited Liability Corporate Entity), does not require a pay slip [and] as such we did not prepare any pay slips during your term as manager at [the foreign entity], [REDACTED].”

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity at the foreign entity. In denying the petition, the director found that the beneficiary's listed job duties are generalized and non-specific and do not sufficiently demonstrate that she has been primarily employed in a managerial capacity at the foreign entity. The director also found that the beneficiary's subordinates' job descriptions are not those of positions that are supervisory, professional, or managerial in nature. The director further found that it is evident the beneficiary has been primarily involved in the non-managerial operations and tasks of the organization with occasional first-line supervisory duties over nonprofessional employees.

On appeal, the petitioner does not specifically address the beneficiary's foreign employment in a qualifying managerial or executive capacity. The petitioner focuses on the letters of support from members of the community, the state documents identifying the petitioner's physical location within a rural area of economic concern, and the fact that the beneficiary may manage an essential function of the organization, thus removing the focus on subordinate employees. The petitioner resubmits all of the initial evidence presented with the petition.

2. Analysis

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

By statute, eligibility for this classification requires that the duties of a position be “primarily” of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary may exercise discretion over the day-to-day operations of specific projects undertaken by the foreign entity, the petitioner has failed to show that the beneficiary's actual duties are primarily managerial in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

As described above, the petitioner first characterized the beneficiary's role at the foreign entity as general and operations manager and briefly described her duties in very broad terms. In a separate letter, the foreign entity described the beneficiary's duties at the foreign entity as follows: taking care of the general running of business, marketing, personnel management, work scheduling, making estimations, following the progress of

jobs, invoicing, customer relations, parts & stock material ordering, hands-on metals fabrication and welding, and basic accounting and pay slips.

The submitted descriptions are not only vague but also vastly different. The petitioner's description of the beneficiary's duties abroad alludes to a managerial position, while the foreign entity's description of her duties abroad indicate that she performs many non-qualifying operational duties. These initial descriptions are insufficient to show that the beneficiary primarily performs qualifying duties at the foreign entity. The petitioner failed to document what proportion of the beneficiary's duties at the foreign entity consists of managerial duties and what proportion consists of non-managerial duties. The petitioner listed the beneficiary's duties abroad but failed to quantify the time the beneficiary spends on them. This failure of documentation is important because the beneficiary's listed tasks at the foreign entity, as noted above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary has been primarily performing duties in either a managerial or executive capacity. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the RFE, the petitioner provided a brief and equally vague list of job duties for the beneficiary's position at the foreign entity, including an allocation of percentages of time the beneficiary spends on specific duties. The foreign entity indicated that the beneficiary devotes 30% of her time to employees, 25% of her time to productivity, 30% of her time to establishing goals, and 15% of her time to customer service and quality control. Within the percentages provided, the foreign entity does not specifically indicate the duties or tasks the beneficiary devotes her time to within the listed duties with accompanying percentages. The foreign entity also listed several duties outside of the allocated percentages and failed to quantify the amount of time the beneficiary devotes to those duties or where they fall within the allocated percentages of time. Neither the petitioner nor the foreign entity, include any additional details or specific tasks related to each duty, nor did they indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103.

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties at the foreign entity to demonstrate that these duties qualify as managerial or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner further failed to submit credible evidence of an organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Finally, the petitioner has failed to submit evidence that the beneficiary's subordinate employees relieved her from performing non-qualifying operational duties of the foreign entity.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary has been employed by a qualifying foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. EMPLOYMENT ABROAD FOR ONE CONTINUOUS YEAR

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed by the qualifying foreign entity for one continuous year within the three years preceding the filing of the petition. See 8 C.F.R. § 214.2(1)(3)(iii). Here, the petitioner filed the Form I-129 on April 7, 2014 and indicated that the beneficiary was employed as the general and operations manager of two independent companies abroad, one the qualifying foreign entity, and the other a company in which the beneficiary owns 36% of its shares. The petitioner was unable to produce pay stubs or other sufficient evidence to demonstrate that the beneficiary was in fact an employee of the foreign entity and as such, it has not demonstrated that the beneficiary was employed by the qualifying foreign entity for one continuous year prior to filing. For this additional reason, the petition cannot be approved.

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 (9th Cir. 2003).

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In 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 petitioner has not met that burden.

ORDER: The appeal is dismissed.