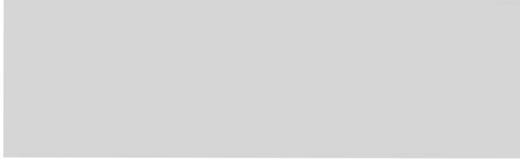


(b)(6)

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



U.S. Citizenship
and Immigration
Services



DATE: **MAR 25 2015** OFFICE: CALIFORNIA 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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Washington limited liability company established in [REDACTED] states that it operates as a "staffing agency." The petitioner claims to be an affiliate of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as the CEO of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed in a qualifying managerial or executive capacity at the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner contends that the "record establishes that the Service's decision is based on erroneous conclusions of fact and misrepresentations of the law governing what constitutes management or executive positions." The petitioner submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

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

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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 ISSUE ON APPEAL

The sole 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(l)(3)(v)(B).

A. Facts

The petitioner filed the Form I-129 on June 20, 2014. On the Form I-129, where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner stated the following:

Chief Executive Officer (CEO) and President. As an entrepreneur, [the beneficiary] saw a business opportunity in opening a staffing business in China to provide qualified English-speaking teachers to schools in China. [The beneficiary] created [the foreign entity] and applied for all necessary government licenses and documents in August 2012 and received the licenses in September 2012. [The beneficiary] is the sole investor and shareholder. As CEO and President, [the beneficiary] is the face of [the foreign entity]. He manages the overall development and expansion of the company. In particular, he developed and implemented the company's goals and business plan; hired quality employees, made promotions to "manager", and oversaw the managers' hiring of additional personnel; and created and expanded a successful business. As CEO, [the beneficiary] is now developing new goals and expansion plans, in particular opening a new office for [the foreign entity's] affiliate, Petitioner.

In its letter of support, the petitioner described the beneficiary's position and staffing abroad as follows:

[The beneficiary] hit the ground running, and working with [redacted] (now the Chinese Manager of [the foreign entity]), marketed his business, developed relationships with schools, entered into contracts with schools to find and provide qualified English-speaking teachers, and entered into contracts with those qualified teachers to fill positions in the schools. Within the first six months, [the foreign entity] contracted with 15 teachers, and within the first year, had doubled the number of full-time, contract teachers to 30 plus several part-time placements. [The beneficiary] quickly hired [redacted] as a full time employee, and after training and supervising her work, promoted her to Chinese Manager. In early 2013, [the beneficiary] hired [redacted], again trained and supervised and [sic] his work, and promoted him first to English Manager and now to Senior Manager. [redacted] manages the day-to-day operations of [the foreign entity], hires employees and interns, oversees and manages all of the contract teachers, and reports to [the beneficiary].

* * *

[The foreign entity] currently has six full-time employees. The two assistants' duties involve data entry, website maintenance, answering telephones and basic emails, photocopying, filing, and support to the Assistant Manager and Chinese Manager. Assistant Manager [redacted] trains assistants, facilitates communication between employees and contract teachers, plans events, and reports to and supports his superiors. As Chinese Manager, [redacted] oversees and manages the work of the assistants and [redacted] markets the business to schools; drafts and enters into contracts on behalf of [the foreign entity] with schools; and communicates with school officials regarding each contract teacher's performance and any issues that may arise. She reports to the Senior Manager, [redacted]. As Senior Manager, [redacted] oversees and manages the work of his two managers and indirectly oversees the assistants; hires new employees and refers termination recommendations to the CEO; drafts and enters into contracts on behalf of [the foreign entity] with teachers; facilitates communication and troubleshooting with all contacts teachers; and supervises each contract teacher's performance through reviews, feedback, and training. If a school notifies [the foreign entity] of any issues, [redacted] addresses and resolves those issues with the contact teacher. [redacted] reports to the CEO.

The petitioner submitted the foreign entity's organizational chart, which depicts the beneficiary as CEO, the senior manager, Chinese manager, assistant manager and two assistants and identifies each employee by name. The petitioner submitted the beneficiary's pay stubs from the foreign entity for the months of October 2012 to September 2013 as evidence of his employment abroad.

The petitioner submitted the beneficiary's resume indicating that he is the "CEO/Founder of [the foreign entity]" from 2012 to the present, listing his duties in that position as follows:

- Manage banking including authorize payments to teachers and staff.
- Reply emails to teachers who interested [sic] in teaching in [C]hina as well as supervise/oversee the correspondent emails sent by staff.

- Post new ads online and oversee the ads posted by staff.
- Deal with any foreign teacher's query that is not sorted by staff.
- Oversee and sign new contracts with new teachers.
- Making phone calls to new teachers who are interested in teaching.
- Resolve all the issue with staff.
- Interact with accountant for tax.
- Make new marketing projects for promoting company and getting the message out of its doing [*sic*] including leaflets designs.
- Handing out business cards to new clients.
- Oversee the housing for new teachers in [C]hina and help them settle inn [*sic*].
- Visit various school and institutions and introduce them to our services.
- Help new teachers to perform better at their jobs by providing them a onsite [*sic*] training so they know the Chinese way of teaching.
- Implementing of rules and regulations at the office and maintenance of proper filing system.
- Organizing annual events with teachers for interactions with other foreigners.
- Monthly evaluations of the managers and oversee reports of the Chinese employee's [*sic*].

The director issued a request for additional evidence ("RFE") on June 27, 2014, advising the petitioner that the description of duties provided for the beneficiary's employment abroad does not demonstrate what he actually does on a day-to-day basis. The director noted that the petitioner failed to indicate the percentage of time the beneficiary devotes to his duties and the organizational chart did not describe the duties, educational level, or salary of the beneficiary's subordinates. The director instructed the petitioner to submit evidence to establish that the beneficiary's position abroad was in a managerial or executive capacity.

In response to the RFE, the petitioner submitted a letter, dated July 8, 2014, signed by the beneficiary as CEO/President of the foreign entity, which describes his current duties as follows:

First, I direct the management of the company. As CEO, I have decision-making authority and discretion to create and implement all policies and procedures so that the company runs efficiently and profitably and can be properly managed by the Senior Manager. Specific policies I implement and revise as necessary include:

- Human resources policies regarding staff positions, job duties, salary levels . . .
- Office procedures for the running of the business . . . communication with clients and contract employees; training of contract employees; oversight and review of contract employees; and day-to-day procedures
- Oversight procedures to ensure that the company's reputation remains solid . . .
- Financial procedures, such as how invoices are sent and payments are received . . .
- Legal policies, procedures, and review checks to ensure that the company uses and enters into valid contracts and complies with all laws.

The beneficiary stated that he spends 100% of his time working in an executive capacity and indicated that he allocates his time as follows:

- 1) Implementing, reviewing, and revising policies and procedures (20%);
- 2) Expanding the vision and goals of [the foreign entity] through my knowledge, experience, and research, and maintaining and promoting the company's reputation (40%); and
- 3) Directing the management of [the foreign entity] by overseeing and reviewing the work of the Senior Manager (40%).

My employment with [the foreign entity] has been in an executive capacity for at least one year. As with any new business, my work during the initial start-up of the company involved both my executive work and more day-to-day management and work, but as the company has expanded and grown, my Senior Manager has taken over the day-to-day management of [the foreign entity]. My work for the last year or so has been directing his management of [the foreign entity], implementing and revising the company's policies and procedures, and creating and expanding the company's vision and goals.

The petitioner re-submitted the foreign entity's organizational chart depicting the beneficiary at the top tier as the CEO, directly supervising a senior manager, [REDACTED]. The senior manager supervises a Chinese manager, [REDACTED] and an assistant manager, [REDACTED] who both supervise two assistants, [REDACTED] and [REDACTED].

The petitioner also submitted job descriptions for the beneficiary's position abroad as CEO and those of his subordinates, the senior manager, Chinese manager, assistant manager, and assistants. The job description for the beneficiary's position abroad as CEO included the following duties:

- Direct the management of [the foreign entity]
- Create, implement, and revise as needed the policies and procedures of [the foreign entity] to ensure the efficient and profitable running of the company.
- Establish and revise as necessary the budgetary and financial goals of [the foreign entity].
- Oversee the Senior Manager's management of [the foreign entity]
- Perform quarterly evaluations of the Senior Manager and review the Senior Manager's evaluations of the other managers and employees
- Review employee promotion and termination recommendations made by the Senior Manager
- Review monthly and quarterly financial reports and oversee proper payment of government taxes by the company's accounting firm
- Promote the reputation of [the foreign entity] through occasional interaction and meetings with Chinese clients and contract employees
- Create and implement the vision and goals of [the foreign entity]
- Expand the vision and goals of [the foreign entity] to increase the company's presence and profit as a premier staffing company
- Oversee and implement the expansion of [the foreign entity] to the United States through its U.S. affiliate

The director denied the petition on August 8, 2014, concluding that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. In denying the petition, the director found that she was unable to determine what the beneficiary's actual duties are due to the fact that the description of the beneficiary's duties provided in his resume and the position descriptions provided in the petitioner's letters do not coincide. The director noted that without more specific information regarding the duties of the foreign position, the job description provided by the petitioner is insufficient to show that the position is primarily managerial or executive. The director further found that, based on the submitted organizational structure, it appears that the beneficiary has been primarily involved in the performance of the day-to-day non-supervisory duties of the foreign entity.

On appeal, the petitioner reiterates its statements from its letter of support and response to the RFE, relating to the beneficiary's position abroad, and adds that the director ignored the petitioner's full description of the beneficiary's executive position/duties abroad. The petitioner further references the beneficiary's submitted resume and states that it is outdated and incorrect. The petitioner submits a newly updated resume for the beneficiary on appeal and asserts that he has been an executive at the foreign entity for at least one year.

The updated resume lists the beneficiary's job duties for the foreign entity as follows:

- Saw and seized development opportunity for a professional staffing company in [REDACTED]
- During start-up phase: marketed new business; developed contacts and school clients; answered potential client and teach questions via phone and email; drafted contracts; implemented pricing guidelines; hired employees; implemented office policies and procedures; implemented job requirements for each level of contract teacher training procedures and teaching guidelines; trained employees in office policies, procedures, and strategies to be successful; oversaw and reviewed employees' work product; made promotion and employee benefit determinations
- Under my leadership, and in less than one year, company had developed and maintained a solid reputation for the services we provide and as and is profitable with annual revenue continuing to increase
- Oversee the management of the company: review financial reports and financial status of the company; review Senior Manager's decisions and running of the business via quarterly reports and reviews; ensure Senior Manager manages the company according to the policies, procedures, and goals I implement as CEO, including maintaining company's solid reputation and efficiently and profitably providing our services to clients; review Senior Manager's employee hires and promotions; ensure the right management personnel are hired and promoted so that the company continues to be efficient and profitable
- Strategize methods for obtaining larger market share and expanding business opportunities: create and implement new company goals and expansion plans; determine when and where to expand the business to fulfill clients' needs; pursue new business opportunities and types of services provided to clients

- During year two and beyond, my leadership and oversight of the company ensure continuing increases in profit, number of clients, and number of contract placements; seizing current vacancies in market share; and creating new business opportunities
- Communicate effectively, both verbally and in writing, to all levels of staff and management

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary worked in a qualifying managerial or executive capacity abroad for the required one year within the three years preceding the filing of the petition.

When examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (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.*

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

In the instant matter, the petitioner indicated that the beneficiary has been employed in a qualifying executive position, pursuant to section 101(a)(44)(B) of the Act. The petitioner first characterized the beneficiary's role as CEO and provided a broad and vague description of the position. The description did not establish that the beneficiary primarily performed in the capacity of either an executive or a manager at the foreign entity, as those terms are defined in the statute and regulations. For example, the petitioner indicated that the beneficiary is responsible for managing the "overall development and expansion of the company," but failed to provide a detailed account of what he does on a daily basis. Although the petitioner noted that the beneficiary developed and implemented the company's goals and business plan, hired employees, and created and expanded a successful business, this information failed to convey an understanding of the beneficiary's routine daily duties. 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 explained that the beneficiary supervises a five-person staff and has trained the senior manager to run the day-to-day operations of the company, hire employees and interns, and manage the contracted

teachers. However, the petitioner also explained that the beneficiary initially performed various non-managerial duties associated with the foreign company's start-up, during which time he marketed the business, developed relationships with schools, entered into contracts with schools to locate and provide teachers, and entered into contracts with those teachers. The record reflects that the foreign entity received all required licenses to conduct business in China in September 2012, the beneficiary was admitted to the United States in B-1 status in December 2013, and the petition was filed in June 2014. The petitioner must establish that the beneficiary had a full year of continuous employment in a managerial or executive capacity between September 2012 and December 2013.¹ Given that the foreign entity was in a start-up phase for some portion of the beneficiary's period of employment abroad, and the petitioner concedes that his duties during this time were not primarily managerial or executive, it remains unclear at what point the petitioner claims he began performing primarily qualifying duties.

The petitioner's initial evidence also included the beneficiary's resume, which confirmed his performance of non-qualifying duties, such as sending response emails to teachers interested in teaching in China, overseeing emails sent by staff, posting new ads online and overseeing ads posted by staff, dealing with foreign teachers' queries that are not sorted by staff, making phone calls to new teachers, making new marketing projects, handing out business cards to new clients, overseeing housing for new teachers in China, visiting various schools and institutions, providing onsite training to new teachers in China, and organizing annual events. Although the petitioner now indicates that this resume was outdated and reflected the beneficiary's typical duties during the foreign entity's start-up phase, we note that the beneficiary's stated duties included performing monthly evaluations of managers, which indicates that this resume was written after the beneficiary had in fact hired managers. Therefore, the job description provided in the resume reflects that the beneficiary continued to perform a significant number of marketing, training and other non-qualifying operational tasks even after he hired a subordinate staff.

In the petitioner's letter response to the RFE, the beneficiary stated that he devotes 100% of his time to executive duties and expanded on the description of his duties at the foreign entity, adding percentages of time devoted to broadly stated tasks, such as "implementing, reviewing, and revising policies and procedures (20%); "expanding the vision and goals of [the foreign entity] through my knowledge, experience, and research, and maintaining and promoting the company's reputation (40%);" and "directing the management of [the foreign entity] by overseeing and reviewing the work of the Senior Manager (40%)." The beneficiary also stated that he creates and implements policies on human resources, office procedures, oversight procedures, financial procedures, and legal policies, as well as establishing and revising the financial plans and goals of the company and establishing the operational goals and objectives of the company. The petitioner did not include any additional details or specific tasks related to each duty allocated a percentage of time. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

¹ The petitioner submitted a complete copy of the beneficiary's passport, which indicates that he was previously in the United States in B-2 status from August 2013 until November 2013. Neither this period of time, nor the period of time he has spent in the United States since December 2013, can be counted toward his continuous year of qualifying employment abroad. See 8 C.F.R. § 214.2(1)(1)(ii)(A).

While we do not doubt that the beneficiary exercises authority over the foreign entity and its goals, this position description was inconsistent with the information provided at the time of filing, which indicated that the beneficiary performed a combination of managerial or executive and non-managerial duties, including several duties that overlap with those performed by the company's subordinate staff and are consistent with directly providing the services of the business. Further, as discussed above, the record indicates that the beneficiary's duties likely evolved during his period of employment abroad between September 2012 and December 2013, as the foreign entity was in a start-up phase. Therefore, the petitioner's claim in response to the RFE that the beneficiary's duties have been 100% executive in nature was not supported by the totality of the evidence in the record.

On appeal, the petitioner repeats the same job duties for the beneficiary as provided in response to the RFE, and, as noted above, adds that the beneficiary's resume submitted with the petition was outdated and not reflective of his actual current duties at the foreign entity. The petitioner does not state when the previously-submitted resume was written, however, as discussed, it appears that it reflects the beneficiary's duties subsequent to his hiring of subordinate managers. Again, the record shows that the beneficiary was working for the foreign entity in China from September 2012 until August 10, 2013, and that he returned to China from November 12 to December 27, 2013. The petitioner must establish that the beneficiary performed primarily managerial or executive duties for at least one full year during this timeframe; we cannot base our determination on the beneficiary's "current duties" as of June 2014 when the petition was filed, as his time spent in the United States as a nonimmigrant visitor does not count towards his continuous period of employment abroad.

The new resume for the beneficiary lists new duties that coincide with the petitioner's job description in response to the RFE. However, it also includes many of the same non-qualifying duties, listed in the previous version of the resume, under the sub-heading "during start-up phase." It further groups some of the newly listed duties under other sub-headings, such as "oversee the management of the company" and "strategize methods for obtaining larger market share and expanding business opportunities." This new list of duties is particularly important because the foreign entity had only been doing business for approximately 15 months when the beneficiary left China, and such duties described in the "start-up phase" are not listed in the percentage breakdown provided by the petitioner. The petitioner again offers no information as to when it considers the foreign entity to have emerged from the start-up phase, and the record contains little information regarding the hire dates for the beneficiary's subordinates. Finally, the petitioner simply dismisses the previous resume as "outdated" when it clearly reflected that it was written at a time when the beneficiary had already hired subordinate managers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The 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 failed to demonstrate that the beneficiary's duties abroad primarily focused on the broad goals and policies of the organization rather than on its day-to-day operations. For example, in its initial letter of support, the petitioner did not provide sufficient detail as to what the beneficiary actually does on a daily basis but did provide his resume listing his actual duties performed in that position, as listed above. Those duties listed in the beneficiary's resume, while important, are not executive functions but rather the performance of necessary tasks in order to operate the business on a day-to-day basis. Upon review, the initial job duties provided for the beneficiary's employment abroad failed to demonstrate that the beneficiary focuses the majority of his time on executive duties but rather showed the beneficiary spent the majority of his time performing the day-to-day operations of the business.

In response to the RFE, the petitioner provided a new position description and brief list of job duties with allocated percentages for the beneficiary's position at the foreign entity. The new position description expanded the beneficiary's position and added several new duties to his responsibilities. On appeal, the beneficiary's new resume further expanded on his duties and added a grouping for "start-up phase" that encompasses the majority of non-qualifying duties listed in the original resume.

We do not find that the expansion of the beneficiary's position description alone is sufficient to warrant a finding of a material change made to the beneficiary's position in response to the RFE. However, the additional duties listed for the beneficiary that were not previously included in the petitioner's initial position description, in combination with the new resume and broad tasks allocated percentages, does raise doubts as to the validity of the information provided in response to the RFE and on appeal. Additionally, the position description for "senior manager," submitted in response to the RFE as the duties of the beneficiary's direct subordinate, includes some of the same duties described as the beneficiary's duties at the time of filing the petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. 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.

In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary supervising some of the actual work and five subordinates in the foreign entity's operation. We again point out that, although the petitioner submitted a percentage breakdown of the beneficiary's time by 40%, 40%, and 20%, the duties listed were extremely broad and vague and the petitioner does not provide an accurate allocation of the beneficiary's time spent on performing the specific tasks comprising of his daily routine.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence or on appeal, 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 its 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). 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 in its response to the director's request for further evidence or on appeal does not clarify or provide more specificity to the original duties of the position, but rather adds new duties and groups most of the previously presented non-qualifying duties into a "start-up phase" grouping.

While performing non-qualifying tasks necessary to produce a product or provide a 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. As discussed herein, the petitioner's description of the beneficiary's duties abroad fails to establish that such duties are primarily executive in nature.

Although the petitioner specifically indicates that the beneficiary was employed in an executive capacity at the foreign entity, we will examine the position as it relates to managerial capacity as well.

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).

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

Here, the petitioner submitted an organizational chart for the foreign entity indicating that he had one direct subordinate, who supervised two managers, both supervising two assistants. The petitioner also submitted thorough lists of job duties for the beneficiary's subordinate employees. It can be reasonably expected that the foreign entity have supervisory staff subordinate to the beneficiary's position. However, although it is shown that the beneficiary may have at least one subordinate with some supervisory duties, he has not been shown to *primarily* supervise and control the work of other supervisory, professional, or managerial employees. The fact that one of his subordinates may supervise lower-level employees is not sufficient to elevate the

beneficiary to a position that is managerial in nature. The petitioner has failed to demonstrate that the beneficiary's duties primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the foreign entity. As noted above, the petitioner failed to submit a detailed description of the beneficiary's positions to establish that his daily routine has consisted of primarily managerial duties.

Further, the petitioner failed to clearly indicate when the beneficiary's subordinates were actually hired as it relates to his qualifying employment in any executive or managerial capacity at the foreign entity, given that it was in a start-up phase when his employment began. The record also reflects that the beneficiary continued to perform non-qualifying operational or administrative duties even after his subordinate staff was hired. As such, the petitioner has not established that the beneficiary was employed in a managerial capacity by the foreign entity.

The petitioner has not established, in the alternative, that the beneficiary has been 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 duties at the foreign entity 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 manages an essential function of the foreign entity.

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

III. CONCLUSION

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.