



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: MAR 25 2015 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker under 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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ 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 corporation established in [REDACTED] states that it operates a fast food restaurant chain. It claims to be an affiliate of [REDACTED] the beneficiary's employer in Russia. The beneficiary was previously granted one year as an L-1A intracompany transferee in order to open a "new office" in the United States as the petitioner's technical director. The petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish the beneficiary is employed in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the evidence is sufficient to establish that the beneficiary is employed as a function manager.¹

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, Petition for a Nonimmigrant Worker, 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.

¹ The petitioner indicates on the Form I-1290B, Notice of Appeal or Motion, that it will submit a brief and/or additional evidence within 30 days of filing the appeal. The record indicates that the petitioner did not file a brief or supplemental evidence within the allowed timeframe. Therefore, the record will be considered complete as presently constituted.

- (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.

II. Managerial Capacity in the United States

The sole issue on appeal addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial position under the extended petition. The petitioner does not claim that the beneficiary is or will be employed in an executive capacity as defined at section 101(a)(44)(B) of the Act.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 16, 2014. The petitioner indicated that it operates a fast food restaurant chain and has six employees. The petitioner submitted lease documents for an office location, a restaurant located at [REDACTED] and a restaurant in the [REDACTED] shopping mall, all located in the Chicago metropolitan area.²

In an addendum to the Form I-129, the petitioner described the beneficiary's duties as technical director as follows:

- Manage and control the work of professional employees from Technical, Food, Market, and Design Departments.
- Make critical business decisions on selection of premises for new restaurants, negotiate leases and direct and control the whole process of redesigning and remodeling;
- Oversee and organize technical department activities, select, purchase, coordinate and supervise the installation of the necessary equipment for restaurants;
- Recruit and dismiss employees from production and technical departments. Recruit and hire an IT personnel to install and maintain the computer-automated system of the restaurants and manage the Company's web-site.
- Manage and oversee the activities of the Chief Engineer and the Chef in developing a process scheme of restaurants operation; Coordinate the creation of cooking menu and ensure it adheres to the company's mission of providing healthy food.
- Secure workers and supervise timely repair, construction and finish works, as well as to prepare estimates and reports for any type of repair, construction and finish works, as well as

² The petitioner submitted a third lease agreement and contract for work to be performed at a location in the [REDACTED] however the record indicates that the lease was cancelled on October 1, 2013. There is no evidence that the [REDACTED] location was ever completed or operational.

to monitor due quality, timely performance and to monitor the rational utilization of repair materials, tools and equipment.

- Secure failure-free operation of all utility systems, including electrical system, ventilation, heating, sewage, and water supply. To dispatch the technical support and supervise their work.
- Develop manuals, programs and proposals designed to improve emergency, fire, and other safety systems of the company and provide them to the company management.
- Inform the management of the defects discovered in the work process and measures taken or planned in order to eliminate them.

The petitioner submitted an Illinois Department of Child Support Services report listing the petitioner's employees and their respective dates of hire. The report includes the beneficiary, [REDACTED], and [REDACTED]. The petitioner also provided its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2013 indicating that it paid wages to two employees. Although the petitioner submitted a confirmation from the IRS indicating that it issued four IRS Form 1099s in 2013, the record only contains Form 1099s for [REDACTED], [REDACTED], and [REDACTED]. The petitioner also provided a payroll summary for the period January 1 to March 5, 2014 which included the beneficiary, Mr. [REDACTED] Ms. [REDACTED] Ms. [REDACTED] and Mr. [REDACTED].

The petitioner provided an organization chart, which indicates that the beneficiary is directly subordinate to the president, [REDACTED]. The chart indicates that the beneficiary oversees the technical, food, marketing and design departments and has three subordinates identified as: chief cook [REDACTED], PR manager ([REDACTED]), and designer [REDACTED]. The chart also places repair, architecture, and construction contractors in the technical department subordinate to the beneficiary.

The petitioner submitted a "Technical Director Job Description" indicating that the position is subordinate only to the company's president. In addition to the job duties stated in the Form I-129, the document also describes the beneficiary's powers as:

1. To give instructions, orders and directions regarding any matters within his his [sic] competence and functional responsibilities.
2. To monitor the adherence to all safety regulations, including the fire safety engineering and take appropriate actions in case of their violation.
3. To offer proposals and options for taking disciplinary actions regarding company's employees who violate health and/or fire safety regulations.
4. To be aware and review the plans and draft decisions of the company management that are directly related to his work and/or work of his subordinates.
5. To provide his proposals to the management on how to improve his work and the overall operation of the company.
6. To inform the management of the company of all defects discovered in the process of his work and offer ways to eliminate them.

7. To enforce the management of the company to comply with all organizational and engineering provisions that are necessary for proper execution of his job duties.

The petitioner submitted a copy of the beneficiary's resume. The resume states that the beneficiary has been employed with the petitioner since August 2013. The resume states that during his employment with the U.S. company he has performed the following duties: project management, coordination, planning and construction of new restaurant locations; oversight of reconstruction, planning, structuring and design of newly developed facilities; communication, negotiation and research of contracts with general constructors and subcontractors; organization and planning of technical requirements related to construction projects; and research related to new construction project development and restaurant locations.

The petitioner submitted copies of the engineering and construction contracts for work to be performed by a third party at its [REDACTED] location. The design and engineering contract is dated January 6, 2013; it requires a 30% retainer upon acceptance and covers the design development, construction documents, plumbing, HVAC, and electrical engineering consulting services. The January 22, 2014 construction contract includes demolition, interior construction, electric, mechanical and HVAC, and plumbing and requires a 35% down payment due upon signing. The petitioner also submitted a contract for a build out at [REDACTED].³

The director issued a request for evidence ("RFE") instructing the petitioner to submit additional evidence that the beneficiary's employment in the United States is in a managerial capacity or executive capacity. Specifically, the director suggested that the petitioner provide, among other things, the following: a letter from an authorized representative of the U.S. entity describing the beneficiary's expected managerial duties and the percentage of time spent on each; an explanation of how the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees including whether the beneficiary will have authority to hire and fire or recommend similar personnel actions; and explanation of how the beneficiary will manage an essential function, department, or subdivision of the organization including how the beneficiary will make decisions on daily operations of the activity or function under his authority; and an organization chart showing the U.S. entity's organizational structure and staffing levels including a list of names, job titles, education, and a summary of the job duties performed by each employee.

In response to the RFE, the petitioner stated that the beneficiary directly communicates and manages contracted architects, construction workers, and repairmen. The petitioner stated that as the restaurants open, the company will establish its own repair/maintenance department and that the beneficiary will be in charge of two building maintenance and equipment maintenance managers in addition to outside managers/contractors. The petitioner stated that IRS Form 1099s are unavailable for the contractors because the building process started in 2014.

³ As noted above, the petitioner submitted evidence that the lease for this location was cancelled on October 1, 2013.

The petitioner indicated that the beneficiary spends his time as follows:

- Make critical business decisions on selection of premises for new restaurants, negotiate leases and contracts with building contractors, architects, designers, and equipment installers – 10%
- Direct and control the whole process of redesigning and remodeling the restaurant sites [sic]. Manage and control the work of managers and supervisors of all technical aspects, and more specifically the work of Chief architect/architect supervisor, construction manager, equipment installation and building maintenance manager. Oversee and organize technical department activities, select coordinate and supervise the installation of the necessary equipment for restaurants – 60%
- Recruit and dismiss employees from production and technical departments. Recruit and hire an IT personnel to install and maintain the computer-automated system of the restaurants and manage the Company's web site. Hire new workers as proposed by first-line managers – 5%
- To organize, plan, prepare budgets, reports and necessary paperwork for new build-outs, construction, repairs, and finish works – 10%
- To monitor due quality, timely performance and the rational utilization of repair materials, tools and equipment – 5%
- Secure failure-free operation of all utility systems, including electrical system, ventilation, heating, sewage and water supply through making decisions to hire and/or dispatch the necessary technical support; review reports of first-line manager regarding the repairs. Inform the President of the defects discovered in the work process and measures taken or planned in order to eliminate them – 5%
- Develop manuals, programs and proposals designed to improve emergency, fire and other safety systems of the company – 5%

The petitioner submitted additional contracts for construction, marketing, and culinary support services. The petitioner provided a contract for a build out at [REDACTED] dated July 10, 2012.⁴ The contract indicates that the labor and supervision are provided by the third party company.

The petitioner also provided a revised organization chart. The president, [REDACTED] is at the apex of the organization chart. The beneficiary, an operations director, a financial department controller, and a marketing director are subordinate to the president. The operations director is identified as [REDACTED] the financial department controller is identified as [REDACTED] and the marketing director is identified as [REDACTED]. The chart indicates that the beneficiary manages architecture and design contractors, construction contractors, and installation and maintenance contractors. The contractors' employees are included as an additional level of subordination. The chart places a regional manager, [REDACTED] subordinate to the operations director, and indicates that he supervises a line cook and two cashiers. The petitioner also submitted position descriptions and salary information for each of the positions on the organization chart.

⁴ The first page of the [REDACTED] contract is dated July 10, 2012; however the [REDACTED] lease was not signed until January 28, 2014. Further, the construction agreement attached to the contract is dated April 21, 2014 subsequent to when the petition was filed.

The petitioner provided an Illinois quarterly Employer's Contribution and Wage Report for the third quarter of 2013 and the first quarter of 2014. The reports indicate that the petitioner paid wages to the beneficiary and [REDACTED] in the fourth quarter of 2013. In the first quarter of 2014, the report indicates that the petitioner paid wages to the beneficiary, [REDACTED]

[REDACTED] A letter dated May 29, 2014 explains that the discrepancy between the organization chart and the Illinois tax reports is due to the fact that the [REDACTED] location opened during the second quarter of 2014, and the chef and cashiers were hired after March 31, 2014.

In its letter dated May 29, 2014, the petitioner asserted that the beneficiary manages the managers of the contracted third-party architect and design, construction, and installer/repair service providers who started working for the petitioner in 2014. The petitioner indicates that at the end of 2013, the beneficiary was responsible for choosing the locations of the restaurants according to the technical requirements and the objectives of the company, interviewing prospective architects and contractors for the build out and installation of the necessary equipment, and making hiring decisions. The petitioner indicated that the company plans to open additional restaurants and will hire two managers and additional maintenance workers to supervise and perform the building and equipment maintenance for its restaurant chain. The letter references attached bank statements, but the statements were not included in the RFE response.

The director denied the petition finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial capacity. The director stated that the petitioner failed to establish that the beneficiary manages or directs the management of a department, subdivision, function, or component of the petitioning organization and that it appears that the beneficiary is primarily involved in the performance of routine operational activities of the entity. The director noted that the organization chart does not identify the contract employees and that the petitioner did not provide job descriptions for the beneficiary's subordinates. The director also noted that the contract agreements do not contain any provision authorizing the beneficiary to supervise or control the work of the contracted employees.

On appeal, the petitioner asserts that the beneficiary spends the majority of his time managing the essential design, engineering, and construction function performed by contracted architects, installers, or construction workers. The petitioner states that beneficiary has broad discretionary authority over the function and qualifies as a function manager. The petitioner states that "it is not unusual in the first few years for a new office to have lower staffing levels," and asserts that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. The petitioner notes that the beneficiary's L-1A petition was previously approved and that his position has not changed since that time.

B. Analysis

Upon review, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial capacity.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in

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

Here, the petitioner provided only a vague description of the beneficiary's responsibilities that fails to convey what tasks he performs on a day-to-day basis. For example, the petitioner indicated that the beneficiary makes critical business decisions, directs and controls the whole process of redesigning and remodeling the restaurant sites; manages and controls the work of managers and supervisors, oversees and organizes technical department activities, and organizes and plans the new build-outs. The broadly described duties suggest the beneficiary's level of authority; however, they fail to provide the specifics necessary to understand how the beneficiary actually spends his time on a daily basis. The regulations require the petitioner to describe the beneficiary's duties with the level of detail necessary to determine whether each duty meets the statutory definitions of managerial or executive capacity. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, the position description indicates that the beneficiary spends a portion of his time negotiating leases and contracts; selecting the installation of the necessary equipment for the restaurants; preparing budgets, reports, and necessary paperwork for new build-outs; and developing manuals. These duties suggest the beneficiary's involvement in operational activities that are not typically considered to be managerial duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The initial position description also included supervisory duties over non-managerial staff and duties unrelated to the design, engineering, and construction function; however in response to the RFE, these duties were omitted from the position description. For example, the beneficiary's initial duties included managing and controlling the work of professional employees from Technical, Food, Market, and Design Departments; managing and overseeing the activities of the chef in developing a process scheme of restaurant operations; and coordinating the creation of cooking menu and ensuring it adheres to the company's mission of providing healthy food. The petitioner did not mention these duties in response to the RFE. 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).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive

duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). As discussed, the beneficiary's broadly described duties fail to explain how the beneficiary spends his time on a daily basis. Absent a clear and credible breakdown of the time spent by the beneficiary performing specific tasks, the proportion of time the beneficiary spends performing managerial duties cannot be determined.

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

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). In the instant matter, the petitioner claims that the beneficiary is 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 detailed position description that clearly explains 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. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity.

The petitioner claims that the beneficiary manages its essential design, engineering, and construction function; however, the initial organization chart placed the food department, marketing department, and design department subordinate to the beneficiary. Additionally, the initial position description included duties such as "manage and control the work of professional employees from technical, food, market, and design departments"; "manage and oversee the activities of the Chief Engineer and the Chef in developing a process scheme of restaurants operation"; and "Coordinate the creation of cooking menu and ensure it adheres to the company's mission of providing healthy food." The petitioner subsequently removed these job duties from the beneficiary's job description and submitted a revised organizational chart but did not provide any explanation for this change. The revised chart changed the organization structure of the company moving the food, marketing, and design departments so that the beneficiary's only subordinate employees are the contracted managers of the third-party architecture and design, construction, installation, and maintenance companies.

Based on these discrepancies regarding the nature and scope of the beneficiary's responsibilities, there is insufficient evidence of the amount of time that the beneficiary spends on duties unrelated to the technical function. 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). Considering the vague and inconsistent position descriptions, the petitioner has not established that the beneficiary is primarily performing managerial duties related to the technical function.

The submitted third-party contracts fail to further explain the managerial duties the beneficiary performs on a daily basis in relation to the contracted work or to demonstrate the beneficiary's ongoing or substantial oversight of the architecture or construction work performed by the third-party companies. While all of the contracts indicate that the petitioner must pay a retainer fee upon agreement, it has not provided bank statements, copies of checks, or any other evidence to demonstrate that it paid for the retainer fees or the contracted work. Even considering the two January 2014 contracts, the evidence is insufficient that any potentially managerial duties associated with the limited number of temporary contracts would require a substantial proportion of the beneficiary's time. The petitioner has failed to establish that the company has grown sufficiently to support the employment of a technical director in a primarily managerial capacity.

Other than identifying the beneficiary's non-managerial tasks, such as negotiating contracts and leases, purchasing equipment, preparing budgets and reports and completing necessary paperwork, the petitioner has not described the beneficiary's specific duties. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner did not meet that burden.

Although the petitioner has not claimed that the beneficiary is a personnel manager, it provided a revised organization chart in which the beneficiary is depicted as supervising the managers of the contracted companies, who in turn oversee additional employees.⁵

⁵ The initial organization chart included additional employees subordinate to the beneficiary; however, the initial chart was inconsistent with the with the Illinois Department of Child Support Services ("DCSS") document. The initial organization chart named the beneficiary's subordinates as [REDACTED]; and [REDACTED]. However, the DCSS document does not include [REDACTED]. Additionally, although the DCSS document indicates that [REDACTED] were hired prior to the time the petition was filed; they are absent from the initial organization chart. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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

In the instant matter, the evidence fails to establish that the beneficiary is a personnel manager. While the petitioner has provided contracts with third party architecture and construction companies, the petitioner has not established the beneficiary's supervisory authority over individual workers employed by the companies. The petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an 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 a qualifying executive or manager position. In order to be a supervisor, an employee must be shown to possess some significant degree of control or authority over the employment of a subordinate. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Leroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). The contracts provided contain no written terms that would give the petitioning company's employees any significant degree of supervisory control over the contractors' employees.

The petitioner claims that it intends to hire managers and maintenance employees in the future that will be subordinate to the beneficiary. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971).

The petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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).

Further, in the present matter, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D).⁶ The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing non-managerial tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial position.

Rather, overall record suggests the U.S. entity is still in the initial stages of its formation. The petitioner indicated that the beneficiary's duties include the following: negotiate leases and contracts with building contractors, architects, designers, and equipment installers; select, coordinate, and supervise the installation of the necessary equipment for restaurants. Many of these activities are reasonably expected to be completed prior to the filing of an initial new office petition, or at least prior to the expiration of the first year. The petitioner submitted a copy of its business plan, which indicates that the company originally intended to open its first restaurant by September 2013. The beneficiary's continued responsibility for the duties required to form the business does not indicate the beneficiary will be employed in a managerial capacity under the extended petition, but suggests that the U.S. entity has not grown sufficiently in the first year to support the beneficiary's employment in a primarily managerial capacity.

We acknowledge that USCIS had approved a previous L-1A classification petition filed on behalf of the beneficiary. The petitioner states that the previous approval should warrant the approval for the instant extension petition as the beneficiary has been offered the same position. However, the previous petition was granted to allow the beneficiary to open and work in a new office. The beneficiary's status was approved on the condition that within one year of the approval of that petition, the new office would grow to the point where the beneficiary's services would be required in a qualifying managerial or executive capacity. Therefore, at the time of the approval of the beneficiary's initial L1A visa petition, his managerial duties were of a purely speculative nature. The regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that the petitioner establish that the beneficiary's duties at the end of the initial year and under the extended petition are primarily managerial or executive in nature. Thus, the director need not give deference to the prior new office approval, and the prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

⁶ Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a qualifying managerial capacity. Accordingly, the appeal will be dismissed.

III. Doing Business

Beyond, the decision of the director, the evidence of record does not establish that the petitioner has been doing business for the year preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

As noted above, the regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii). The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states: "*Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." The petitioner has not submitted bank statements, tax documents, or any evidence that it was engaged in the regular, systematic, and continuous provision of goods and/or services since the commencement of the beneficiary's initial period of L-1A classification. In fact, the petitioner states that its location did not open until the second quarter of 2014, and the evidence of record indicates that it did not hire any cooks or cashiers for its fast food restaurant until after March 31, 2014, less than one month before the instant petition was filed. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a de novo basis).

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, the petitioner has not met this burden.

ORDER: The appeal is dismissed.