



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF Y-, INC.

DATE: OCT. 27, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an investment and retail business, seeks to extend the Beneficiary's employment as its General Manager under the L-1A nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

In denying the petition, the Director concluded that the Petitioner did not establish that the Beneficiary will be employed in a qualifying executive or managerial capacity in the United States or that it could currently support such a position.

On appeal, the Petitioner asserts that the Beneficiary will be employed in a qualifying executive capacity under the extended petition. 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 management 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

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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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. THE ISSUE ON APPEAL

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary will be employed in a qualifying executive or managerial capacity under the extended petition and whether the Petitioner established that it can support a managerial or executive position after its initial year of operations.

A. Facts

The Petitioner filed the Form I-129 on April 14, 2014. The Petitioner indicated on the Form I-129 that it is operating an "investment and retail business" with seven current employees and a gross annual income of \$425,806.00. In its letter of support, dated April 11, 2014, the Petitioner explained that it operates two different business entities: [REDACTED] located in [REDACTED] Georgia, and [REDACTED] located in [REDACTED] Georgia. The Petitioner stated on the Form I-129 that the Beneficiary works at the [REDACTED] Georgia location.

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On the Form I-129, where asked to describe the Beneficiary's proposed duties in the United States, the Petitioner stated the following:

As the General Manager of [the Petitioner], [the Beneficiary] will plan, develop, and establish all business and strategic policies and objectives for the company and supervise their implementation of [the Petitioner] in the United States. He will be responsible for policy implementation, recruitment, hiring, and firing of staff, and determine marketing and sales strategies. He will also oversee all marketing and sales activities, such as advertising, promotion, pricing, product development, and public relations. [The Beneficiary] will continue to report directly to the parent company for all business matters within the United States.

In its letter of support, dated April 11, 2014, the Petitioner described the Beneficiary's proposed position as follows:

[The foreign entity] appoints [the Beneficiary] as the General Manager of [the Petitioner] for a period of three years to develop the business within the U.S. As the General Manager of [the Petitioner], [the Beneficiary] will plan, develop, and establish all business and strategic policies and objectives for the company and supervise their implementation. He will also be responsible for overseeing the financial operations of the organization, production and sales, planning and directing activities such as sales promotions and coordinating with other department heads as required. Moreover, he will be responsible for building awareness and facilitating client development. Lastly, he will implement the hiring policies of the company, recruit employees for the U.S. office, manage the accounts payable and receivable, manage the staff, prepare work schedules and assign specific duties as needed. [The Beneficiary] will report to the board of directors in the parent company for all business matters within the U.S. . . .

As General Manager, [the Beneficiary] will oversee managers of different divisions within [the Petitioner]. . . . [The Beneficiary] will oversee and direct all marketing, sales, and finance divisions.

The Petitioner submitted its organizational chart depicting the Beneficiary at the top tier of the hierarchy as the General Manager supervising the [redacted] and the [redacted]. The [redacted] has one Store Manager, [redacted] who supervises two Sales Associates, [redacted] and [redacted]. The [redacted] has one Store Manager, [redacted] who supervises a Service Manager, [redacted] and a Sales Manager, [redacted]. The chart shows that the Service Manager and Sales Manager jointly supervise two [redacted] and [redacted], and one Sales Associate, [redacted]. Although the Petitioner stated on the Form I-129 that it had seven current employees, the organizational chart identified a total of ten employees, including the Beneficiary.

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The Petitioner submitted its 2013 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that it paid \$3,200 in compensation of officers, \$6,630 in salaries and wages, and \$0 in cost of labor during 2013.

The Petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2013, for its business operations located in [REDACTED] Georgia. The Form 941 indicates that it had four employees and paid \$8,971.50 in wages, tips, and other compensation during that period.

The Petitioner provided copies of paystubs showing that it employed the following individuals at its [REDACTED] business location in [REDACTED] Georgia:

- Beneficiary, from January 1, 2014 to April 15, 2014.
- [REDACTED], from January 20, 2014 to February 22, 2014
- [REDACTED] from January 20, 2014 to February 22, 2014
- [REDACTED] from January 20, 2014 to February 22, 2014

The Petitioner also submitted its Form 941 for the fourth quarter of 2013 for its business operations in [REDACTED] Georgia. The Form 941 indicates that it had zero employees and paid \$858.75 in wages, tips, and other compensation during that period.

The Petitioner submitted paystubs showing that it employed the following individuals at its business location on [REDACTED] Georgia:

- [REDACTED] from January 4, 2014 to February 21, 2014
- [REDACTED] from January 4, 2014 to February 21, 2014
- [REDACTED] from February 8, 2014 to February 21, 2014
- [REDACTED] from February 8, 2014 to February 14, 2014
- [REDACTED] from February 1, 2014 to February 21, 2014
- [REDACTED] from January 18, 2014 to February 7, 2014

The Petitioner submitted a position description for the General Manager position, outlining his duties as follows:

45% of Time on Spend Each of the Following Tasks [*sic*]

- Responsible for the overall operations management and performance of [REDACTED] and [REDACTED]
- Establish and implement necessary sales and marketing strategies in order to maximize sales profitability for each store and service center.
- Develop sales and operational performance metrics to track daily results of store and service operations and make necessary and timely adjustments when the metric goals are not being met.

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- Achieve operational objectives through monitoring and insuring compliance with company policies, procedures, and guideline set by Board.

30% of Time on Spend Each of the Following Tasks

- Review P&L's and create actionable plans to protect margins, control payroll and operating expense
- Review and decide on merchandising plans to support sales strategies.
- Maintain the highest standard for customer service. Guide managers in resolving customer service issues.
- Provide leadership and mentor store/service manager in a professional manner to further improve company's services.

25% of Time on Spend Each of the Following Tasks

- Continually assess the performance level of retail and service managers and define areas that are below expectations and set goals/timelines for improved performance.
- Monitor training program of retail and service associates on selling, management and customer service skills.
- Oversees retail & service managers with recruiting, hiring for all retail & service positions.
- Ensured the records was maintained correctly by analyzing the costs, operations and forecasting the data determining store and service center's progress towards the goals and objectives set by organization. Report company status to Board of Directors.
- Delegated responsibilities to managers to further attainment of goals and objectives

The Petitioner also submitted a similar position description for the Beneficiary's subordinates' positions: Store Manager [REDACTED] Service Manager [REDACTED] Sales Manager [REDACTED] Lube Technician [REDACTED] Sales Associate [REDACTED] [REDACTED] Store Manager [REDACTED], and Store Associates [REDACTED]

The Petitioner submitted a letter from the foreign entity, dated September 30, 2012, describing the Beneficiary's position in the United States as follows:

- Company decide to import tobacco from india [*sic*] our [REDACTED] brand name and establish to sale in USA market and sale foal tobacco and also pokiyo tobacco and kalkati foal and also different varieties of different tobacco products in USA market, just like that try to export from USA of company named [REDACTED] and also different products of [REDACTED] tobacco company and try to export their tobacco products and sale in Indian market [*sic*]. Our estimate business plan to do this for atleast [*sic*] 5 years of Project.

- Plan, develop and establish all business and strategic policies and objectives for the company and supervise their implementation. Directs and coordinates activities among departments. Oversees the financial operations of the organization, production and sales, planning and directing activities such as sales promotions and coordination with other department heads as required. Acts on behalf of the company's [sic] in formulating and administering policies; Formulating and administering company policies and developing long range goals and objectives.
- Implement the hiring policies of the company, recruit employees for the USA office, manage the accounts payable and receivable, manage the staff, prepare work schedules and assign specific duties as needed. Directs and coordinates activities of departments or divisions progress towards stated goals and objectives. Supervise department managers and directors and other administrative department to review achievements and discuss required changes in goals or objectives resulting from current status and conditions.

....

- [The Beneficiary] serves as General Manager since [M]ay 2000[sic]. He has been fully authorized by [the foreign entity] to make executive and managerial decision both for [the foreign entity] in India and also for [the Petitioner] in USA. Have full authorities to make any executive decisions for the daily operation and direct department managers for the daily operations.

The Petitioner submitted its business plan, which outlines its personnel plan as follows:

The business will use a defined organization intended to support long term growth plans. This organization delegates authority to the lowest levels thus motivating our workforce to perform to the best of their ability.

All purchasing and financing of capital will require approval of the General Manager. The managers will also act upon items brought to them for review by the General Manager. The day to day affairs of the business will be managed by the General Manager (GM). The GM is responsible for the maintenance of all financial records, approval of purchases of products and supplies, payment of bills, marketing programs and advertising, approval of hiring and firing of all employees with specific responsibility for office and support service employees, establishment of specific operating procedures and all other matters that do not require approval of the partners. The GM will also oversee the maintenance and upkeep of the company, computer systems and capital goods.

The positions of all manager [sic] report everything to General Manager.

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The company will have two department managers, a Department Manager and a Marketing Department Manager. The Department managers and Marketing Managers will report to General Manager. The Both managers will have joint responsibility for the hiring and firing of employees. All hiring and firing actions must be approved by the GM.

The Director issued a request for evidence (RFE) on May 6, 2014, advising the Petitioner that the foreign entity's letter from 2012 indicates that the Beneficiary will be involved in the import/export of tobacco and that the job description submitted with the organizational chart does not provide adequate detail regarding the duties he carried out opening two businesses in the previous year, nor what his future duties will be in expanding the organization. The Director instructed the Petitioner to submit evidence satisfying this requirement.

In response to the RFE, the Petitioner submitted a letter from the foreign entity, dated September 1, 2013, that is almost identical to the foreign entity's letter submitted with the initial petition and dated September 30, 2012.

The Petitioner also submitted a copy of the same organizational chart previously submitted for the U.S. company and stated that the number of employees had grown from seven employees to nine employees.

The Petitioner submitted a document, on its letterhead, specifically stating the Beneficiary's proposed job duties as General Manager for the extended year as follows:

| | |
|-----|---|
| 40% | Establish and implement company policies, goals, objectives, and procedures, conferring with board members, organization officials, and staff members as necessary. |
| 30% | Monitor daily operations of all business operations across multiple locations; Insure compliance with all governmental regulations. Oversees procedures and methods to expedite clearance of import shipments, delivery to customers. |
| 10% | Directs departments or divisions managers for which responsibility is delegated to further attainment of goals and objectives. |
| 10% | Evaluate processes, performance measures, technology and staffing to identify and make executive decisions pertaining to efficiency opportunities and operational optimization. |
| 5% | Oversees department managers' recruitment, training, and orientation programs. Evaluates staffs performances. |
| 5% | Reviews analyses of activities, costs, operations, and forecast data to determine departments or divisions progress toward stated goals and objectives. |

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The Petitioner submitted a second document, on its letterhead, titled, Position: General Manager, listing the position job duties as follows:

| | |
|-----|--|
| 40% | Plans, develops and establishes policies and objectives of [the Petitioner] for import and export business. |
| 40% | Supervises, directs and coordinates marketing strategies; financial planning; business contracts and shipments among departments and managers in the entire operation of the North America market[.] |
| 10% | Re-structuring personnel within the company and re-determine and evaluate the current operation functions on behalf of the parent company for better business opportunities[.] |
| 5% | Active with the Board of Directors and make sure they comply with established policies and objectives of the company. |
| 3% | Presides over the Board of Directors and serve as chairman of executive officers to make sure that they comply with established policies and objectives of the company[.] |
| 2% | Reports directly to the parent company for all business matters within the USA. |

The petitioner also submitted its IRS Forms 941, along with its Georgia Employer's Quarterly Tax and Wage Reports (Form DOL-4N) for the first two quarters of 2014. The wage documentation shows that the Petitioner's number of employees during any given month varied from three to nine between January and June 2014, with a high of nine employees in March 2014 and a low of three employees as of June 2014. Despite this fluctuation, the Petitioner re-submitted the same organizational chart in response to the RFE that it did at the time of filing.

Comparing the organizational chart to the Petitioner's wage and payroll records, we note several discrepancies. One of the two lube technicians, [REDACTED], does not appear in any of the Petitioner's payroll records, while the other earned \$780.27 in the first quarter of 2014 and \$355.87 during the second quarter. The Petitioner stated that this is a full time position that is paid a \$25,000 annual salary. The individuals identified as "sales manager," "service manager," and "sales associate" for [REDACTED] on the organizational chart were paid in the first quarter of 2014, but are not listed on the Form DOL-4N for the second quarter of 2014. With respect to the store manager of the [REDACTED] business, the Petitioner stated that it employs [REDACTED] in this position at a salary of \$35,000 per year. The Petitioner provided paystubs for [REDACTED] from January and February 2014 showing that he earned \$3,000, but he was not reported on the Petitioner's Form DOL-4N in the first quarter of 2014. The Petitioner included him on its Form DOL-4N for the second quarter of 2014, and stated that he was paid \$3,233.00.

Regarding the employees of the Petitioner's [REDACTED] business, the Petitioner provided evidence that it paid \$4,166.25 to the store manager in the first quarter of 2014, and \$3,786.75 in the second quarter. The Petitioner paid one store associate \$1696.50 in the first quarter and \$130.50 in the second quarter, while the other store associate earned \$1957.50 in the first quarter and \$1885.00

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in the second quarter of 2014. The Petitioner provided job descriptions for these positions which stated that the store manager earns \$35,000 annually and the store associates are each paid \$20,000 annually.

Finally, as noted, the Petitioner's quarterly wage report shows that it employed only three people by the end of the second quarter of 2014. The Petitioner provided copies of payroll records for the months of April through July 2014. Most of the paychecks issued during this period went to three individuals who were not identified on the organizational chart: [REDACTED] and [REDACTED]. Nevertheless, the record shows that these individuals were also employed during the first two quarters of 2014.

Finally, the Petitioner's response to the RFE included a purchase agreement reflecting that the Petitioner had agreed to purchase a third retail business on July 31, 2014.

The Director denied the petition on October 23, 2014, concluding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying executive or managerial capacity or that the Petitioner could currently support such a position. In denying the petition, the Director found that it is unclear how a business of the Petitioner's size and scope can support so many managerial positions and questioned who is performing all of the day to day functions of the organization. The Director found that the evidence provided does not demonstrate that the Petitioner's business has grown to the point where it can support a qualifying managerial level position.

The Director observed that the Petitioner did not establish that the Beneficiary oversees a manager or a subordinate staff of professionals. As such, the Director found that the Beneficiary will not be employed in a qualifying managerial capacity, but will instead be primarily engaged in the performance of non-qualifying duties necessary to operate the business. The Director further found that the Beneficiary will not function at a senior level within the organization's hierarchy other than in position title.

In support of the appeal, the Petitioner submits a letter in which it asserts that the Beneficiary is and will be employed as an executive in the United States. The Petitioner asserts that the Beneficiary "acted as an executive to supervise its managers and supervisors for three retail business for the business operation," and further states:

Petitioner established that it employed 7 employees at the time of filing the petition. Petitioner also submitted document established [*sic*] it had two gas stations/convenience stores and one lube center. Petitioner also established that it had employed "two managers, three sales associates, two service managers and two lube technicians as [the Beneficiary's] subordinates."

The Petitioner asserts that it "provided ample proof that Beneficiary is working as General Manager of the company and in the capacity of an executive."

B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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

In the instant matter, the Petitioner first characterized the Beneficiary's role as General Manager and briefly described his proposed duties in very broad terms, noting that he will: plan, develop, and establish policies and objectives; oversee the financial operations; oversee production and sales; implement hiring policies; manage the staff; oversee managers of different divisions; and oversee and direct all marketing, sales, and finance divisions. The Petitioner also included duties related to its projected focus on importing and exporting tobacco products between the foreign entity and its U.S. company. The Petitioner did not include any additional details or specific tasks related to each broad area of responsibility. 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).

The Petitioner submitted another description of the Beneficiary's duties, allocating percentages of time he would devote to them, in equally broad terms. The Petitioner did not provide sufficient information detailing the Beneficiary's proposed duties at the U.S. company to demonstrate that these duties will qualify him 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 the proposed duties does not 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.

In response to the RFE, the Petitioner submitted the same letter from the foreign entity with the duties relating to the import and export of tobacco products changed to reflect a newly indicated project focus of retail sales through gas stations, convenience stores, lube centers, and liquor stores. The Petitioner also submitted two additional lists of job duties for the Beneficiary's position of General Manager at its U.S. company, including percentages of time devoted to each duty. Each list of duties amounts to 100% of the Beneficiary's time; however, each list of duties is different from the other and different from the initial list of duties with percentages of time allocated submitted with the initial petition. 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 (BIA 1988). Overall, while the record contains several position descriptions for the Beneficiary's position, none of them adequately details his actual duties and the inconsistencies between the descriptions prevent us from giving any one description significant evidentiary weight.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See sections 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 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 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).

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Here, the Petitioner states that the Beneficiary will supervise two store managers, who will, in turn, supervise lower-level staff. The description of each of the Store Managers' duties indicate that they allocate some time to managing their individual stores and some time to supervising the individual stores' staff. However, as discussed there are inconsistencies in the record regarding the Petitioner's employment of the stores' staff. For example, the [REDACTED] store manager is claimed to receive an annual salary of \$35,000 but the Petitioner was paying her less than half of that salary at the time of filing and the record contains no evidence of her continued employment with the company as of the date of the RFE response. Moreover, the sales associates were part-time workers, not salaried employees as claimed, and the record reflects no payments to them after April 2014. Even with a full-time manager and two part-time sales associates, it is unclear how the store manager would act primarily as a supervisor given the typical operating hours of a convenience store. It is more likely than not that all three employees would need to perform sales associate duties during their work hours in order for the store to be minimally staffed and open for business.

Similarly, there is inconsistent evidence in the record regarding the Petitioner's employment of the store manager for the [REDACTED] location, and at least three of that store's employees, including the subordinate sales and service managers, were not paid in the second quarter of 2014. In addition, there is no evidence of any wages paid to one of the lower-level employees assigned to that store. 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).

Therefore, although the Beneficiary is shown to have two subordinates with some supervisory duties, the inconsistencies in the record regarding the Petitioner's structure and staffing levels preclude a finding that the Beneficiary is and would be supervising subordinate managers under the extended petition, or that these would be his primary duties. The Petitioner has not demonstrated that the Beneficiary's duties will primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on providing the services of the company.

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, 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 is a function manager. The

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Petitioner did not describe an essential function to be managed by the Beneficiary or provide a breakdown of the Beneficiary's job duties to support such a claim.

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. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial.

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. 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.

The Petitioner asserts that the Beneficiary will be an executive; however, the Petitioner has not demonstrated that the Beneficiary's actual duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, the Petitioner has submitted inconsistent duties for the Beneficiary's position of General Manager, which raises questions as to his actual daily routine and who runs the day-to-day operations of the business. 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. at 591-92.

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 § 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*

(b)(6)

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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).

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).¹ The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The Petitioner states that it operates one convenience store and one auto lube business with a total of seven employees at the time of filing and nine employees at the time it responded to the RFE. However, it twice provided the same organizational chart showing ten employees, while its payroll records show that the Petitioner employed as few as three workers while the petition was pending. The record does not support a finding that either store is adequately staffed to relieve the Beneficiary from performing day-to-day routine tasks associated with operating each of the businesses. For example, the convenience store is likely open seven days per week and had only two part-time sales associates and a manager at the time of filing. Given that the Beneficiary works at this location, it is more likely than not that he is required to fill in for the manager and sales associates in order to keep it staffed during its operating hours. Similarly, at least four of the [REDACTED] employees depicted on the organizational chart were no longer with the company as of April 2014 when the petition was filed. In the instant matter, the Petitioner has not reached the point that it can employ the Beneficiary in a predominantly managerial or executive position.

Finally, we acknowledge the Petitioner's submission of documentation showing its purchase of a third retail location in July 2014. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

¹ 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).

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Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity, or that the Petitioner has grown to the point where it can support an employee in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

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

As noted, on the Form I-129, the Petitioner indicated that it is a subsidiary of the Beneficiary’s foreign employer, [REDACTED]. Where asked to explain the company stock ownership and managerial control of each company, the Petitioner stated, “Petitioner is 100% owned by [the foreign entity].”

Throughout the record, the Petitioner claims it is wholly owned by the foreign entity; however, the record contains contradictory and inconsistent evidence as to the Petitioner’s actual ownership.

In support of the petition, the Petitioner submitted its corporate documents indicating that it is authorized to issue 100,000 shares of stock at “no par value” and listed the foreign entity as owner of 100 shares, or 100% of its issued shares. The Petitioner also submitted its Share Certificate number one, dated October 1, 2012, issuing 100 shares to the foreign entity, listed as [REDACTED] [sic].”

In support of the petition, the Petitioner submitted copies of its 2013 IRS Form 1120, U.S. Corporation Income Tax Return. The 2013 Form 1120 at Schedule K, which includes questions related to the petitioner’s ownership and control, are marked “no” at question 7 which asks, “[a]t any time during the tax year, did one foreign person own, directly or indirectly, at least 25% of **(a)** the total voting power of all classes of the corporation’s stock entitled to vote or **(b)** the total value of all classes of the corporation’s stock?”

In response to the RFE, the Petitioner submitted copies of its 2012 IRS Form 1120, reflecting the same response at Schedule K, indicating that a foreign person does not own at least 25% of the petitioning U.S. company.

The Petitioner also submitted a letter from [REDACTED] of [REDACTED] in [REDACTED] Georgia, dated July 22, 2014. The letter references the requirements for filing an IRS Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign

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Corporation Engaged in a U.S. Trade or Business, and states that the Petitioner is not required to do so. The letter further states that the Petitioner is 100% owned by a foreign person.

In the instant matter, the record does not clearly demonstrate the actual ownership of the petitioning U.S. company, as some evidence reflects that the foreign entity is the majority owner, while the Petitioner's tax documents show that a foreign person does not own at least 25% of its U.S. company. 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 (BIA 1988).

Based on the inconsistencies discussed above, the Petitioner has not established it has a qualifying relationship with the Beneficiary's foreign employer. For this additional reason, the petition cannot be approved.

An application or petition that does not comply with the technical requirements of the law may be denied by this office 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 that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-, Inc.*, ID# 13659 (AAO Oct. 27, 2015)