



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

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

MATTER OF U-T-S- INC.

DATE: FEB. 23, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a tattoo supply, import-export, and freight forwarding company, seeks to extend the Beneficiary's temporary employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition, concluding that the evidence of record did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the evidence of record is sufficient to establish that the Beneficiary will be employed in a qualifying executive capacity and that he has sufficient subordinate staff to perform the day-to-day operational activities of the business.

Upon *de novo* review, we will dismiss 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, 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.
- (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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a “new office” petition must submit 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.

II. MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue before us is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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;

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- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term “executive capacity” as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (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.

A. Facts

The Petitioner filed the Form I-129 on November 30, 2014. The record shows that the Beneficiary was previously granted one year in L-1A status in order open the Petitioner’s new office in Florida as its general manager. The Petitioner states that it is a subsidiary of [REDACTED] the Beneficiary’s former employer located in Venezuela. The Petitioner reported \$360,878 in sales for 2013 and had five employees at the time of filing.

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In a support letter dated October 17, 2014, the Petitioner stated that it will “engage in the business of aiding the parent company in the Distribution and act as Purchasing Agent” for tattoo supplies and equipment, make-up and other cosmetology supplies. The Petitioner further stated that it had created “a special division” engaged in freight forwarding services and provided evidence that it had registered [REDACTED] as a fictitious name with the Florida Department of State. The Petitioner explained that it seeks “to become a one stop shop for import and export tattoo equipment and delivery services to the United States and Latin America” and to “provide reliable and affordable first class shipping and freight services to consumers.”

The Petitioner stated that it requires the Beneficiary to act as “Division Manager . . . in order to direct, manage, and coordinate activities of the Sales & Marketing Department in the United States to assure the continued success of the company.” The Petitioner explained that it was established in 2008 and that “during the first 5 years of operation, we dedicated our market strategies and handled costs in a minimum level, in order to establish the profitability of our business.” The Petitioner explained that the Beneficiary “supervised operations from Venezuela” until November 2013 when he was granted a one-year L-1A visa.

The Petitioner described the Beneficiary’s duties in the United States as follows:

The position being offered to [the Beneficiary] in the United States with [the Petitioner] in our office of [REDACTED] Florida is of General Manager; he will take control of all management, finances and budgeting for the expansion of the business. He shall be empowered to make critical directions on spending and expanding (with emphasis in Marketing). We expected [the Beneficiary] will orient and be responsible for organizing, direct and developing [the Petitioner]. [The Beneficiary] will focus in National and International management not just from the [REDACTED] Florida, but also for Venezuela. He will also formulate strategies and policies of how received new clients and partners. [The Beneficiary will] continue travel to China, where [we] do commercial business. . . . [The Beneficiary] will also be focused in managing policy development safely, employee relations and performance measures considering [*sic*]. Also, ensuring compliance with standards for cost control, waste reduction, quality, and balancing work capacity for distribution in the United States and abroad. He will provide all required supervision work for logistic department of our main office in Venezuela in the future to subsidiary office for the export all the order; he will review our Logistic and Purchasing Coordinating the preparation all the export.

In addition, the Petitioner indicated that the Beneficiary would: be responsible for “planning, developing and establishing policies and objectives,” “supervise and direct the activities of subordinate managers,” “coordinate functions and operations,” “direct all marketing, sales, and fiscal policies,” “supervise the compilation of financial data,” “execute contracts,” “plan and direct public relations policies,” “devise strategies and formulate policies,” “manage all aspects of the company, including sales, marketing, developing of new product lines and maintain the budget,” “formulate

sales goals and policies,” “establish pricing and mark up policies,” and “devise strategies and formulate policies.”

Furthermore, the Petitioner provided a duty description for the Beneficiary indicating that he allocates his time as follows during a 40 hour workweek:

- 15% Direct and coordinate the organization’s financial and budget activities to fund operations, maximize investments, and increase efficiency.
- 15% Negotiate or approve contracts and agreements with suppliers, distributors, federal and states agencies and other organizational entities.
- 15% Review reports submitted by managerial staff to recommend approval or suggest changes.
- 15% Appoint department heads or managers and assign or delegate responsibilities to them.
- 12% Confer with President of Parent Company [the foreign employer] and managerial staff of [the Petitioner] to discuss issues, coordinate activities, and resolve problems.
- 8% Analyze operations to evaluate performance of the company and its staff in meeting objectives, and to determine areas of potential cost reduction, program involvement, or policy change.
- 5% Direct, plan, and implement policies, objectives and activities of [the Petitioner] to ensure continuing operation to maximize returns on investments and to increase productivity.
- 5% Manage the dependencies within the company plans and identifies risks in advance, taking appropriate action to mitigate those risks.
- 5% Direct and coordinate the activities concerned with services, pricing, sales, marketing or distribution the company products.
- 5% Direct human resources activities, including the approval of human resources plans and activities, the selection of high-level staff, and establishment and organization of major departments.

Within each duty category above, the Petitioner listed additional responsibilities, stating that the Beneficiary “exercises budgetary authority on the strategic plans, contracts (internal and third party), business financial and account expenditures,” oversees “commercial activities involved with selection, purchase and cost management of all the software and materials used,” negotiates “global-scale purchase contracts with key suppliers,” “approves recommendations from managerial staff for capital growth plans,” coordinates “agendas in conjunction with Services and Sales Leadership Team objectives,” “defines scope and direction of Leadership Teams,” “communicates marketing and services objectives to the Leadership Teams,” and ensures “that the appropriate policies and processes are in place.”

The Petitioner submitted an organizational chart reflecting that the Beneficiary directly supervises an operation manager, a sales and marketing manager, and a logistics and cargo manager. The chart depicts a customer services employee who reports to the sales and marketing manager. Finally, the

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chart shows vacancies for an administrative assistant who will report to the operation manager, a sales and cargo specialist who will report to the sales and marketing manager, and warehouse and staff positions that will report to the logistics and cargo manager. The Petitioner provided corroborating evidence including payroll records and quarterly tax returns, showing that it employed all claimed subordinates at the time of filing.

In addition to the organizational chart, the Petitioner provided duty descriptions for the positions of sales and marketing manager, operation manager, and logistics and cargo specialist. The Petitioner also submitted evidence that the logistics and cargo manager has a “University Associate in Business Administration” qualification from a Venezuelan institution, and the operations manager has a bachelor’s degree in communications from a Peruvian institution.

The Petitioner submitted numerous invoices as evidence of its purchase and sale of tattoo supplies listing the Beneficiary as the primary contact for the company. The Petitioner provided a letter from a vendor [REDACTED] stating that it is represented by “[the Beneficiary], distributor and is authorized to register, import, and distribute our product and our colored gloves.” Likewise, a letter from a company called [REDACTED] indicated that the Beneficiary “is solely authorized to import, distribute, and sale our products, in the country of [REDACTED].” The Petitioner submitted a “Certificate of Free Sale” dated January 24, 2013 stating that [REDACTED] is engaged in the distribution of products which are sold in the United States of America and exported to various countries, including Venezuela, to individual [REDACTED] at [the foreign employer].

The Director issued a request for evidence (RFE) on February 13, 2015. The Director stated that it was unclear whether the Petitioner was asserting that the Beneficiary acts in a managerial or executive capacity and asked the Petitioner to clarify. The Director advised the Petitioner that it had not provided sufficient probative details concerning the Beneficiary’s duties to establish that he would primarily perform managerial or executive duties.

In response, the Petitioner stated that it had “great expectation to expand the sale of our equipment and accessories to other American markets,” and that the Beneficiary “would travel with more frequency to Venezuela and other countries, while maintaining his responsibility as General Manager of [the Petitioner].” Further, the Petitioner submitted a “Labor Certification” stating that the Beneficiary performs the following duties in the United States, which it characterized as 95% managerial in nature:

- 20% Manages the main connection between the foreign corporations and [the Petitioner] in order to determine the best equipments required by customers in Venezuela and other Latin American countries.
- 10% Communicate with suppliers and coordinate meetings in order to establish price agreements and times of shipping of all merchandise required by foreign customers.

- 10% Supervises the correct procedure developed by his employees to ship the merchandise to Latin America, due to he counts with a variety of freight forward companies operating from Florida to Latin America as well as shipments by air or sea, according to customers urgency and the prices offered.
- 5% Keep communications with the manager in the Venezuelan parent company to coordinate common responsibilities with the foreign directive.
- 5% Assists to meetings with major vendors two or three times a week. During these meetings, the vendors provide information about news in the related market and offered competitive prices to the company.
- 5% Approves new purchases and payments to vendors.
- 5% Makes a daily marketing analysis in order to increase the sales every year and share the ideas of the proposed goals to his subordinates. This daily work includes directing, handling, coordinating and motivating his employees to make additional efforts to reach the proposed goals for the end of the year.
- 15% Responsible for the overall performance of the corporation. Correct and implement the policies regarding the administration, commercialization, marketing, sales finance, personnel, and training services.
- 5% Meets frequently with subordinate executives to ensure that the commercial operations are implemented in accordance with these policies.
- 5% Retain overall accountability even though may delegate several responsibilities including the authority to oversee subordinate executives who direct the activities of the departments of the corporation, its policies on a day-to-day basis.
- 5% Reviews and approves to submit quarterly reports to update the company on new or ongoing activities and issues. He also submits, in a timely manner, all requested corporate paperwork, due to his responsible to ensure that all proper corporate status is maintained.
- 5% Represents and speaks on behalf of the corporation to the public and other organizations. He also attends all corporate meetings, and trainings.
- 5% Responsible to hire and fire employees, and supervise and coordinate the employees' jobs through the departments.

In addition, the Petitioner provided revised duty descriptions for each of the Beneficiary's direct subordinates. The Petitioner stated that the operation manager "prepares reports and presentations," performs "account and data retrieval," assists "the sales manager with editing new releases," works with "operation department to ensure effective service efforts," responds "to questions from managers, executives and clients/customers," executes "orders according to instructions of the Manager," and creates "proposals and send[s] to customers." Further, the Petitioner indicated that the sales and marketing manager "develops and implements strategies to maintain and/or expand sales," "maintains and expands relationships with clients," "prepares strategic account plans," advises customers on new products and service offerings, "expedites the resolution of customer problems/complaints," conducts technical/product demonstrations, and participates in trade shows. Lastly, the Petitioner explained that the cargo and logistic manager handles technical details relating to customs regulations and other international transportation documentation, deals with all "national and international import/export legislation," manages "Test & Control Campaigns," builds "relationships with Logistics mediators," and works "closely with package engineers to ensure the protection of freight in transportation."

The Director denied the petition on March 27, 2015, concluding that the Petitioner did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity. The Director noted that the Petitioner asserted that the Beneficiary oversees three supervisors, only one of which was stated to have a subordinate. Further, the Director found that there was insufficient evidence to establish that any of the Beneficiary's claimed subordinates perform supervisory or managerial duties.

On appeal, the Petitioner states that its response to the RFE did not properly emphasize that the Beneficiary acts in a qualifying executive capacity. The Petitioner asserts that the Beneficiary is primarily engaged in directing the management of the organization and setting its goals and policies and therefore qualifies as an executive. The Petitioner states that the Beneficiary oversees three managers, that he will "work to grow the reach of the business worldwide," and that he supervises a team of professional marketing and sales staff working for the foreign employer and Petitioner. The Petitioner states that the Beneficiary will continue to act in an executive capacity "preparing the business plan carrying out expansion ideas and identifying new areas where [the Petitioner's] services can be employed." The Petitioner indicates that the Beneficiary "will continue to exercise discretionary authority over day-to-day operations of the sales and marketing staff."

The Petitioner contends that the Director failed to fully account for the Beneficiary's managerial and executive tasks as described in the record. The Petitioner acknowledges that the Beneficiary's subordinates do not have subordinate personnel, but asserts that the organization is set for growth. The Petitioner states that the Director failed to recognize that a "growing business" may appear top heavy with managers who "are also working as front line personnel to get the operations off the ground." The Petitioner asserts that the evidence "overwhelmingly" establishes that the Beneficiary acts in an executive capacity and that he oversees an essential function of the company. The Petitioner contends that the Beneficiary's duties are "comprehensive" and reflect that he will

perform “higher level sales and marketing tasks.” Lastly, the Petitioner states that the Beneficiary also qualifies as a manager based on his supervision of professional subordinates.

B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the Petitioner has not established that the Beneficiary would 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 definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day 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”).

Here, the Petitioner provided two different duty descriptions for the Beneficiary, both of which were claimed to be comprehensive in that the Petitioner asserted that each set of duties would require 100% of the Beneficiary's time. For instance, in the duty description provided in response to the RFE, the Petitioner stated that the Beneficiary devotes twenty percent of his time to managing “the main connection between the foreign corporations and the [Petitioner] in order to determine the best equipments [*sic*] required by customers in Venezuela and others [*sic*] Latin American countries.” However, the Beneficiary's duty description provided at the time of filing did not mention this task and was notably not included amongst four main duties accounting for 60 percent of his time. Likewise, the Petitioner stated in response to the RFE that the Beneficiary spends 10 percent of his time communicating “with suppliers to coordinate meetings in order to establish price agreements and times of shipping of all merchandise,” but the Beneficiary's original duty description makes no mention of the Beneficiary coordinating shipping. The Petitioner stated at the time of filing that the Beneficiary would spend 15 percent of his time directing and coordinating the organization's financial and budget activities and another 15 percent reviewing reports submitted by his managerial staff, again, duties that are not specifically mentioned in his duty description provided in response to the RFE.

As such, the evidence indicates that the Petitioner has submitted conflicting duty descriptions thereby making it difficult to determine what the Beneficiary actually does on a day-to-day basis and how much of his time is spent on any given tasks. 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).

Further, we note that, despite the Petitioner's claim in response to the RFE that 95 percent of the Beneficiary's time is spent performing duties that are managerial, the listed duties suggest that the Beneficiary spends a significant amount of his time focused on the daily operational tasks of the business rather than performing qualifying managerial or executive tasks. For instance, as stated, the Petitioner indicated that the Beneficiary would devote 20 percent of his time to determining the best equipment required by customers, 10 percent of his time to communicating with suppliers on the timing of shipping, another 10 percent managing accounts with freight forwarding companies, 5 percent of his time in meetings with vendors, 5 percent of his time conducting a "daily market analysis," and 5 percent approving all purchases and payments to vendors. Overall, the duty description submitted in response to the RFE indicates that Beneficiary's spends more than half of his time performing non-managerial duties and is significantly involved in the day-to-day operations of the business. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* Section 101(a)(44) of the Act.

This conclusion is supported by numerous supplier invoices in the record for the purchase of tattoo supplies in the United States reflecting the Beneficiary as the primary contact. Although the Petitioner asserts that the Beneficiary delegates operational tasks to subordinates, none of the aforementioned invoices reflect the names of the Beneficiary's claimed managerial subordinates, and the Petitioner has not attributed duties related to the sourcing and purchasing of tattoo supplies to the Beneficiary's subordinates. In addition, the Petitioner submits vendor letters indicating that the Beneficiary has been given the right to sell certain products in the United States, yet these make no mention of the Petitioner or the foreign employer, suggesting further the Beneficiary's direct involvement in non-qualifying tasks. The Petitioner also provides no supporting evidence or documentation reflecting any other employees of the company, other than the Beneficiary, performing non-qualifying operational tasks.

The fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

Beyond the required description of the job duties, United States Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of

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the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The Petitioner has presented a shifting picture of its business operations that leaves question as to the actual goods and services it provides, and whether it has developed sufficiently after one year to support the Beneficiary in a qualifying managerial or executive capacity. First, the Petitioner states in its business plan, elsewhere in the on record, and on appeal, that it has a division, [REDACTED] established to operate as a freight forwarding business. However, while the record shows that the Petitioner registered a fictitious name for this line of business, the Petitioner provides no supporting evidence that it has engaged in a shipping and freight business, but only that it has purchased tattoo supplies and equipment in the United States for re-sale to domestic and international customers. If the Petitioner is in fact also doing business as a freight forwarder, then it is unclear how the activities of this separate line of business are allocated among the Petitioner's employees, including the Beneficiary.

The Petitioner states on appeal that its organizational structure is still "top heavy" after its first full year of operations, and it acknowledges that its claimed managers are still performing the work of "front line personnel" as of April 2015. However, 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 a 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.

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

The Petitioner has acknowledged that its managers are currently performing the work of "front-line workers" and the record reflects that the company has not hired any lower-level sales, warehouse, logistics, administrative or other operational staff. While the Petitioner claimed to have a lower-level customer service employee at the time of filing, it did not provide a description of her duties. Further, on appeal, the Petitioner states that the Beneficiary's subordinates "at this time do not have

any supervised personnel but the organizational structure is set up to allow for growth and these individuals will supervise new employees as they are hired for various positions.” 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). The Petitioner has not established that the Beneficiary was supervising a staff of subordinate managers or supervisors as of the date of filing.

The Petitioner also references on appeal that the Petitioner oversees professional subordinates and submits educational credentials. 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 Petitioner has not established that the Beneficiary qualifies as a personnel manager based on his supervision of professional subordinates. The Petitioner provided evidence of educational qualifications for the Beneficiary’s subordinates indicating they had earned foreign post-secondary degrees in engineering, communications and business. However, in determining whether a Beneficiary’s subordinates are professionals, we focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the Petitioner has acknowledged that its managers are currently performing the work of “front-line” personnel and has not established that a bachelor's degree is required for such work. As such, the Petitioner has not demonstrated that the Beneficiary acts as a personnel manager based on his supervision of professionals.

In addition, the Petitioner states on appeal that the Beneficiary oversees an essential function of the organization suggesting that he qualifies 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish 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.

In this matter, the Petitioner has not provided evidence that the Beneficiary manages an essential function. First, it is not sufficient to simply state that a Beneficiary oversees an essential function without explaining in detail what the essential function is. Here, the Petitioner has provided varying descriptions of the Beneficiary's duties in the United States and provided evidence suggesting that he has been, and will continue, to primarily perform operational duties. The Petitioner has not sufficiently articulated or documented the Beneficiary's qualifying duties in managing an essential function. Further, the preponderance of the evidence reflects that the Beneficiary is merely acting as a purchasing agent for the foreign employer in the United States. Although this may be deemed essential for the foreign employer, it also reflects that the Beneficiary is primarily engaged in the performance of non-qualifying operational duties rather than primarily managing an essential function.

Lastly, on appeal, the Petitioner contends that it mistakenly over emphasized the Beneficiary's managerial role in the United States and indicates that the Beneficiary acts in a qualifying executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex 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.*

For similar reasons, the Beneficiary does not qualify as an executive consistent with the statutory definition. Again, the Petitioner has submitted conflicting duty descriptions that leave question as to his actual day-to-day tasks. The Beneficiary's duty description provided in response to the RFE, along with numerous documents on the record, suggest that the he is significantly involved in the performance of non-qualifying operational duties and not primarily focused on the broad goals and policies of the organization. In contrast, the Petitioner has not provided any evidence to indicate that the Beneficiary is delegating these non-qualifying tasks to his claimed managerial subordinates. Indeed, the transactional documentation submitted on the record suggests the opposite, reflecting that the Beneficiary has been involved in nearly every transaction the company has made. As such, the Petitioner has not established that the Beneficiary will be employed in a qualifying executive capacity.

Again, we do not doubt that the Beneficiary exercises the appropriate level of authority over the organization and is responsible for its overall direction. However, the record does not show that the petitioning company has grown to the point during its initial full year of operations where it can

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support a position in which the Beneficiary is primarily engaged in qualifying managerial or executive duties. For this reason, the appeal will be dismissed.

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of U-T-S- Inc.*, ID# 15723 (AAO Feb. 23, 2016)