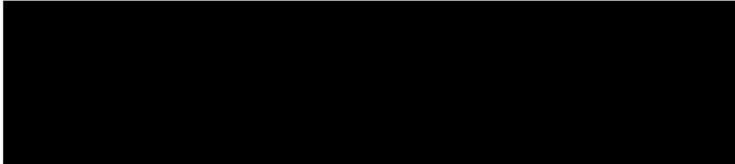


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D-7

File: WAC 06 099 50031 Office: CALIFORNIA SERVICE CENTER Date: **SEP 12 2007**

IN RE: Petitioner:  
Beneficiary:



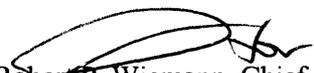
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on May 3, 2007, the AAO rejected the appeal as untimely. On June 4, 2007, the petitioner filed a motion to reconsider the AAO's decision. The motion will be granted and the AAO will reconsider its decision. In lieu of addressing the timeliness of the underlying appeal, the AAO will address the merits of the appeal. Upon a full review of the record, the AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its vice president 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 is a corporation organized under the laws of the State of Delaware and is allegedly in the business of selling and distributing clothing. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary will primarily perform qualifying duties. Counsel also submits a brief and additional evidence, including documents addressing the alleged employment of subordinate workers and letters from third parties attesting to the beneficiary's proposed executive employment.

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

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

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

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

The petitioner does not clarify in the initial petition whether the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. On appeal, counsel submits letters from third parties addressing the beneficiary's claimed employment in an "executive" capacity. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed either as an executive *or* a manager and will consider both classifications.

The petitioner described the beneficiary's proposed job duties in the United States in the Form I-129 as follows:

[F]ully responsible for directing petitioning U.S. entity, through subordinate personnel; the beneficiary would be responsible for overall U.S. sales and marketing operations of the products, managing the planning and implementation of the overall sales strategies nationwide, overseeing the marketing and promotional activities nationwide. Oversight of customs and regulatory compliance; and oversight of all accounting, banking and financial matters.

The petitioner also submitted an organizational chart for the United States entity. The chart shows the beneficiary reporting to the petitioner's president and directly supervising a warehouse manager, an accountant, an office manager, a delivery incharge employee, a sales representative, and a personal business banker. The chart does not reveal the identities of the warehouse manager and the sales representative. Also, the unidentified sales representative is portrayed as supervising two independent contractors.

Finally, the petitioner submitted its California wage reports. The most recent wage report submitted is for the

third quarter of 2005. The instant petition was filed on February 7, 2006. This wage report only lists the president, the office manager, and the delivery incharge worker as employees. The other workers identified in the organizational chart are not listed in the most recent wage report submitted for the petitioner.

On February 20, 2006, the director requested additional evidence. The director requested, *inter alia*, a list of all employees in the United States; a more detailed organizational chart for the petitioner which identifies all employees, a description of the employees' job duties, educational levels, and immigration status in the United States; a more recent wage report; and a more detailed description of the beneficiary's proposed duties in the United States which includes a breakdown of how much time the beneficiary will devote to each duty.

In response, counsel submitted a letter dated May 8, 2006 in which she describes the beneficiary's proposed duties as follows:

Through the U.S. subsidiary, under the guidance of the [beneficiary], the company is planning to acquire a larger share of the U.S. market than the one it had, before it had established a physical presence in the United States. During his assignment in the U.S., [the beneficiary] will essentially perform the same duties he performed in the Philippines and will maintain broad discretion over the manner in which his duties are carried out. He will oversee the managing, developing and directing of all phases of the establishment and expansion of the business operations of the U.S. subsidiary, and will direct its operations in analyzing market trends and economic conditions to forecast potential purchases and sales, conduct the general administration affairs of the company in the marketing the products of the company, and will engage in long-range planning and identifying new business opportunities and new international markets. He will direct all business operations through the activities of the company's managers and professionals; he will be overseeing and in [sic] directing all contract negotiations and the implementation of all company policies; and will ultimately [be] responsible for all hiring and firing; for making executive decisions on the day[-]to[-]day operations; as well as having oversight on all accounting, customs, banking and financial matters.

[The b]eneficiary will oversee and direct all phases of the establishment and expansion of the activities of [the petitioning organization] through the United States and Canada. [The beneficiary] will oversee and direct the firm establishment, development and expansion of the U.S. subsidiary, on the East Coast of Canada and the U.S., by establishing a new branch in Florida, which, after its establishment, will be the Regional Office for the East Coast of the U.S. and Canada. [The beneficiary] will also oversee efforts to increase its sales to Puerto Rico, where the company already has a few clients, and to establish new retail boutiques, the Carribean [sic] which are situated on the most popular tourist routes.

As stated above, [the b]eneficiary will have broad latitude and discretion in the performance of his duties of planning, formulating, and implementing the company's administrative and operational policies and procedures; and of establishing operational goals and policies; of analyzing market trends and economic conditions to forecast potential purchases and sales; he

will be responsible for the general administration of the affairs and marketing the service activities of the company. He will be responsible for long-range planning and identifying business opportunities and international markets; will direct the business activities through the work of managers and professionals; [w]ill direct managerial personnel in the negotiation of contracts and implementation of all policies; [w]ill be responsible for hiring and firing, making executive decisions on the day[-]to[-]day operations, and will have oversight of all accounting, customers, banking and financial matters; and hiring and firing of all employees and contracting independent sales, marketing, import managers, transportation managers, warehousing managers and advertising companies, etc. etc. etc.. [sic] Reports only to the President of the [p]etitioner of the foreign, Philippines parent company.

Counsel also indicated in the May 8, 2006 letter that it is "not feasible" to provide a breakdown of how much time the beneficiary will devote to each of his many duties because of the changing needs of the business.

The petitioner also submitted a materially different organizational chart for the United States operation. The new organizational chart now specifically identifies the "warehouse manager" as [REDACTED]. The new chart also identifies the "accountant" as [REDACTED] and indicates that this worker supervises [REDACTED] the individual identified as the "accountant" in the original organizational chart. [REDACTED] is also described as an independent contractor. Finally, the chart adds a bookkeeper and indicates that this worker is supervised by the accountant, [REDACTED].

Furthermore, the petitioner submitted a wage report for the fourth quarter of 2005. Once again, this wage report only lists the president, the office manager, and the delivery incharge worker as employees. The other workers identified in the organizational chart are not listed in this wage report. While the petitioner did submit Forms I-9 and W-4 for the warehouse manager, the accountant, and the bookkeeper as evidence of their employment, these documents all indicate that these workers were hired after the filing of the instant petition on February 7, 2006. Therefore, the record indicates that the petitioner employed only the president, the office manager, and the delivery incharge worker as of the petition's filing date. While the petitioner described the "sales representatives" as independent contractors, which should not be listed as employees in the wage reports, the petitioner failed to establish when the representatives began working for the petitioner, how they are compensated, or how much time the representatives spend performing sales tasks for the petitioner.

Finally, the petitioner submitted job descriptions for the subordinate workers. Both the office manager and the delivery incharge worker are described as performing the tasks necessary to produce a product or to provide a service, e.g., clerical and delivery tasks.

On May 23, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary will primarily perform qualifying duties. Counsel also submits a brief and additional evidence, including documents addressing the alleged employment of subordinate workers and letters from third parties attesting to the beneficiary's proposed

executive employment.

Upon review, the petitioner's assertions are not persuasive.

Title 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 Citizenship and Immigration Services (CIS) 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 even if the petitioner has plans to expand its business and to hire additional employees. 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. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position and is ineligible for an extension.

When examining the executive or managerial capacity of the beneficiary, the AAO 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 will be either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary will primarily be employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Upon a review of the job descriptions provided by the petitioner, the petitioner's descriptions of the beneficiary's job duties have failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided vague and nonspecific descriptions of the beneficiary's duties that fail to demonstrate what the beneficiary will do on a day-to-day basis. For example, the beneficiary is described as "directing" the petitioner, as engaging in "long-range planning and identifying business opportunities and international markets," and as "planning, formulating, and implementing the company's administrative and operational policies and procedures." However, the petitioner fails to describe these policies and procedures or to explain what, exactly, the beneficiary will do in "directing" the petitioner or in engaging in long-range planning. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes overly broad duties does not establish that the beneficiary will actually perform managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the many duties ascribed to him even though this was requested by the director. This is particularly important in this matter because many of the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the beneficiary is generally described as directing and being responsible for the marketing of the petitioner's products as well as the "expansion" of the petitioner's business activities. He will also "direct" the petitioner's operations and oversee "contract negotiations and the implementation of all company policies." However, duties involving marketing, business expansion, and negotiating contracts constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the organizational chart and job descriptions for the subordinate employees fail to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to both the marketing duties and the management and expansion of the business in general, it must be concluded that he will perform these tasks. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager or executive. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As explained above, the record indicates that the petitioner employed a president, an office manager, and a delivery incharge worker as of the petition's filing date. The petitioner's claimed employment of a warehouse manager, bookkeeper, and accountant after the filing of the petition is not relevant to these proceedings. 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. Since the beneficiary will report to the president, only the office manager and the delivery incharge worker would be available to assist the petitioner in performing the many duties ascribed to him. As these two workers are described as performing either basic clerical tasks or processing deliveries and shipments, the record is not persuasive in establishing that anyone other than the beneficiary would be available to perform the many non-qualifying tasks related to his marketing, business expansion, and general administration duties. Furthermore, while the petitioner asserts that it employs a variety of independent contractors including sales representatives, a personal business banker, and an accountant, it is unclear how these workers would relieve the beneficiary of the need to perform the non-qualifying tasks related to his duties. Not only do the descriptions of these contractors fail to list the non-qualifying tasks in question, the petitioner has failed to establish when the contractors began working for the petitioner, how they are compensated, or how much time the contractors spend performing services for the petitioner. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Overall, based on the evidence presented, it is more likely than not that both the beneficiary and his staff will primarily perform non-qualifying tasks. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9<sup>th</sup> Cir. 2006).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate staff members, it appears that the beneficiary will supervise a staff of two employees and, indirectly, the provision of certain specialized services by four contracted service providers. However, the petitioner has not established that the two subordinate employees are primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these employees are performing the tasks necessary to produce a product or to provide a service, e.g., clerical and deliveries tasks. Also, the supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. See section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that only the management of *employees*, not independent contractors, may be considered to be a qualifying duty for purposes of this visa classification. Finally, as explained above, the petitioner's employment of subordinate workers after the filing of the instant petition is not relevant to these proceedings. 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.

In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not establish the educational background or skill level required to perform the duties of the two subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.<sup>1</sup> The petitioner also did not reveal the immigration status of the petitioner's other employees even though this evidence was requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>2</sup>

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<sup>1</sup>In evaluating whether the beneficiary manages professional employees, the AAO 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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

<sup>2</sup>While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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

Similarly, the petitioner has failed to establish that the beneficiary will act in an "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. 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 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 the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will perform the tasks necessary to produce a product or to provide a service and/or will act as a first-line supervisor. Finally, given that the beneficiary will report to the president of the petitioner and that the president is described as overseeing the petitioner's "business planning and expansion efforts," it is not credible that the beneficiary, the proposed vice president, would have any realistic authority to direct the management, or establish the goals and policies, of the organization.

It is noted that, on appeal, counsel submits letters from third parties concluding that the beneficiary will be employed in an executive capacity. Upon review, the AAO does not find these letters persuasive in establishing that the beneficiary will be employed primarily in an "executive" capacity in the United States. As explained above, the record does not establish who, exactly, will perform the non-qualifying tasks inherent to the beneficiary's many proposed "executive" duties. In the absence of a subordinate staff capable of

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101(a)(44)(A)(ii) of the Act. 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(1)(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 will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line manager of non-professional employees and/or will be engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

relieving the beneficiary of the need to perform non-qualifying tasks, it must be concluded that the beneficiary will perform these tasks even if the beneficiary otherwise has "executive level responsibility[ies]." Furthermore, while the beneficiary's job description may vaguely outline the duties of an executive level employee, a job description which reiterates the regulations and provides few details regarding what the beneficiary will do on a day-to-day basis is not probative of the beneficiary actually performing qualifying duties. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is appropriate for CIS 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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, it is noted that the instant petition was filed to extend a previously approved petition. The previously approved petition was approved from May 3, 2004 until May 3, 2005. The instant extension petition was filed on February 7, 2006. In that petition, the petitioner clearly indicates that its basis for the classification sought is the "continuation of previously approved employment without change with the same employer." The petition also seeks to "extend the stay of [the beneficiary] since [he] now hold[s] this status." Title 8 C.F.R. § 214.2(l)(14)(i) clearly states that an extension petition may only be filed if the validity of the original petition has not expired. In this case, since the validity of the previous petition expired on May 3, 2005, the instant extension petition filed on February 7, 2006 must be denied as untimely. Therefore, the AAO will dismiss the appeal for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes

of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired.

In this matter, the petitioner, a corporation, asserts that it is 51% owned by the beneficiary's foreign employer and 49% owned by the petitioner's president, [REDACTED]. In support of this assertion, the petitioner submitted a stock certificate, corporate minutes, a tax return, and organizational documents. However, the petitioner's 2004 IRS Form 1120 fails to attribute any value to its capital stock. Also, the lease submitted by the petitioner for its California business premises indicates that the lessee is "[REDACTED]" [REDACTED].

On February 20, 2006, the director requested additional evidence. The director requested evidence that the foreign entity purchased its shares in the United States entity.

In response, counsel explained in the letter dated May 8, 2006 that "[t]he shares of the U.S. company were purchased with the inventory of merchandise, which was shipped, on several different dates, by [the foreign employer] and was sold by [the petitioner]. The monies from the sales transactions were deposited into the bank account of [the petitioner]." Counsel further explains that these deposits totaled \$22,285.00. However, the bank documents indicate that most of these funds originated with the petitioner's president and 49% stockholder, [REDACTED]. Moreover, the record is devoid of any evidence establishing what "inventory" or "merchandise" was transferred by the foreign entity or when this claimed transfer occurred. Finally, while counsel asserts that [REDACTED] made payments to the petitioner as repayment of a debt he owed to the foreign entity, counsel provides no evidence establishing the size or nature of this alleged debt. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Upon review, the AAO concludes that the petitioner has not established that it has a qualifying relationship with the foreign entity. The petitioner has failed to credibly establish that the foreign entity has provided consideration in exchange for the issuance of 51% of the petitioner's stock. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). To the contrary, the record only indicates that [REDACTED] the claimed 49% stockholder and president of the petitioner, provided funds to the petitioner. Furthermore, given the lease submitted by the petitioner, the record indicates that [REDACTED] is actually doing business as the petitioner.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity,

