

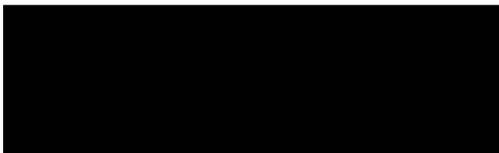
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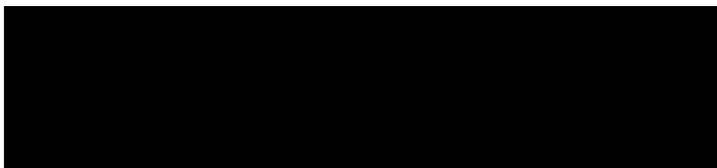
File: SRC 05 241 50753 Office: TEXAS SERVICE CENTER Date: FEB 28 2008

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, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its general manager 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 Florida and allegedly operates a convenience store.<sup>1</sup> The beneficiary was 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 did not 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 in failing to consider that it was delayed in establishing its United States enterprise due to the actions of an allegedly unscrupulous immigration consultant. Specifically, counsel argues that it is equitably entitled to a petition extension in order to further establish its "new office" because its alleged immigration consultant failed to timely deliver a copy of the "new office" approval notice (SRC 04 192 51497) thus denying the petitioner the opportunity to grow its business to a sufficient size by the end of its one-year "new office" period.

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

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<sup>1</sup>It must be noted that, according to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 14, 2007. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. See § 607.1421 Fla. Stat. (2006). If this appeal were not being dismissed for the reasons set forth herein, this would also call into question the petitioner's continued eligibility for the benefit sought.

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.

A threshold issue in the present matter is whether the petitioner is excused from establishing that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity due to the alleged actions of the petitioner's unlicensed immigration consultant.

The petitioner describes its failure to fully establish its business, and attempts to connect this failure to the alleged involvement of an unauthorized and unscrupulous immigration consultant, in a letter dated December 20, 2005, in an affidavit signed by the beneficiary dated December 19, 2005, and in an affidavit signed by Shayne J. Epstein, Esquire, dated December 12, 2005. In these documents, the petitioner explains that the beneficiary, who was in the United States as a B-2 visitor for pleasure, consulted Attorney Epstein in early 2004 regarding the filing of an L-1A petition. However, instead of hiring ██████████ the beneficiary apparently hired a paralegal employed in ██████████'s office, ██████████, for a "substantially reduced fee." ██████████ allegedly submitted the petitioner's L-1A "new office" petition in July 2004. This "new office" petition (SRC 04 192 51497) was approved from September 2, 2004 until September 2, 2005. The petitioner

alleges that it and/or the beneficiary were not notified by [REDACTED] of the approval of the "new office" petition until April 2005, over seven months after its approval by Citizenship and Immigration Services (CIS). The petitioner further alleges that, due to the actions of [REDACTED], it was unable to secure a copy of the I-797 approval notice until June 2005. While the petitioner asserts that [REDACTED] refused to immediately provide the beneficiary with a copy of the Form I-797 because of a fee dispute, the petitioner offers no explanation for why [REDACTED] failed to inform the beneficiary of the approval of the "new office" petition until April 2005. Finally, the petitioner asserts that it began operating a convenience store in June 2005.

The petitioner also submitted a copy of its articles of incorporation filed with the State of Florida on May 11, 2004. The articles indicate that the alleged immigration consultant, [REDACTED], was the president of the petitioner at the time the "new office" petition was filed. The beneficiary is listed as the incorporator. Also, the corporation's registered address, principal place of business, and mailing address is 530 East Sample Road, Pompano Beach, FL 33064. This is the same address to which CIS sent the Form I-797 approving the "new office" petition in September 2004 (SRC 04 192 51497).

On April 21, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director also noted that, while CIS "sympathizes with the plight of the beneficiary in securing [the Form] I-797," there is no regulatory provision which permits the extension of a "new office" petition in the absence of a petitioner establishing that a beneficiary will perform qualifying duties. The one-year start-up period may not be extended even if the establishment of the enterprise is delayed by unforeseen circumstances, including the actions of an unscrupulous immigration consultant.

On appeal, counsel to the petitioner asserts that the director erred in failing to consider that it was delayed in establishing its United States enterprise due to the actions of an allegedly unscrupulous immigration consultant. Specifically, counsel argues that it is equitably entitled to a petition extension in order to further establish its "new office" for the reasons set forth in the instant petition.

Upon review, counsel'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. As correctly noted by the director, there is no provision in 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. There is no provision which will excuse a petitioner seeking a "new office" extension from establishing the criteria set forth in 8 C.F.R. §§ 214.2(l)(3) and (14)(ii) because of unforeseen circumstances such as a natural disaster, a family emergency, or the unscrupulous actions of an unlicensed immigration consultant. Accordingly, in this matter, if the petitioner is unable to establish that the petitioner has grown to the point that the beneficiary will perform qualifying duties, it is ineligible for an extension.

Counsel argues, however, that CIS should not consider the petitioner's one-year "new office" start-up phase to have commenced running until after the petitioner received notice from its alleged immigration consultant of the approval of the "new office" petition. As explained above, while the "new office" petition was approved

on September 2, 2004, the petitioner asserts that it did not learn of its approval until April 2005 because its consultant failed to communicate this fact. Therefore, according to counsel, CIS should equitably toll the running of the one-year "new office" period until the first anniversary of the petitioner learning of the approval of its "new office" petition.<sup>2</sup>

Counsel's argument, however, is not persuasive for several reasons. First, a majority of circuits have held that attorney error is generally not a basis for equitable tolling. The principal material error in the present matter appears to be the immigration consultant's failure to inform the beneficiary of the approval of the "new office" petition for more than seven months. This appears to be insufficient under the case law. *See, e.g., Merritt v. Blaine*, 326 F.3d 157, 169 (3d Cir. 2003); *United States v. Martin*, 408 F.3d 1089, 1093 (8<sup>th</sup> Cir. 2005); *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9<sup>th</sup> Cir. 2001); *Gilbert v. Sec. of Health and Human Servs.*, 51 F.3d 254, 257 (Fed. Cir. 1995). The fact that Mr. Mohsen is unlicensed does not appear relevant to the analysis.<sup>3</sup>

Second, counsel has not established that the petitioner was in fact wrongly "represented" by an unlicensed immigration consultant. It must be emphasized that the beneficiary is not a recognized party in this proceeding. *See* 8 C.F.R. §§ 103.2(a)(3) and 103.3(a)(1)(iii). The petitioner, and affected party, in this matter is a Florida corporation. As explained above, the record indicates that the petitioner's registered address, principal place of business, and mailing address at the time the "new office" petition was filed in 2004 was 530 East Sample Road, Pompano Beach, FL 33064. This is the same address to which CIS sent the Form I-797 indicating the approval of the "new office" petition. Furthermore, the petitioner's articles of incorporation indicate that ██████, the alleged immigration consultant, was actually the president of the petitioner at the time the petition was filed. The beneficiary, as the incorporator, was responsible for the delivery of the articles to the Florida Department of State under Florida law. *See* § 607.0201 Fla. Stat. (2007). Therefore, the record clearly indicates that the petitioner's president was given notice by mail of the approval of the "new office" petition at the petitioner's principal place of business. The fact that the petitioner may have failed to act upon this actual knowledge will not support a claim of ineffective assistance of counsel. The petitioner's

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<sup>2</sup>It is not clear whether counsel is asserting that the one-year period should commence in April 2005 when the petitioner allegedly learned of the approval of the "new office" petition or June 2005 when it physically received a copy of the Form I-797 Approval Notice. However, because counsel's argument is not persuasive regardless of the dates involved, this issue need not be resolved by the AAO.

<sup>3</sup>It must be noted that the AAO, like the Board of Immigration Appeals, is without authority to grant equitable relief. *See generally Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Equitable relief is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, even if counsel's equitable tolling argument had merit, the AAO has no authority to grant this equitable relief.

internal failure to communicate or poor choices in corporate officers may not be used to justify the award of equitable relief in this matter, even assuming the AAO had the authority to grant such relief.<sup>4</sup>

Third, counsel has not sufficiently established why [redacted] actions (or inaction) resulted in the petitioner's failure to grow its business to a sufficient size to support a managerial or executive position. The petitioner states simply that it was "unable to commence operations for the L-1 enterprise" until after the beneficiary learned of the approval of the "new office" petition in the spring of 2005. However, as indicated above, the petitioner, for all intents and purposes, did have knowledge of the approval of the petition in September 2004. Regardless, even assuming that the person or persons principally responsible for the establishment and growth of the "new office" did not have actual notice of the approval of the petition until April 2005, it is unclear why, exactly, this frustrated the establishment and growth of the "new office." In order to be eligible for approval as a "new office," the petitioner should have already secured sufficient physical premises to house the proposed enterprise and should have already received a sufficient investment to commence doing business in the United States. However, even though the petitioner's enterprise should have been poised to immediately commence business operations in July 2004 when the "new office" petition was filed, and the beneficiary was already in the United States as a B-2 visitor for pleasure, it appears from the record that the petitioner did not take steps to establish the United States operation until after the beneficiary learned of the approval of the "new office" petition. The petitioner failed to explain why, exactly, it failed to commence doing business of any sort in 2004 or how [redacted]'s activities, or failure to act, prohibited the "new office" from doing business. 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 (Reg. Comm. 1972)).

Accordingly, as the petitioner was not excused from establishing that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity due to the alleged actions or inactions of the petitioner's unlicensed immigration consultant, the petitioner must establish that the beneficiary will perform qualifying duties to be eligible for an extension of the "new office" 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;
- (ii) supervises and controls the work of other supervisory, professional, or managerial

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<sup>4</sup>Furthermore, even assuming that [redacted] could be considered to have been the petitioner's legal, albeit unlicensed, representative rather than a corporate officer, the petitioner did not properly articulate a claim for ineffective assistance of counsel. A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. See *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988). In this matter, the record does not indicate that a complaint was filed against [redacted] with any authority and, if not, why not. Accordingly, a claim for ineffective assistance of counsel has not been stated.

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 primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. 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. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner describes the beneficiary's proposed duties in a letter dated August 31, 2005 as follows:

The responsibilities of the [beneficiary] will include overseeing the management of all business and financial operations; overseeing the purchasing [of] inventory items; overseeing staffing decisions[;] and the daily management of the company. [The] General Manager will be responsible for the further expansion of [the petitioner]. The General Manager will be responsible for the hiring of all managerial personnel, overseeing Managers for each store, and will have discretionary authority over all business operations.

The petitioner also indicates that it has hired two cashiers to assist the beneficiary in operating the single-

location convenience store and that it has recently acquired a second location. However, it appears that the second location is not yet in operation.

On September 28, 2005 and February 7, 2006, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's duties, copies of the petitioner's quarterly wage reports, a copy of the petitioner's organizational chart, and a description of the duties of the subordinate employees.

In response to the September 28, 2005 request, the petitioner submitted a letter dated December 20, 2005 in which it further describes the beneficiary's duties as follows:

1. Confer with store manager to direct and coordinate activities of business – 20%.
2. Oversee selection of inventory, pricing, and selection of distributors – 15%.
3. Confer with store manager to evaluate employee performance, salaries and job performance – 10%.
4. In coordination with [an] accountant, review financial records and activity reports, review revenue stream, and prepare budgets and forecasts – 15%.
5. Evaluate properties for purchase to expand operations, meet with brokers and sellers – 20%.
6. Negotiate contracts with vendors and suppliers, service providers and distributors – 10%.
7. Meet with service providers to implement promotional materials to attract customer attention – 10%.

In response to the February 7, 2006 request, counsel submitted a letter dated March 14, 2006, in which he explains that the petitioner's two "cashiers," described by counsel as "managers," will work different shifts. Counsel appended to his letter a document titled "organizational chart" which describes the two "managers" as performing the tasks necessary to operate a convenience store. The "day manager" is described as working until 5:00 p.m. The "night manager" is described as beginning his shift after the "day manager" finishes his shift.

On April 21, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Upon review, the AAO concurs that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

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 are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, 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.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will oversee "the management of all business and financial operations" and the "daily management of the company." However, the petitioner does not specifically state what the beneficiary will do in performing these broad, managerial sounding duties. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive 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.

Likewise, all of the duties ascribed to the beneficiary in the letter dated December 20, 2005 appear to be non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner asserts in the breakdown of duties that the beneficiary will spend a majority of his time supervising the two cashiers, reviewing financial documents related to a single-location, three-employee convenience store, evaluating properties for possible purchase, and interacting with vendors, suppliers, and service providers. However, it has not been established that these duties are managerial or executive in nature. To the contrary, these duties appear to be non-qualifying administrative or operational tasks. Furthermore, as the petitioner has failed to establish that the two subordinate employees are supervisory, managerial, or professional employees (*see infra*), the supervisory functions ascribed to the beneficiary are non-qualifying, first-line supervisory tasks. As the petitioner has indicated that the beneficiary will devote all of his time to these non-qualifying tasks, it has not been established 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).

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 asserted in the record, the beneficiary will directly supervise two cashiers, who are also described as "managers." However, these employees are not described as having supervisory or managerial responsibilities. To the contrary, these employees are described as performing tasks related to the operation of a single-location convenience store. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, 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. 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 failed to

establish the skills required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.<sup>5</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>6</sup>

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

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<sup>5</sup>In evaluating whether the beneficiary will manage 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>6</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 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(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 will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will perform 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).

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 be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9<sup>th</sup> 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)). Furthermore, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

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

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii), (iv), and (v)(B).

In this matter, the petitioner described the beneficiary's duties abroad in a document titled "organizational chart" as follows:

Direct business operations, including financial operations, marketing and sales, licensing procedures, and personnel matters.

The petitioner also listed 10 other workers associated with the foreign entity. However, the petitioner did not describe the duties of these other workers nor did it establish the foreign entity's organizational hierarchy.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties will be 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, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to

discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign employer are qualifying organizations.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." *See also* 8 C.F.R. § 214.2(l)(14)(ii)(A). 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." "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services."

In this matter, the record is devoid of evidence of the foreign employer currently doing business. The record does not contain any evidence from 2005 addressing the regular, continuous, and systematic provision of goods and/or services abroad. 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.

Accordingly, the petitioner has not established that it and the foreign entity are qualifying organizations. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the petitioner has been "doing business" for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). As indicated above, it does not appear as if the petitioner commenced "doing business" before June 2005. The "new office" petition was approved in September 2004.

Accordingly, the petitioner has failed to establish that the petitioner has been "doing business" for the previous year, and the petition may not be approved for this additional reason.

The previous approval of an L-1A petition does not preclude CIS from denying an extension based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See*

