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FILE: EAC 08 023 51797 OFFICE: VERMONT SERVICE CENTER Date:

JUL 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)

ON 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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its 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, a Florida corporation, states that it is engaged in providing residential and commercial cleaning and handyman services and property management services. It claims to be a subsidiary of Clover Developments, Ltd., located in the United Kingdom. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, from October 1, 2006 until September 30, 2007, and its previous request to extend the beneficiary's stay was denied on October 16, 2007. The petitioner filed the instant petition on October 29, 2007 seeking to extend the beneficiary's stay for three additional years.

The director denied the petition concluding that the petitioner had not established that the beneficiary will be employed 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. On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary will primarily perform managerial or executive duties, and that he will be responsible for supervising professional managers and other personnel who will relieve him from performing the day-to-day operations of the company.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 nonimmigrant petition was filed on October 29, 2007. The petitioner indicated on Form I-129 that it has seven employees. In support of the petition, the petitioner provided the following description of the beneficiary's duties as president:

- Overall strategic and financial control of the subsidiary
- Identify opportunities and ideas for the company and implement them to increase overall sales and profitability
- Setting and monitoring all corporate goals, policies and procedures
- Setting and implementing marketing and sales campaigns and investigating opportunities for the expansion of same
- Exercising discretion over the day to day operations of the business
- Develop efficient organizational structure for company and staff
- Implementing business plan which includes public relations and networking through local chambers and business groups
- Widest discretionary responsibility on all business and financial decisions
- Setting budgets and cash flow and ensuring these are adhered to
- Maintain company in a sound financial condition
- Setting pricing policies and undertaking regular review to remain competitive
- Interviewing, recruiting, hiring and firing staff

- Set vacation period and salary scales
- Evaluating the performance of all management and staff
- Meet with all staff on an annual basis to review performance and discuss expectations and goals
- Meet with staff once a month to discuss past 30 days production. Review goals and objectives and encourage feedback and ideas for future growth and productivity
- Analyze sales statistics to formulate policies and to assist promoting business
- Representation of the business to all corporate and legal entities
- Representation of the business on the negotiation of purchasing full researched businesses for acquisition and their subsequent integration into [the petitioning organization]
- Determining and monitoring customer service functions
- Monitoring the company's progress and setting guidelines for its on-going long term expansion and development
- Perform any other executive job function as necessary, delegate responsibilities as necessary to ensure smooth operation of the business.

The petitioner also provided a document which explains the company's history and development, and provides an overview of its operations. The petitioner explained that the company started out providing residential housecleaning and pool cleaning services, that it quickly incorporated commercial contracts into its infrastructure, and that it provides these services under the assumed name "Crisp & Clean." The petitioner further stated that in July 2007, the petitioner acquired an established cleaning/handyman business, Cheetham Services, Inc., which is operated as a separate division doing business as Bryher Services. Counsel stated that each department has an experienced manager who reports to the beneficiary. The petitioner further indicated that it is in negotiations to acquire a property management services business, with an anticipated closing date of December 1, 2007, and noted that it had also hired a manager for this prospective department.

The petitioner indicated in a letter dated October 18, 2007 that the beneficiary "has been able to dedicate his time and expertise to source new contracts, additional business for acquisition and to guide the subsidiary to the outstanding success it has achieved in a short space of time." The petitioner noted that the beneficiary has implemented a marketing and sales campaign through local advertising, obtained membership in the local chamber of commerce, and "has been paramount in the development and implementation of a web site."

The petitioner submitted an organizational chart which depicts the beneficiary as president, supervising an office manager, [REDACTED] who in turn supervises: the manager of Crisp & Clean, [REDACTED] the manager of Bryher Services, [REDACTED] and the manager of Florida Property Services, [REDACTED]. The

⁴ It is assumed that Florida Property Services is the property management business that the petitioner intends to purchase as of December 1, 2007. The record is devoid of any evidence supporting the petitioner's assertion that it has concluded purchase negotiations with this company or that an acquisition date has been set. 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)). Regardless, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved

petitioner also submitted separate organizational charts for its Bryher Services and Crisp & Clean components. The Bryher Services chart, which depicts a total of nine employees, includes: [REDACTED] as building manager, a painting/tiling kitchen remodeling supervisor with three subordinates; a handyman/general repairs supervisor with one subordinate; and two lawn care/landscaping employees. The Crisp & Clean organizational chart depicts a total of nine employees, including: [REDACTED] as cleaning manager, [REDACTED] as cleaning supervisor for residential and commercial properties; [REDACTED] as cleaning supervisor for vacation properties, and a total of six cleaning personnel. The office manager who appears on the above-referenced chart, [REDACTED], does not appear on either of the more detailed charts.

As evidence of wages paid to employees, the petitioner submitted payroll records from August 2007 which show that, during that month, the company employed [REDACTED] the cleaning manager, who earned \$1,050, and [REDACTED] a cleaning supervisor, who earned \$1,200. The petitioner also provided copies of IRS Forms W-4 for the building manager, [REDACTED] dated October 2007, and for three other employees including a cleaning person, a painter and a lawncare employee, two of which were also dated in October 2007. The record also contains evidence that the vacation property cleaning supervisor and one vacation property cleaning person previously received wages from Cheetham Services, Inc. It is noted that the petitioner stated in its letter dated October 18, 2007 that the petitioner had hired Cheetham Services' staff and that they are on the petitioner's payroll, but there is no documentary evidence to support a finding that the petitioner employed these workers as of the date of filing.

The petitioner submitted a copy of its balance sheet for the first seven months of 2007 which shows no wages or salaries paid, no payroll expenses, and no money paid for sub-contracted cleaning labor. The profit and loss statement shows that the company reported \$11,195 in "outside services," but no supporting documentation was submitted that would identify to whom this money was paid. The petitioner labeled one of its exhibits "Sub-contractor details who are used on a regular basis by [the petitioner]," but the attached document was a list of businesses which utilize the petitioner's services.

Finally, the petitioner submitted copies of resumes and position descriptions for the building manager and the cleaning manager. As these descriptions are part of the record, they will not be repeated entirely here. Briefly, the petitioner indicated that each manager would fulfill similar duties for their respective departments, including: monitoring daily activities, liaising with subordinate supervisors, managing subordinate staff, scheduling client appointments, liaising with clients, processing weekly time sheets, distributing wage checks, creating schedules for staff, performing quality checks, assisting with personnel training and equipment purchasing, and attending weekly planning meetings with the beneficiary.

On November 6, 2007, the director issued a request for evidence (RFE), advising the petitioner that it had not provided sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or

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. 1978). The petitioner's assertions with respect to the activities and employees of the proposed property management business will not be considered.

executive capacity. The director noted that the evidence submitted did not show that the beneficiary would function in a senior level within the organizational hierarchy other than in position title, nor did it demonstrate that he would be involved in supervising and controlling the work of supervisory, professional or managerial employees who could provide relief from performing the services of the corporation. The director therefore requested additional evidence with respect to the beneficiary's subordinates noting that the petitioner should "provide a detailed explanation outlining how each of the duties of these employees is truly managerial or requires the expertise of a professional." The director also requested evidence of the educational qualifications of the subordinate employees.

In response, counsel for the petitioner submitted a letter dated November 9, 2007, in which he stated:

[The beneficiary] has achieved extraordinary success by building a profitable and expanding entity with 7 full time employees. This has been possible by his business acumen, managerial ability, and reliance on the managers appointed to the various divisions within the Company and I therefore cannot agree with your statements that he does not qualify for an L-1A visa extension. The company has achieved its current standing by having a structured and well managed business. The personnel appointed to the managerial positions were placed in those positions for their knowledge and hands on experience gained over a period of years within similar industries and not because they have "professional" qualifications.

The petitioner provided additional information and evidence relating to the building manager, cleaning manager, and "proposed property manager," identified as [REDACTED]. The documentation included evidence that the building manager is a member of the Florida Engineering Society, and holds a Master of Project Management degree issued by the George Washington University School of Business.

The petitioner also submitted an updated balance sheet and profit and loss statement showing the company's performance as of the end of October 2007. The document shows that the company paid \$13,639 in salaries and wages and \$12,985 in outside services during the ten-month period.

The director denied the petition on November 21, 2007, determining that the petitioner had failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The director found insufficient evidence to establish that the beneficiary would supervise managers or professionals, given the size and nature of the petitioner's business. The director determined that the beneficiary's proffered salary of \$40,000 "appears to be incongruous with that of an employee who is actually managing other bona fide managers or professionals." The director also found insufficient evidence to demonstrate that the beneficiary would manage a function or that he would perform the claimed managerial tasks on a full-time basis. The director concluded that the beneficiary would more likely than not be engaged in the non-managerial, day-to-day operations of the business.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive or managerial position. Counsel suggests that the director failed to take into account the fact that the petitioner is a start up business when considering the company's staffing levels, and noted that "every start up business will be small after only a short period of trading." Counsel contends that the petitioner "has provided proof of substantial trading and appointment of professional personnel to key management positions."

Counsel further asserts that the beneficiary has appointed professionals to key management positions with the understanding that “they are probably over qualified for their positions,” noting that the company will require their qualifications and experience as it grows. Counsel disputes the director’s conclusion that the beneficiary would be performing the services of the business rather than managing its functions. Counsel notes that the petitioner provided a “comprehensive list” of the beneficiary’s duties sufficient to establish that he will be employed in a “managerial/executive position.”

Finally, counsel emphasizes that a “substantial number of people rely on [the petitioner] for continued employment,” and notes that the company has various prospective revenue and employment opportunities based on its projected growth, including the proposed property management division and a designing service.

Upon review of the record and for reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Although the appeal will be dismissed, AAO also notes that the director’s conclusion that the beneficiary’s proffered salary is incongruous with employment in a managerial or executive capacity is not supported by the statute and regulations, which contain no salary requirements for L-1 beneficiaries. Accordingly, the director’s comment in this regard is withdrawn.

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 in either an executive or a managerial capacity. *Id.*

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 show 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). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner’s business as its president, minority owner and highest ranking employee, the totality of the evidence submitted does not demonstrate that the beneficiary’s actual duties will be primarily managerial or executive in nature. It is not sufficient for the petitioner to establish that the beneficiary performs *some* managerial or executive duties.

The petitioner has provided a lengthy, yet vague and nonspecific description of the beneficiary’s duties that failed to demonstrate that he would be employed in a primarily managerial or executive capacity. Many of the listed responsibilities merely paraphrased the statutory definitions of managerial and executive capacity. For example, the petitioner indicated that the beneficiary will be “setting and monitoring all corporate goals, policies and procedures,” “exercising discretion over the day to day operations of the business,” holding “widest discretionary responsibility on all business and financial decisions,” and exercising “overall strategic and financial control” of the company. Conclusory assertions regarding the beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). These broad assertions are not probative descriptions of the beneficiary’s actual day-to-day responsibilities.

Many of the beneficiary's duties relate to the sales, marketing, and customer service aspects of the petitioner's business. In this regard, the petitioner indicates that the beneficiary's responsibilities will include "identify opportunities and ideas for the company and implement them to increase overall sales responsibility"; "setting and implementing marketing and sales campaigns and investigating opportunities for expansion"; "public relations and networking through local chambers and business groups"; and "representation of the business to all corporate and legal entities." The petitioner also indicated that the beneficiary has devoted much of his time to "source new contracts" and has "implemented a marketing and sales campaign through the distribution of flyers, door hanging cards and placing advertisements in the local media." The petitioner has not established that the beneficiary's duties with respect to the company's sales and marketing activities will be primarily managerial in nature. Rather, based on a review of the position descriptions for the beneficiary's subordinates and other evidence in the record, it is evident that the beneficiary is more likely than not the only employee in the company charged with marketing and selling the petitioner's services to residential and commercial customers.

While the record indicates that the building and cleaning managers schedule client appointments, the beneficiary appears to be the employee responsible for meeting with new and prospective clients. The record contains letters dated as recently as September and October 2007 addressed to new and prospective cleaning and painting/handyman services clients, which show that the beneficiary is responsible for initial client meetings and providing quotes for services. Clients are directed to contact the beneficiary regarding any questions. The beneficiary's direct involvement in marketing and selling the petitioner's services and providing estimates cannot be considered managerial or executive in nature and the record fails to show that the petitioner has hired, or intends to hire, subordinate staff to relieve the beneficiary from performing these non-qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties such as sales and marketing, 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The beneficiary's position description also includes a number of duties related to the petitioner's finances, including "overall . . . financial control of the subsidiary," setting budgets and cash flow, and maintaining the company "in a sound financial condition." The petitioner has not, however, established that any of its subordinate employees are responsible for performing day-to-day administrative tasks associated with the petitioner's finances, such as maintaining accounts payable and receivable, bookkeeping, and routine banking. Thus while the petitioner makes conclusory assertions regarding the beneficiary's role in managing the petitioner's finances, it can not be concluded that he would be relieved from performing non-qualifying duties associated with this area of responsibility.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the

statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing 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).

Moreover, the petitioner's description of the beneficiary's duties cannot be considered in the abstract. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. Title 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit 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. 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 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.

The petitioner claims that the beneficiary will have responsibility for supervising six full-time subordinate employees and additional contractors hired on an as-needed basis, but the petitioner has not specified or documented exactly who it employed at the time the petition was filed. Furthermore, the petitioner submitted several organizational charts at the time of filing which identified a total of 19 individuals working for the company, not including the employees of the proposed property management business. The only evidence submitted to corroborate the claimed organizational structure was payroll documentation from the month of August 2007 showing that the only employees at that time were the cleaning manager and cleaning supervisor. While the petitioner submitted copies of IRS Forms W-4, Employee's Withholding Allowance Certificate, for the building manager, one painter, one lawn care employee, and one cleaning person, this documentation must be accompanied by other evidence to show that these employees have commenced work activities. In the absence of such evidence as pay stubs and payroll records, the petitioner has not established that it employed these workers as of the date the petition was filed. Furthermore, with the exception of the painter, these employees were hired after the expiration of the beneficiary's initial one-year new office petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation only one year within the date of approval of the petition to support an executive or managerial position.

The AAO acknowledges that the petitioner appears to have paid \$13,639 in salaries during the third quarter of 2007, as indicated on the balance sheet submitted in response to the RFE. However, it cannot be determined based on the evidence provided how many or which workers were employed as of the date of filing or how many hours they worked on average. Similarly, the petitioner's balance sheets show that the company paid \$11,195 in outside services during the first seven months of 2007, and only an additional \$1,700 in outside services over the next three months, thus suggesting a significant downturn in the use of outside staff. Regardless, the limited evidence provided in the record does not support the petitioner's claim that it employed seven full-time workers at the end of the first year of operations, or its claim that it regularly utilized the services of the 19 employees identified on the organizational chart. 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)).

Although the beneficiary is not required to supervise personnel, if it is claimed that he is employed in a managerial capacity based on his supervision of employees, the petitioner must establish that the subordinate **employees are supervisory, professional, or managerial.** See § 101(a)(44)(A)(ii) of the Act. The petitioner claims that the beneficiary directly supervises a building manager and a cleaning manager. Although the building manager appears to have at least a baccalaureate degree, the petitioner has not demonstrated that he had commenced employment with the company at the time the petition was filed. Further, counsel for the petitioner specifically stated in his letter dated November 9, 2007 that “[t]he personnel appointed to the managerial positions were placed in those positions for their knowledge and hands on experience . . . not because they have “professional qualifications.” Counsel now claims on appeal that the beneficiary’s subordinates are professionals and that the company will eventually require employees with professional qualifications in those roles. 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.² Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a 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 not established that the beneficiary’s subordinates currently perform duties that require a bachelor’s degree and therefore has not established that the beneficiary supervises professionals.

Furthermore, notwithstanding the building managers and cleaning manager’s job titles, the petitioner has not shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Since the petitioner has not documented the majority of the claimed full-time and contract staff in its building and cleaning departments, it has not supported its assertions that each department “manager” is actually performing supervisory or managerial duties, rather than carrying out the services of their respective departments. The limited evidence in the record shows that the cleaning manager actually earns lower wages than the cleaning supervisor, her alleged subordinate. The petitioner has not shown that the beneficiary's subordinate employees are supervisors, professionals, or managers, as required by section 101(a)(44)(A)(ii) of the Act.

² 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).

While the petitioner has not specifically 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, 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. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial, and in fact the record shows that the beneficiary performs a number of sales and marketing tasks. As noted above, 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 at 24.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). 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. 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.

Furthermore, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (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 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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).

At the time of filing, the petitioner was a one-year-old company engaged in providing residential home cleaning, commercial cleaning, lawn care and landscaping, painting, remodeling, handyman and pool maintenance services. The petitioner claims to have seven full-time employees, but has failed to adequately document its staffing structure at the time of filing. The petitioner has submitted some documentation related to the building manager, cleaning manager, cleaning supervisor, one painter, one cleaning person and one lawn care specialist. The petitioner does not claim to employ any administrative, clerical or sales and marketing staff, nor is there evidence that any of the subordinates relieve the beneficiary from performing these non-qualifying duties. As discussed, evidence in the record shows that the beneficiary is directly involved in such non-qualifying duties as providing estimates and quotations to customers, handling routine customer service, and marketing and selling the petitioner's services. Given the limited number of people employed by the petitioner's service-oriented organization, it is more likely than not that the cleaning "manager" and "supervisor" and building "manager" are actually providing the petitioner's services at this stage of the company's development, while the beneficiary is left to perform all other ancillary non-qualifying duties involved in operating a small business.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. A review of the totality of the record fails to establish that the petitioner has a reasonable need for the beneficiary to perform primarily managerial or executive duties at its current stage of development.

Even though the enterprise is in a preliminary stage of organizational development and anticipates additional growth, the petitioner is not relieved from meeting the statutory requirements. 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 petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized period of stay expired on September 30, 2007. However, the petition for an extension of the beneficiary's L-1A status was filed on October 29, 2007, almost one month following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.