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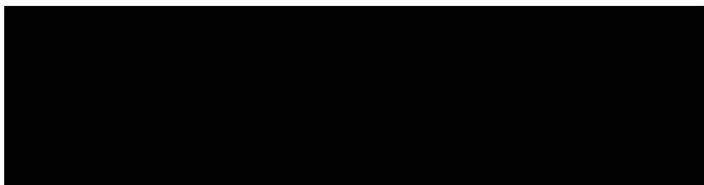
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: EAC 07 232 52027 Office: VERMONT SERVICE CENTER Date: **JUN 03 2008**

IN RE: Petitioner:
Beneficiary:



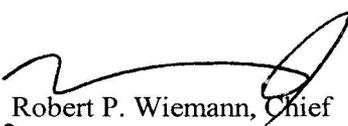
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF THE 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 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 petition seeking to extend the employment of the manager of its claimed U.S. subsidiary 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 Colombian corporation. The U.S. entity, a Florida corporation, states that it is engaged in the import, export and wholesale of parts for automobiles, trucks and heavy equipment. The beneficiary was initially granted a one-year period in L-1A classification, and the petitioner now seeks to extend the beneficiary's stay for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director observed that although the petitioner claimed to employ three employees in the United States, the evidence submitted suggests that the beneficiary is the only employee of the U.S. company. The director determined that the beneficiary would evidently be primarily engaged in providing the goods and services of the United States business to its customers, rather than primarily performing managerial or executive duties.

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 for the petitioner asserts that the director's decision contains several factual errors and suggests that the director failed to conduct a careful and thorough review of the record. Counsel asserts that the petitioner demonstrated submitted shows by a preponderance of the evidence that the proffered position is managerial and executive in nature. Counsel submits a brief and additional evidence in support of the appeal. In addition, counsel requests oral argument before the AAO.

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 sole issue addressed by the director is whether the petitioner established that the beneficiary would 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 nonimmigrant visa petition was filed on July 31, 2007. On the Form I-129 petition, the petitioner indicated that its U.S. subsidiary has three employees. In a letter dated July 20, 2007, the petitioner indicated that the beneficiary performs the following duties as manager of the U.S. company:

[The beneficiary] has refined and re-engineered the business goals, and continues to implement the operational and management policies of Heavy Auto Parts, Inc. in the United States, including its structure, components, and functions in accordance to the parent company's systems and business operation directives. Moreover, [the beneficiary] has exercised, and continues to exercise, wide latitude in discretionary decision-making, receiving his directives and general supervision solely from the parent company's President. As part of his duties, he has been the executive Manager of the organization in the State of Florida, and has supervised and controlled the work of the company's staff. [The beneficiary] has had, and continues to have, full authority to hire or fire personnel, or recommend promotions or leave authorizations for the company staff. Moreover, [the beneficiary] exercise[s] managerial and executive discretion over the day-to-day operations of the American auto parts enterprise, directly reporting the status and functions of the organization solely to the President of the foreign parent company, to [sic]. [The beneficiary] is solely responsible of his acts and application of his managerial and executive discretionary powers. Furthermore, [the beneficiary] directs and coordinates the managerial activities of the business, including managing staff, preparing work schedules, and overseeing duties. He reviews financial statements, sales and activity reports, and other performance data to determine productivity and goal achievement and to determine areas needing cost reduction and program improvement, so as to properly and effectively establish and implement departmental policies, goals, objectives, and procedures, while conferring with board members, organization officials, and staff members as necessary. He also manages activities directly related to providing the company's services, coordinates the American subsidiary's financial and budget activities to fund operations, maximize investments, and increases efficiencies as dictated by his executive and managerial acumen. The foreign parent company wishes [the beneficiary] to continue, on a temporary basis, to be responsible for supervising the staff's work, sets [sic] standards for the work along with its general guidelines, supervise the creation of business incentives, and shall continue to coordinate the activities of fully establishing the business operations, services, investments, and related operations, the work qualify of the American subsidiary, promoting the business enterprise, recommending the acquisition of new businesses, and the completing the interface of the international parent company operational systems with that of the American subsidiary.

On August 14, 2007, the director issued a request for additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In part, the director instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's duties with an explanation as to how the duties will be managerial or executive in nature; (2) a list of United States

employees that identifies each employee by name and position title; (3) a complete position description for all U.S. employees, including a breakdown of the number of hours devoted to each employees' job duties on a weekly basis; (4) copies of the U.S. company's IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2006 and the first two quarters of 2007; (5) copies of the petitioner's 2005 and 2006 IRS Forms 1120, U.S. Corporation Income Tax Return.; and (6) copies of all IRS Forms W-2 and Forms 1099 issued by the United States entity in 2006.

The petitioner's response to the director's request for evidence was received on September 27, 2007. The petitioner provided the following expanded position description for the beneficiary's role as "commercial manager":

[The beneficiary] has the discretion over operations decisions for the company. [The beneficiary] manages the organization and/or essentials [sic] functions of the organization. He is responsible to negotiate contracts with suppliers in the acquisition of equipment and parts inventory, major customers, and financial institutions on behalf of the corporation. His knowledge in construction equipment and truck parts are [sic] fundamental for the organization's purchasing process. He manages the essential function within the organization of overseeing the organization and selling the products to be distributed in the U.S. [The beneficiary] as the commercial manager with knowledge in International trade is responsible for the international operations. [The beneficiary] overseas [sic] the sales negotiation of equipment and parts with international customers in different regions of the world such as Latin America and Middle [E]ast increasing the export of U.S. products to the rest of the world. [The beneficiary] is responsible to evaluate and hire insider or outsiders [sic] employees to be hired by [the U.S. company]. He directly supervises and has the authority to hire and fire or recommended [sic] those as well as other personnel actions (such as promotion and leave authorization) or, if not [sic] other employee is directly supervised, he functions at a senior level within the organizational hierarchy or with respect to [the] function managed. [The beneficiary] also exercises discretion over the day to day operations of the activity of the function for which he has authority.

The petitioner also re-iterated the previously submitted position description, and provided the following breakdown of the beneficiary's responsibilities:

- (5%) Networking with business industries in community to identify and cultivate new information sources, attend trade shows and conferences to keep abreast of industry.
- (5%) Travel and communicate within the United States with various distributors, clients, equipment purchasing, and potential suppliers and clients.
- (5%) Preparation of budget for the operations and monitor finances
- (10%) Determination of needs of the US company, including purchasing the equipment and inventory that will be used.
- (5%) Evaluate and review the services ultimately provided by the company to ensure it meets proper specifications as per customer, and the products to ensure conformity with standards.

- (10%) Identify new international and domestic [sic] markets for penetrations [sic] and development of marketing strategies. This includes the development of advertising strategies.
- (15%) Maintain regular communications with the foreign parent company.
- (15%) Monitor the activities for all employees and the development of outsourced jobs such as accounting services, advertisement material services, among others.
- (30%) Manage the overall activities of the company; and/or supervise the administration and finances of the company.

The petitioner stated that the U.S. company employs a part-time administrative assistant who performs the following duties:

- Receiving and placing [p]hone calls: 5 hours
- Sales support: 2 hours
- Preparing reports: 4 hours
- Sending and [r]eceiving mail: 2 hours
- Office and warehouse supplies ordering and maintenance: 2 hours
- Assisting managers with e-mails, letters, memos and communications: 5 hours

Finally, the petitioner stated that the U.S. company employs an independent sales representative who “is responsible for new business development by identifying opportunities and contacting new and existing customers for the company’s parts program.” The petitioner stated that this employee’s time is allocated as follows:

- Calling customers: 3 hours
- Visiting fleet customers and repair shows: 9 hours
- Customer support and troubleshooting: 5 hours
- Communicating with managers: 3 hours

The petitioner provided copies of the U.S. entity’s IRS Forms 941, Employer’s Quarterly Federal Tax Return, for the last two quarters of 2006 and the first two quarters of 2007. The U.S. entity indicated on each Form 941 that it had one employee. The salary of \$6,500.01 paid to the company’s sole employee in the second quarter of 2007 is consistent with the beneficiary’s proffered annual salary of \$26,000. The petitioner submitted a copy of the beneficiary’s Form W-2, Wage and Tax Statement for 2006, which shows that he received a salary of \$7,333. The petitioner did not provide copies of any Forms 1099 issued in 2006, or any other evidence of wages paid to contract employees. The petitioner’s 2006 IRS Form 1120 reflects wages paid to the beneficiary only. The record, therefore, contains no documentary evidence of payments to the administrative assistant or independent sales representative.

The director denied the petition on October 2, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director addressed the petitioner’s staffing levels and noted that the petitioner claimed to employ three staff. The director incorrectly stated that the petitioner had not provided the requested position descriptions for its employees. This comment

will be withdrawn.¹ The director further noted that, although the petitioner claimed that the U.S. company has a staff of three people, its quarterly tax returns reflect that the company has only one employee.

In addition, the director observed that the beneficiary's proffered annual salary of \$26,000 "does not appear to be commensurate with a bona fide manager or executive position in a major metropolitan business market," and the director also commented upon the beneficiary's "apparent lack of a college degree" as "telling of the importance of the position he holds." These comments are inappropriate and will be withdrawn. The director's position is not supported by the statute and regulations, which contain no salary or educational requirements for L-1 beneficiaries. Furthermore, the record reflects that the beneficiary completed a bachelor's degree prior to commencing his position with the U.S. entity.

The director went on to discuss the beneficiary's position description, noting that the information provided by the petitioner merely identified general managerial functions and failed to specify exactly what the beneficiary would be doing within the context of the company's current staffing arrangement. The director found that it was not clear that the position would be managerial or executive in nature, other than in position title. The director observed that the U.S. company does not appear to have any full-time salespersons or other employees to provide sales and services to customers, and concluded that it is likely that the beneficiary will perform or help to perform these types of non-qualifying duties, rather than primarily performing managerial or executive duties.

On appeal, counsel for the petitioner asserts that the director failed to consider all of the relevant evidence submitted, failed to make a "careful determination," and issued a decision "fraught with unreasonably arbitrary and capricious handling of the evidence." Counsel emphasizes that the petitioner did in fact submit job descriptions and photographs requested in the request for evidence, and notes that the director appears to have overlooked such evidence. Counsel also asserts that the director incorrectly applied the regulation pertaining to evidentiary requirements for "new office" petition extensions pursuant to 8 C.F.R. § 214.2(l)(14)(ii), rather than applying the regulation at 8 C.F.R. § 214.2(l)(14)(i). Counsel notes that although the beneficiary was previously granted only one year in L-1A status, which is the maximum period in L-1A classification permitted for a beneficiary coming to open or be employed in a new office, the U.S. company was in fact incorporated in 2001, and this information was included on the petition. Counsel states that if the director "even bothered to look at the previous petition, his or her review was careless and shoddy because the previous petition clearly indicated that it was not for a new office." Counsel submits a copy of the L Classification Supplement submitted with the petitioner's previous L-1 petition on behalf of the beneficiary (EAC 06 229 51831), on which the petitioner indicated that the beneficiary would not be coming to the United States to open a new office.

Here, it should be noted that record of proceeding before the director did not contain a copy of the previously approved visa petition. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. §

¹ The director also stated, incorrectly, that the petitioner had failed to submit requested photographs of the U.S. business, and therefore questioned "the veracity of the instant petitioning entity as a functioning business entity for immigration purposes." The record reflects that the petitioner did in fact submit the requested photographs of the U.S. office; therefore, the director's comment is withdrawn.

103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the U.S. company was established in 2001, there are instances in which a company may not commence regular business operations for some time following incorporation. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H) “doing business” means the regular, systematic, and continuous provision of goods or services. Here, the record shows that, while the U.S. entity filed a Form I 120 for the 2005 calendar year, it did not pay any salaries, wages or compensation to officers in that year, report any cost of labor, or indicate any payments to outside contractors, other than \$710 in “professional fees.” It achieved gross sales of \$24,061. Based on the evidence in the current record, it was not unreasonable for the director to assume that the petitioner was not doing business in a regular and systematic manner for a full year prior to the filing of the initial petition on behalf of the beneficiary in August 2006, and therefore, conclude that the instant petition was for the extension of a petition involving a “new office.” *See generally* 8 C.F.R. § 214.2(l)(1)(ii)(F) and 8 C.F.R. § 214.2(l)(14)(ii).

Regardless, the petition was ultimately denied based on the petitioner’s failure to establish that the beneficiary would be employed in a primarily managerial or executive capacity as those terms are defined at section 101(a)(44)(A) and (B) of the Act. The petition was not denied based on the petitioner’s failure to satisfy the evidentiary requirements for new office petition extensions set forth at 8 C.F.R. § 214.2(l)(14)(ii). The director’s citation to these regulations is withdrawn; however, the director’s error in this regard is found to be harmless.

Counsel further asserts that the director erred by concluding that the beneficiary would not be employed by the U.S. company in a primarily managerial or executive capacity under the extended petition. Counsel contends that the petitioner’s description of the beneficiary’s duties “evidences that the beneficiary has functioned, and would continue to function, in a managerial and executive capacity.” Counsel asserts that the petitioner is providing an objective expert opinion from Professor James D. Thaler, Jr., a professor at Stetson University College of Law, in support of its claim that the proffered position is in fact primarily managerial and executive in nature. Counsel provides in his brief a six-page summary of Professor Thaler’s opinion letter, noting that Professor Thaler concluded that the beneficiary is a “high level manager and executive with this company,” and that the beneficiary’s job description “more than satisfies the definition of someone who acts primarily as a manager or executive.”

Counsel concludes that the petitioner has established by the preponderance of the evidence that the beneficiary’s proffered duties are executive and managerial, and that the petitioner’s U.S. subsidiary is a viable enterprise. Counsel asserts that the U.S. company, achieved year-to-date sales of \$215,147.88 in 2007, a 370% increase over the company’s 2006 total sales, and that such success can be attributed to the beneficiary’s “managerial and executive prowess.”

Finally, counsel has submitted a request for oral argument in order to address “[t]he issue of what exactly constitutes managerial and executive duties in light of the ever changing global business environment all companies face today.” Counsel also wishes to address “the utter lack of equity, and abuse of discretion, that is rampantly evident in this case.”

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. However, as a preliminary matter, the AAO concurs with counsel that the director's decision does in fact contain factual errors, an application of an improper standard, and one incorrect citation to the regulations. These errors have been addressed above. The director should focus on applying the statute and regulations to the facts presented by the record of proceeding.

However, the AAO cannot find, nor has counsel claimed, that these errors led the director to incorrectly conclude that the beneficiary would not be employed in a primarily managerial or executive capacity. The director's determination was in fact supported by valid references to evidence in the record. Specifically, the director noted that the petitioner failed to provide a detailed description of the beneficiary's actual duties, and failed to resolve apparent inconsistencies in the record with respect to the U.S. entity's staffing levels. Neither counsel nor the petitioner has directly addressed these deficiencies on appeal.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Therefore, the AAO will address the petitioner's evidence and eligibility herein.

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.*

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). Here, while the beneficiary evidently exercises authority over the petitioner's business as its manager and sole full-time employee, the record is insufficient to establish that his actual duties would be primarily managerial or executive in nature. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

The petitioner's description of the beneficiary's job duties fails to establish that he would perform primarily managerial or executive duties under the extended petition. While several of the beneficiary's duties are given managerial connotations, a review of the totality of the record does not support the petitioner's claim that a majority of the beneficiary's time would be devoted to performing duties that fall under the statutory definitions of managerial or executive capacity. Rather than clarifying the beneficiary's actual day-to-day duties as manager of the U.S. company, the petitioner's initial description of the beneficiary's duties merely

paraphrased the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. For example, the petitioner indicated that the beneficiary “exercises wide latitude in discretionary decision-making,” “implement[s] the operational and management policies” of the U.S. company, “supervised and controlled the work of the company’s staff,” has “full authority to hire or fire personnel,” “exercise[s] managerial and executive discretion over the day-to-day operations of the business,” and “establish[es] and implement[s] departmental policies, goals, objectives, and procedures. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The remainder of the beneficiary’s position description did little to shed light on the actual duties he would perform as the manager and sole full-time employee of a truck and heavy equipment spare parts import, export and wholesale company. The petitioner stated that the beneficiary “actively manages activities directly related to providing the company’s services” but did elaborate as to what “activities” he supervises, who provides the company’s services, or what specific tasks the beneficiary performs in this regard. Similarly, the petitioner stated that the beneficiary “coordinates . . . financial and budget activities,” but it did not identify the specific finance and budget-related tasks the beneficiary performs or “coordinates,” nor did it identify any lower-level personnel who would relieve the beneficiary from day-to-day finance-related tasks such as bookkeeping. Reciting the beneficiary’s vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary’s activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Accordingly, the director requested a comprehensive description of the beneficiary’s duties and an explanation as to how they would be managerial or executive in nature. In response, the petitioner re-iterated the same overly general position description, and added new duties, such as negotiating contracts with suppliers to acquire equipment and spare parts inventory, participating in the purchasing process, managing the “essential function” of “selling the products to be distributed in the U.S.,” and overseeing “the sales negotiation of equipment and parts with international customers in different regions of the world.” The petitioner stated in its breakdown of the beneficiary’s duties that the beneficiary spends: 10 percent of his time “purchasing the equipment and inventory that will be used”; 5 percent of his time “networking with business industries”; 5 percent of his time to “communicate . . . with various distributors, clients, equipment purchasing, and potential suppliers and clients”; 10 percent of his time evaluating the company’s products and services, and 10 percent of his time identifying new markets.” All of these duties relate to the petitioner’s day-to-day purchasing, sales and marketing activities, and the petitioner failed to explain how such duties qualify as managerial or executive in nature. It is insufficient for the petitioner to state that the beneficiary manages the function of “selling products” or “oversees sales negotiations” without establishing that someone other than the beneficiary performs the actual day-to-day sales transactions. As discussed further below, the petitioner has failed to establish that the U.S. company employs direct staff or contractors who would relieve the beneficiary from performing the company’s day-to-day activities.

The petitioner indicated that the beneficiary spends the majority (60 percent) of his time maintaining communications with the foreign parent company, monitoring activities for all employees and outsourced employees, and managing the “overall activities of the company and/or supervis[ing] the administration and finances of the company.” Although the petitioner indicates that these three responsibilities constitute the beneficiary’s “primary” duties, it once again failed to elaborate what specific tasks are entailed by the beneficiary’s responsibility for managing the company’s “overall activities” or “administration and finance.” The petitioner also failed to provide any detail regarding the nature or purpose of the beneficiary’s communications with the parent company and whether such communications involvement management issues. 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. at 1108. Given that the company claims to export products to Latin American customers, it is not unreasonable to suppose that communications with the Colombian parent company might involve routine matters such as tracking shipments, obtaining purchase specifications or other activities related to the U.S. company’s operational functions. Finally, the petitioner has not clearly demonstrated through documentary evidence that it has lower-level employees or outsourced workers, such that supervision of such employees would require 15 percent of the beneficiary’s time. 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)).

Overall, the descriptions of the beneficiary’s duties do not allow the AAO to determine the actual duties to be performed by beneficiary, such that they can be classified as managerial or executive in nature. 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 has not adequately documented what proportion of the beneficiary’s duties would be managerial functions and what proportion would be non-managerial. Notwithstanding the breakdown provided by the petitioner, the majority of the duties remain too vaguely-defined to be categorized as managerial. The petitioner’s description of the beneficiary’s job duties does not adequately establish what proportion of the beneficiary’s duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Absent a clear and credible breakdown description of the beneficiary proposed duties and the amount of time to be spent on them, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing qualifying duties. The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed within the context of the petitioner’s business.

Furthermore, the petitioner’s description of the beneficiary’s duties cannot be read or considered in the abstract. Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner’s organizational structure, the duties of the beneficiary’s subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner’s business, and any other factors that will contribute to a complete understanding of a beneficiary’s actual duties and role in a business.

As observed by the director, the record does not demonstrate that the petitioner has a sufficient number of direct or contracted employees who could perform the non-managerial duties associated with operating the petitioner's business on a day-to-day basis. While the petitioner has consistently claimed to employ three employees, there is no documentary evidence to corroborate the employment of the claimed "administrative assistant and sales" employee or the independent sales representative. As noted by the director, the petitioner's IRS Forms 941 for the last two quarters of 2006 and first two quarters of 2007 indicate that the petitioner has one employee, not three employees. The director reasonably assumed that the employee reported on the Forms 941 is the beneficiary himself, and the petitioner has not claimed that this assumption was incorrect. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

By requesting copies of the petitioner's recent Forms W-2, Forms 1099 and Forms 941, the director was clearly and reasonably instructing the petitioner to submit documentary evidence to show that it actually employs the claimed staff. If the petitioner's employees are not paid as payroll employees or as contractors, it is reasonable to expect the petitioner to submit comparable documentary evidence to demonstrate that it employed the claimed staff at the time the petition was filed. The record is devoid of any evidence of payments to the beneficiary's claimed subordinate employees. Again, 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. at 165. Although the director specifically referenced the petitioner's failure to submit evidence of payments to two of its three workers, the petitioner has neglected to address this issue on appeal, and has still not submitted documentary evidence of payments to the claimed subordinate staff.

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. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the U.S. entity was a six-year-old company that is described as a "heavy duty trucks & trailer parts wholesaler," with domestic and international customers. The petitioner reasonably requires someone to locate and purchase parts and inventory, to maintain relationships with suppliers and find new suppliers, to handle customer sales and service activities, to coordinate the transport and distribution of products to domestic and international customers, to maintain the company's day-to-day finances, to manage accounts payable and receivable, to advertise and market the company's products and services, and to perform routine clerical and administrative tasks associated with operating any business. The petitioner has not established that anyone other than the beneficiary was responsible for performing any of these non-managerial day-to-day functions of operating its business at the time the petition was filed. It is reasonable to

conclude that these activities would require far more of the beneficiary's time than any managerial duties he may perform given the petitioner's staffing levels. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

There is no indication in this matter that the director did not consider the reasonable needs of the organization in making his determination that the beneficiary would not be employed in a primarily managerial or executive capacity. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Contrary to the petitioner's assertions, the record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, purchasing, customer service, marketing, financial, administrative and clerical functions. Moreover, even if the petitioner had established that the U.S. company employs the claimed part-time administrative and sales employees, it is not evident that two part-time employees would relieve the beneficiary from primarily performing non-qualifying duties associated with the company's sales, marketing, purchasing and financial functions.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. 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. The AAO has consistently interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner has also asserted that the beneficiary manages the "essential function" of "overseeing the organization" and selling the products to be distributed in the U.S. company. 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 detailed position description explaining the duties 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 operational duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function, as it has not established that he performs managerial duties associated with "selling the products to be distributed," While the beneficiary evidently exercises discretion over the business as its sole full-time

employee, the petitioner has not established that his primary duties are the high-level duties contemplated by the statutory definition of managerial capacity.

The AAO acknowledges the submission of the advisory opinion letter from Professor James D. Thaler, offered as evidence that the beneficiary will perform in a qualifying managerial or executive capacity. Professor Thaler explains that the beneficiary functions primarily as an executive or manager based upon three factors: (1) the definitions of an executive and a manager based upon generally accepted management principles; (2) the position description for the offered position as “commercial manager,” and (3) the definitions listed under Title 8, Code of Federal Regulations, section 204.5(j)(2). The AAO may, in its discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Based upon the statements made by Professor Thaler, it is reasonable to determine that the only information he possesses regarding the beneficiary’s position is a job description provided by the petitioner. He did not provide a copy of the position description he reviewed. Based on the content of his letter, it appears that the position description was similar, if not identical, to the position description provided by the petitioner in its letter dated July 20, 2007. The deficiencies of this position description have been discussed in detail above. A review of the letter reveals that Professor Thaler reviewed a job description that paraphrased the statutory definitions, and concluded, based on this description, that the beneficiary meets the criteria set forth at sections 101(a)(44)(A) and (B) of the Act. Professor Thaler provides no indication that he has any information or documentation relating to the beneficiary’s actual day-to-day duties, the nature of the petitioner’s business or its actual staffing structure. For example, Professor Thaler indicates that “as defined in the Position Description, [the beneficiary] has no obligation to be involved in frontline work.” He also states that the petitioner’s lower-level tasks are performed by “sales people and clerical staff,” and that “[n]owhere in the Position Description does it direct [the beneficiary] to personally provide those types of services.” As discussed above, the petitioner has not submitted documentary evidence to establish that it employs the claimed part-time administrative assistant and part-time sales representative, or any other staff. Further, the petitioner did not provide Professor Thaler with the more detailed position description provided to USCIS in response to the request for evidence, a description which clearly includes operational tasks related to sales and purchasing. Professor Thaler’s opinion was primarily based on a vague and extremely limited position description that was already found by CIS to be excessively generalized. Therefore, in this case, the expert opinion submitted is insufficient to overcome the valid objections of the director or the deficiencies discussed in detail above.

Finally, the AAO acknowledges counsel’s request for oral argument. However, the regulations at 8 C.F.R. § 103.3(b) provide that the requesting party must explain in writing why oral argument is necessary. USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. In this instance, counsel identified no unique factor or issues of law to be resolved. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument will not be granted.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

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.