

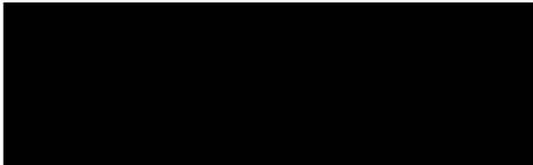
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
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**U.S. Citizenship
and Immigration
Services**



D-7

FILE: EAC 07 262 52223 OFFICE: VERMONT SERVICE CENTER Date: NOV 03 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, states that it is engaged in the provision of maintenance and repair services. It claims to be a subsidiary of [REDACTED] ME - GS Refrigeracao, located in Sao Paulo, Brazil. The beneficiary was initially granted a one-year period in L-1A status in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for two additional years.

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

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, the petitioner asserts that the director misconstrued the evidence submitted and incorrectly concluded that the petitioner does not employ a full-time staff. The petitioner contends that the beneficiary supervises three employees and contractors, and performs primarily managerial or executive duties. The petitioner submits a brief and evidence in support of the appeal.

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 petitioner filed the nonimmigrant visa petition on September 14, 2007. The petitioner stated that the company is engaged in the repair and maintenance of air conditioners and heating systems for commercial and residential clients, painting, sprinkler repair, cabinet installation, residential and commercial remodeling, flooring, handyman services, and other similar services.

In a letter dated September 12, 2007, the petitioner provided the following description of the duties performed by the beneficiary as general manager:

[The beneficiary] is responsible for establishing the policies and initiatives required to ensure that the company will operate as a team, establishing the goals needed to reach the objectives of the company, coordinating the development and the implementation of the plans, programs, and strategies for generating resources, revenues and profits for the company, directing the management, coordinating the activities of the different branches of the company, ensuring that the work is done under established policies, and focusing on the desired and programmed results, reviewing and presenting activity reports and financial statements to determine and to show the progress and status in attaining goals and objectives, and finally, representing the company before the managers, employees, contractors, clients, potential clients, and prospects in general.

In a separate statement of job duties titled "Job Offer," the petitioner stated that the beneficiary allocates his time as follows during a 40-hour work week:

- | | |
|-----------------------------------------------------------|--------------------|
| 1. Net-Meetings with the Holding Company | 2 hours (5.0%) |
| 2. Meeting with Management | 21.5 hours (53.8%) |
| 3. Meeting with contractors, Suppliers, Business Partners | 5 hours (12.5%) |

- | | |
|-------------------------------------------------------------|-------------------|
| 4. Meetings and Contacts with Clients and Potential Clients | 5.5 hours (13.8%) |
| 5. Other Meetings and Contacts | 2 hours (5%) |
| 6. Analysis, Evaluation, Preparation | 4 hours (10%) |

The petitioner also provided a sample daily schedule for a typical Monday to Friday workweek. The record contains other statements of the beneficiary's duties, but they closely resemble the duties listed in the letter dated September 12, 2007, and will therefore not be repeated here.

The petitioner submitted an organizational chart showing that the beneficiary supervises a finance and administration employee, [REDACTED] and three departments, which include marketing, planning and development and operations. The chart shows that the marketing department is staffed by [REDACTED] who is responsible for sales and customer care, and an unidentified independent contractor. The operations department is staffed by a manager, [REDACTED], as well as unidentified independent contractors responsible for labor and installation, and a "staffing company." The "planning and development" department, according to the organizational chart, is not yet staffed. The petitioner provided position descriptions for the beneficiary's three subordinates.

The petitioner also submitted its Florida Form UCT-6, Employer's Quarterly Report, for the second quarter of 2007, which confirmed that the company employs the three individuals named on the organizational chart, all at a gross monthly salary of \$1,000.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, on December 14, 2007, the director issued a request for additional evidence (RFE), in which he requested, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties with an explanation as to how those duties will be managerial or executive in nature; (2) a list of the petitioner's employees, along with a complete position description for each worker, a breakdown of the number of hours devoted to their job duties on a weekly basis, and educational credentials for each employee; (3) a copy of the petitioner's IRS Form 941, Employer's Quarterly Tax Return, for the third quarter of 2007; and (4) copies of the petitioner's IRS Forms W-2, W-3, 1096, and 1099 for 2006, evidencing wages paid to employees and contractors. The director also requested photographs of the petitioner's business premises.

In response to the director's request, the petitioner stated that the beneficiary performs the following duties in his role as general manager:

[M]anaging all supervisors and managers of all departments of the company as follows:

- [REDACTED] – Sales Department Manager and Supervisor
- [REDACTED] – Operations Department Manager and Supervisor
- [REDACTED] – Financial Department Manager and Supervisor

His duties will vary according to the department he is managing and supervising at the moment. As examples:

- On the sales department, he makes sure all customers are satisfied, he assures that all sales processes are handled with perfection and professionalism; he guides and trains the department manager on new programs brought to the company.
- On the operations department he brings in new projects to be experienced and manages the head of [the] department into [sic] that. He provides information and support to the groups and chambers that joined the company.
- On the Financial Department he receives all reconciliation of the day made by the different departments and assures what [sic] being processed. He manages cautiously this department since here the numbers have to be accurate.

The petitioner also submitted the following descriptions of duties for the beneficiary's subordinates:

Sales Department

██████████ is responsible for acquiring new clients by phone operations during the first 2 [hours] of work. She has 3 [hours] of her work day to visit existing clients and/or call them to make sure they are being treated right by the company staff. The other 3 [hours] she does part of the sales reconciliation to be sent to the manager daily.

Operations Department

██████████ is head of this department. For 3 [hours] of the day she analyzes network events and groups in Central Florida that the company may benefit if joining with. She also researches the competitors to check if there [sic] members of those "chambers." For 3 [hours] she does research on clients to be and already clients so the company would know in what area to invest. The other 2 [hours] she supervises what is being done in the other department's reconciliation of the day.

Financial Department

██████████ for 2 [hours] she plans and organizes controlling and evaluating the operation of the accounting system. She also audits the financial department. For 1 [hour] she revises and remakes the company's policies. For another 1 [hour] she prepares the financial statements and summaries. She analyzes the financial management reports. She supervises the development of financial simulation models for during 1 [hour]. For 2 [hours] she recruits, organizes, trains and manages the staff. And for the last our [sic] of her work day she reports to senior management any trends that are or may be critical to the financial performance of all departments.

The petitioner also submitted the requested evidence of wages paid to its four claimed employees in 2007. The beneficiary earned \$36,000, while the other employees earned \$12,000 each. The petitioner submitted an un-audited year-end profit and loss statement for 2007 which shows an additional \$59,221 paid to subcontractors; however, the petitioner did not submit copies of IRS Forms 1099 or 1096 as requested by the director. The petitioner submitted a photograph of a van bearing the petitioner's name, a small office with two

desks and one identified employee working, and a photograph of four individuals wearing shirts bearing the company's logo. The petitioner did not identify the employees in the photographs.

The director denied the petition on March 19, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed the petitioner's descriptions of the beneficiary's duties identified general managerial functions, but failed to specify what managerial or executive tasks he would perform within the context of the company's current staffing arrangement. The director further found that it is unclear based on the evidence in the record who is actually providing the petitioner's services to its customers and clients, and therefore likely that the beneficiary will perform or help to perform these duties. In addition, the director noted that the petitioner paid only \$72,000 to four employees in 2007, and questioned whether any employees received wages commensurate with their claimed managerial positions. The director determined that the petitioner had not established that the beneficiary supervises a subordinate staff of supervisors, managers or professionals.

On appeal, the petitioner addresses the wages paid to the petitioner's employees and indicates for the first time that the operations manager works on a part-time basis, and that the beneficiary's other employees earn commissions in addition to their \$12,000 base salaries. The petitioner further asserts that the company has subcontractors that provide air conditioning repair, sprinkler repair, drywall, pool pump, fiber optic lighting and freezer and refrigerator repair services. With respect to the beneficiary's duties, the petitioner states the following:

The General Manager will not to be engaged in any day-to-day activities or non-qualifying duties for his position. His daily schedule is listed below:

- 9:00 am: meeting with employees to schedule their daily activities and review the previous day report of job completed
- 10:00 am: contact the company in Brazil to inform them about the performance of the day before.
- 11:00 am: Review and analyze financial statements. Review client's comments and suggestions.
- 12:00-1:00 pm: Lunch
- 2:00-5:00 pm: He does not have a preset schedule. Most of the time he supervises, directs and solves the employees issues regarding jobs performed and future jobs or/and client issues.

The petitioner re-submits a number of documents that were submitted in response to the petitioner's request for evidence, including evidence of wages paid to employees in 2007, and copies of previous job descriptions submitted in support of the petition. The petitioner also submits a total of 17 color photographs of the interior and exterior of the petitioner's offices and storage space and company vans. According to information included in the photograph, the petitioner's business operates from 8:00 a.m. until 6:00 p.m., Monday to Friday, and from 8:00 a.m. to 1:00 p.m. on Saturdays. The petitioner submitted photographs of the beneficiary

and the three other employees, and a photograph of the beneficiary with two individuals identified simply as and "██████████" who are claimed to be subcontractors.¹

The petitioner's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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 each have two basic 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). The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations and has the appropriate level of authority, the petitioner has failed to show that his duties will be primarily in a managerial or executive capacity.

Although the petitioner has provided a breakdown of how the beneficiary's time will be divided among his various responsibilities, the job description provided is too ambiguous to convey any understanding of what tasks the beneficiary will perform on a day-to-day basis. For example, the petitioner indicated that the beneficiary would devote a total of 53.8% of his time on a weekly basis to "meeting with management," but failed to indicate specifically the purpose of these meetings or how this constitutes a managerial or executive duty. Further, as discussed below, the petitioner failed to establish that its "managers" are actually performing any managerial duties, nor did it indicate that any of the beneficiary's subordinates spend any significant amount of time meeting with him, as his job description would suggest. The petitioner indicates that the beneficiary spends another 26.3% of his time meeting with contractors, suppliers, business partners, clients and potential clients, and 10% of his time on "other meetings." Again, the petitioner failed to provide any details regarding the purpose of the beneficiary's meetings and it cannot be concluded that the beneficiary's duties in this regard are primarily managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

¹ According to USCIS records, the beneficiary has a son named ██████████ who previously applied for employment authorization as an L-2 dependent. His application was denied on January 23, 2007 (SRC 07 034 50818).

The petitioner's other descriptions of the beneficiary's duties are similarly vague and nonspecific, and fail to detail exactly what he does on a day-to-day basis. For example, the petitioner indicates that the beneficiary "establishes policies and initiatives," "establishes goals and objectives," "coordinates the development and implementation of plans, programs and strategies," "directs the management by coordinating the activities of different areas," "reviews and presents activity reports," "makes sure all customers are being satisfied," "brings in new projects to be experienced," and "trains the [sales] department manager on new programs." The petitioner offers no insight into the beneficiary's actual duties with respect to customer service or "new projects." 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 has 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.

Although the director specifically noted that the petitioner's descriptions of the beneficiary's duties were insufficient to establish his employment in a managerial or executive capacity, the petitioner has not attempted to further clarify the beneficiary's duties, other than stating that the beneficiary will not be engaged in any day-to-day activities or non-qualifying duties. 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)).

Without a comprehensive description of the beneficiary's duties upon which to rely, the director reasonably looked at the petitioner's staffing levels to determine whether the record as a whole supported the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity. Beyond the required description of the job duties, CIS 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.

Although the beneficiary is not required to supervise personnel, if it is claimed that his managerial duties involve supervising 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 to employ a sales department manager and supervisor, an operations department manager and supervisor, and a financial department manager and supervisor. Of these employees, the operations manager has subordinates depicted on the organizational chart. Specifically, the chart shows this position above "Labors-Installation (Independent Contractors)." However, the petitioner did not persuasively demonstrate that any of the beneficiary's subordinates perform managerial duties or supervise lower-level employees or contractors. For example, the sales department manager is responsible for sales, customer service and "sales reconciliation" duties. The operations manager, according to the petitioner, "analyzes network events," "researches competitors," "researches clients," and supervises the other departments' daily "reconciliation." None of these duties suggest that the operations manager spends any portion of her time supervising the claimed independent contractors. Finally, the position description for the financial department manager contains a number of duties that do not seem credible given the size and nature of the

petitioner's business. For example, the petitioner indicated that the beneficiary spends one hour every day revising company policies, two hours "evaluating the operation of the accounting system," one hour "supervising the development and implementation of financial simulation models," and two hours recruiting, training, and managing staff. The petitioner does not indicate that this employee actually supervises any employees, so it is unclear who would be carrying out the various financial activities she is claimed to supervise. Furthermore, given that the petitioner does not claim to have a bookkeeper, accountant, administrative or clerical staff, it has not adequately explained why it requires an employee to prepare daily financial management reports, financial simulation models, audits and accounting system evaluations. 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.

Furthermore, 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. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)).

Though requested by the director, the petitioner did not provide the level of education required to perform the duties carried out by the beneficiary's subordinates or provide evidence of their educational credentials. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals.² Nor has the petitioner 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. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Despite the petitioner's inability to show that the beneficiary primarily supervises managerial, supervisory or professional employees, the petitioner can still establish the beneficiary's eligibility by providing evidence that the beneficiary is a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing

² In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee.

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 provide a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(i)(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. 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). In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary.

Here, the petitioner has not claimed that the beneficiary will manage an essential function, nor has it sufficiently articulated the beneficiary's duties, or the proportion of his time devoted to managerial duties. 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 would be managerial or executive, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, as noted by the director, the petitioner has also failed to document who is carrying out the company's services. The petitioner claims to employ independent contractors who provide all of the petitioner's services including air conditioning repair, sprinkler repair, drywall installation, pool pump repair, fiber optic lighting, painting and freezer and refrigerator repair. At the time of filing, the petitioner submitted a year-to-date profit and loss statement indicating that the company paid \$24,165.11 to subcontractors as of August 31, 2007. However, the record contains no evidence of the number of subcontractors the petitioner regularly employs, the number of hours they work, or the duties they perform. 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)). Furthermore, the director specifically requested that the petitioner submit evidence of payments made to contractors in the form of IRS Forms 1096 and 1099 for 2006. Although it does not appear based on the petitioner's 2006 tax return that it paid any contractors in 2006, its 2007 Forms 1096 and 1099 should have been available at the time the petitioner responded to the RFE, and it is noted that the petitioner did provide copies of its Forms W-2 for 2007 at that time. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Based on the foregoing, the petitioner has not established that it has employees or contractors to provide services to the petitioner's customers on a day-to-day basis.

There is also some discrepancy in the record as to whether the beneficiary's subordinates are employed on a full-time basis. The petitioner initially implied that all of the employees work on a full-time basis. After the director remarked upon the \$12,000 annual salary paid to the three "managers," the petitioner now asserts on appeal that one employee, the operations manager, works on a part-time basis, while the finance manager and

sales department manager earn commissions in addition to their \$12,000 base salary. The record contains no evidence that any employees are paid on a commission basis. Furthermore, it is noted that USCIS records show that the beneficiary's spouse, [REDACTED], did not file a Form I-765, Application for Employment Authorization, in order to extend her authorization to work in the United States as an L-2 nonimmigrant beyond August 31, 2007, although the petitioner's records show that she continued to receive wages throughout the third and fourth quarters of 2007. 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).

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, CIS 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 CIS 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. 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.

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).

Here, the petitioner has assigned all four of its employees managerial job titles and has failed to document its employment of the subcontracted workers who are claimed to provide the petitioner's actual services on a day-to-day basis. The petitioner has also failed to indicate who on its staff performs other administrative and operational tasks such as purchasing materials, supplies and equipment, advertising, bookkeeping, issuing and paying invoices, and supervising and scheduling the claimed contractors. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and two managerial employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, 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.