

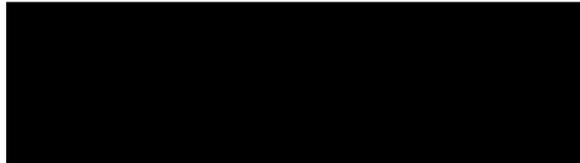
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

DATE: NOV 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: 

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:

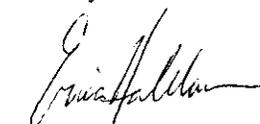


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 beneficiary's employment as a 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 states that it operates a business in the manufacture and sale of industrial products. The petitioner was established in the Cayman Islands and is qualified to conduct business as a foreign corporation in California. It claims to be a subsidiary of [REDACTED]

[REDACTED] The beneficiary was previously granted L-1A status for a period of two and one-half years, from October 2006 to May 2009, and the petitioner now seeks to extend his status so that he may continue to serve in the position of Vice President of Technical Sales and Strategic Projects.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that "[i]n light of the nature of business and the function of the U.S. company, [the beneficiary's] duties are primarily executive in nature." Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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.

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.

II. Executive or Managerial Capacity

The primary issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March, 6, 2009. The petitioner indicated on the Form I-129 that it is operating a business in the manufacture and sale of industrial products with one employee and a gross annual income of \$211,272.

The petitioner submitted a letter in support of the petition detailing the beneficiary's duties, as Vice President, as follows:

- [P]lanning, organizing, directing, and controlling the technical sales and strategic programs of [the petitioner];
- [O]verseeing the business operations of [the petitioner];
- [M]anaging strategic accounts in the U.S.;
- [D]irecting and harnessing company's resources for new business bidding and proposal to clients;
- [A]ssist [the petitioner] in reaching its goal of maintaining existing business while expanding the clientele base by evaluating the developing trends in Semiconductor packaging technology and ensuring the company's factories in Asia are able to support the future needs of the existing and perspective [*sic*] customers.

(Bullets added.)

The petitioner also submitted two separate job descriptions for the position of Vice President of Technical Sales and Strategic Programs. The first job description, dated July 17, 2008, states:

Reports to: President – [REDACTED]
Role: Account Management / Technical Specialist / Project Manager

Nature & Scope:

1. Business and Account management USA
2. Semiconductor Assembly & Test Technical Specialist for in field business development
3. Project management of assigned company projects

Accountability:

- To manage the daily business activity and fulfill the agreed annual sales plan (AOP) in North America Region. Combined AOP circa \$20 million
- To ensure the sustainability of the company's business through regular reviews of competitive positioning. Provide feedback/input to the rest of the organization and stimulate corporate activity to drive the business development with it[s] customers

- To maintain the corporate relationship with customers, arrange and manage meetings between corporate officers on a scheduled basis
- Identify new business opportunities with current and new accounts in the assigned region and create an agreed 4 year plan beyond AOP
- To provide technical advice and co-ordination between customers in North America and the Company's factories in Thailand and China
- Identify and analyse [*sic*] opportunities or threats in the North America region that are consistent with the Corporate strategy and provide advice for the Chief Marketing Officer to act accordingly. Expected typical impact value per issue in the range of \$1 to \$10 million
- Manage or coordinate assigned business projects to ensure they are executed according to the approved plan. Projects may typically have a value in the range of \$1 to \$15 million

The second job description states:

The Vice President of Technical Sales and Strategic Programs reports to the Chief Marketing Officer who has the worldwide sales/marketing responsibility. The VP of Technical Sales and Strategic Programs will:

- Primarily covers North America sales territory.
- Has the main objectives to grow existing business and to penetrate into new business.
- Support existing customers and to search and develop new customers [*sic*]. He helps to bridge technical needs from the customers and capability in the manufacturing plants in Shanghai and Thailand.
- Provide technical support to US based sales activities and to customers, in the design of products manufacturing process and product functions[.]
- Evaluate the developing trends in Semiconductor packaging technology and ensuring the group company's factories in Asia are able to support the future needs of customers.
- Networking for business alliance aiming to create cooperation in penetrate [*sic*] into new market.

Job workweek breakdown by hours:

Visiting local customers	8 hours
Coordinate projects in Asia plants-USA Customer	13 hours (as target time spent ~ 1/4 of quarter in the plants)
Tel calls to customers and to plants	5 hours
Emails	9 hours
Market research activities in USA on Semiconductor related technology	5 hours

The AAO notes that the above hourly breakdown adds up to a 40 hour workweek.

The director issued a request for additional evidence ("RFE") on March 23, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) indicate the total number of employees at the U.S. location where the beneficiary will be employed; (2) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees she supervises by name and job title, including a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties indicating exactly whom the beneficiary directs including their job title and position description and the percentage of time the beneficiary spends performing each of the listed duties; and (4) evidence of wages paid to employees including copies of the U.S. company's payroll summary, IRS Forms W-2 and W-3, and state quarterly wage reports for the last six quarters.

In response to the RFE, the petitioner submitted an organizational chart for the U.S. company, a list of employees for the U.S. company including their current immigration status, a letter of support describing the beneficiary's job duties, quarterly wage reports for 2006 and 2007, and the 2006, 2007, and 2008 federal and state income tax returns for the U.S. company.

The petitioner submitted an organizational chart for the U.S. company listing the beneficiary as the Vice [REDACTED] supervising one vacant position titled North America Sales and another position titled, "Finance & Admin" naming [REDACTED]. There is also a dotted line from the beneficiary to a position titled Sites' Customer Account Managers (Key Accounts' Functional) without any explanation or clarification. The petitioner also submitted a list of employees for the U.S. company and the beneficiary is the only current employee indicated.

The petitioner submitted a letter of support, which described the beneficiary's job duties as follows:

- Business opportunity identification (~ 15% of total hours)
Executive is expected to initiate/conduct study and/or contacts to understand overall industrial trend. . . .
- Approach prospect(s) and initial response to inquiries. (~ 15% of total hours)
Executive is expected to preliminary review customer's requirements from both commercial and technical aspects, preliminary identify requirements-capability gap. Made decision to decline business inquiry that not in line / contradict to company's policy and direction, and/or made decision to pursue further specific business with a set of scope/key parameters for business negotiation.
Executive then expected to delegate selected business project to assigned Account Manager, under Customer Services Department (and/or specially appoint project manager if so required) for further detail review/confirmation.
Executive is expected to provide general direction, especially from commercial aspect for the detail review conducted by assigned person[nel] in manufacturing site(s) as necessary. . . .

- Business proposal and/or negotiation process (~ 20% of total hours)
Executive is expected to provide direction/frame work for business proposal and/or quotation, also to final review and officially release, or instruct respective account manager to release to prospects / customer on behalf of the company.
Once business proposal is officially released, executive is expected to be the focal point for business negotiation on behalf of the company, making decision to withdraw the proposal upon reaching non-agreeable condition and/or decision to agree with customer on agreeable condition(s).
- Business engagement (~ 20% of total hours)
Executive is expected to assume leading role in the initial stage of business engagement in order to ensure successful business project implementation and customer's requirements are fulfilled, to ensure successful business project implementation and customer's requirements are fulfilled, commercially and technically. At this stage, group of tasks may include, but not limited to:]
 - Initiate a master plan for business project to be used as medium for initial business/technical session.
 - Organize and lead initial business/technical sessions(s) between customer's representative and [the petitioner's] management/working team[.]
 - Provide direction/manage utilization of allocated resources for specific business project to achieve pre-set objective(s) and schedule.
 - Negotiate business term(s) and condition(s) should the unforeseeable circumstance and/or extra ordinary requirement arisen [*sic*].
- Customer relationship management (~ 25% of total hours)
Executive is expected to actively manage overall business of key customers by maintaining customer contact, especially at decision making level. Also to be focal point for any major/critical needs requested by customer and to direct and control company's response in time of crisis or conflict.

According to the attached [petitioner's] organization chart, executive is expected to hire and manage [a] US sales manager, the vacant position as soon as industry and overall economic gets better. US sales manager will [be] expected to lead and expand new contact points in order to enhance new business opportunity as well as manage overall business for mid-small size customers.

On the office administrative matter, [the beneficiary] is overseeing [the petitioner's] administrative contractor, [REDACTED] for payroll, State/Federal Taxes, [and] financial book keep purpose.

The petitioner also submitted Form DE-6, California Quarterly Wage and Withholding Report for the years 2006 and 2007 only, rather than the requested quarterly wage reports for 2008 and 2009. Again, the AAO notes that the employee list submitted by the petitioner indicates that the beneficiary has been the company's sole employee since September 2007.

The director denied the petition on May 11, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition.

In support of the appeal, counsel submits a brief in which she asserts that the beneficiary's job duties are executive given the nature of the business. Counsel states:

[The petitioner] serves as the base marketing company for [the foreign company] and its subsidiaries. Pursuant to the corporate set-up, while businesses relationships are established and developed by [the petitioner] in the [U.S.], all subsequent administrative transactions and purchase orders from U.S. customers are delegated to [redacted] and/or [redacted] for production, assembly and shipment.

Accordingly, by the business nature of [the petitioner], minimal day-to-day administrative work is required of the U.S. company as most administrative and transactional work are forwarded to and performed by Account Managers in manufacturing sites, names [redacted]. Other than the aforementioned administrative/transactional work, [the petitioner] has retained, [redacted] [redacted] for a number of years to date as its subcontractor to perform day-to-day financial administrative work of the company.

Counsel also lists the beneficiary's job duties, which are very similar to the job duties discussed in the petitioner's letter of support above. The additional evidence submitted by counsel consists of a letter from the petitioner (previously submitted), U.S. company information, a verification letter from [redacted], [redacted], business proposal/negotiation documents, a list of U.S. customers, and an organizational chart of the petitioner's corporate group.

Discussion

Upon review, and for the reasons stated herein, 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.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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.

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its vice president. However, the definitions of executive and managerial capacity each 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 operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or 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").

In the instant matter, the petitioner provided several versions of the beneficiary's duties. In the initial evidence, the petitioner submitted two separate job descriptions for the beneficiary (in addition to the job duties listed in the letter of support). In the initial breakdown of the beneficiary's duties, the petitioner describes the beneficiary's duties in very broad terms, noting his "main objective is to grow existing business and to penetrate into new business." His other duties consist of "manag[ing] the daily business activity and fulfill[ing] the agreed annual sales plan in north America Region," "identify[ing] new business opportunities with current and new accounts in the assigned region," "manag[ing] and coordinat[ing] assigned business projects to ensure they are executed according to the approved plan," and "planning, organizing, directing, and controlling the technical sales and strategic programs." Some of these duties do not correlate with the other duties detailed by the petitioner and counsel in response to the RFE and in support of the appeal.

It appears as though the beneficiary's position description has evolved throughout the record. For example, the hourly breakdown provided by the petitioner with the initial petition indicates that the beneficiary spends eight hours visiting local customers (equates to 20% of his time), five hours on teleconference calls to customers and to plants (equates to 12.5% of his time), nine hours on emails (equates to 22.5% of his time), 13 hours coordinating projects in Asia plants (equates to 32.5% of his time), and five hours on market research activities in the United States (equates to 12.5% of his time). However, the percentage breakdown provided by the petitioner in response to the RFE does not list any duties related to market research in the United States or coordinating projects in Asia plants. It also indicates that only 25% of the beneficiary's time is spent on customer relationship management when the initial hourly breakdown equated to approximately 32.5% of his time. The initial job descriptions provided state that the nature and scope of the beneficiary's position include business and account management and project management of assigned company projects; one also states that the beneficiary provides technical support to U.S. customers in the design of products manufacturing and functions. However, these duties are not addressed in the percentage breakdown provided in response to the RFE; in fact, the new duties listed specifically indicate that the beneficiary provides direction and the framework for business proposals and is then expected to delegate selected business projects to assigned account managers.

Based on the emphasis placed on market research, sales, customer support, and project management in the initial position descriptions and several inconsistencies as to the beneficiary managing projects himself or delegating to employees abroad, it does not appear that the percentage breakdown submitted in response to

the RFE is accurate or consistent with the descriptions and hourly breakdown submitted with the initial petition. In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Here, the information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job descriptions submitted with the initial petition.

However, as noted above, the petitioner submitted two different position descriptions for the same position at the time of filing the petition. A description prepared by the company in July 2008 indicates that the beneficiary's role includes business and account manager, serving as a "semiconductor assembly & test technical specialist for in field business development" and project management of assigned projects." The other description indicated that the beneficiary is engaged in providing technical support to U.S. based sales activities and to customers, performs market research activities in the U.S. semiconductor packaging industry, is responsible for growing existing business" through networking and by "covering" the North American sales territory. Overall the descriptions suggest that, while the beneficiary has decision-making authority at the managerial level, he also is required to perform a number of technical, sales and market research responsibilities that do not fall within the statutory definitions of managerial or executive capacity. Given the sheer number of position descriptions presented for review, the AAO is not in a position to determine which represents the most accurate account of the beneficiary's actual duties, such that it could be determined that he performs primarily managerial or executive tasks.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). The petitioner has not sustained that burden.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

Here, the petitioner clearly indicates that the beneficiary does not have any subordinates in the United States to perform non-qualifying duties. The AAO notes that the petitioner submitted a list titled "Employees Under Business Development and Customer Support Organization" and an organizational chart listing the beneficiary as the Director of Business Development and Customer Support with a title page stating, "[d]etail list of employee under [the beneficiary's] supervision" However, based on the petitioner's letter of support, it appears that this evidence is for the beneficiary's previous position abroad. The petitioner has not established that the beneficiary primarily performs the duties of a personnel 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 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. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The beneficiary appears to be responsible for essentially all functions of the U.S. marketing and sales support office, rather than performing qualifying managerial duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The beneficiary in this matter has not been shown to be primarily engaged in establishing goals and policies for the U.S. company or overseeing its management. Overall, the beneficiary's duties are focused on sales, customer support, market research, and project management.

The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "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)). 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).

Here, the beneficiary is the sole employee of the U.S. company, and therefore responsible for all non-qualifying duties associated with its day-to-day operations, notwithstanding his executive job title. The petitioner has not established that it has a reasonable need for him to perform primarily managerial or executive duties at its current stage of development. 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 time on non-qualifying duties. Again, 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 Int'l*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

The petitioner indicates that it plans to hire additional staff in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO will uphold the director's determination that 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.

III. Inconsistencies in the Record

The second issue briefly discussed by the director is the significant inconsistencies throughout the record that preclude a finding that the beneficiary is a manager or executive.

The four quarterly wage reports for 2007 submitted by the petitioner fail to name the beneficiary as an employee; the only employee listed is [REDACTED]. In fact, the 2007 fourth quarter report states "no payroll" for that quarter (according to the list of employees, [REDACTED] ended his employment at the U.S. company in September 2007). However, the list of employees submitted by the petitioner indicated that the beneficiary started working for the petitioner on January 1, 2007.

Additionally, the director illustrated numerous discrepancies in the petitioner's federal income tax returns where the salaries and wages did not correspond to the salaries and wages on the corresponding Forms W-2 and W-3 submitted. On appeal, counsel addressed the issue by stating that salaries and wages are calculated differently on tax documents and that the 2006 income tax return includes all payments the company made in relation to employee compensation, such as take-home salaries, medical wages, 401K and non-used vacation on the line for "Salaries and Wages" (line 13). Counsel went on to state that the Forms W-3 and W-2 only reflect take-home salaries and wages paid to the employee(s), which is why the amounts differ. As for the 2007 corporate income tax returns, counsel points out that [REDACTED] was also employed through September, which is why the salaries and wages on the tax returns are higher than the beneficiary's Form W-2.

Counsel's argument that the 2006 corporate tax return includes medical wages, 401K, and non-used vacation in addition to take-home salaries in the salaries and wages line is unconvincing. The petitioner's 2006 corporate tax return indicates that the U.S. company paid \$26,000 in pension, profit-sharing, etc., plans and \$13,563 in employee benefit programs. The petitioner's 2007 corporate tax return indicates that the U.S. company paid \$13,942 in pension, profit-sharing, etc., plans and \$17,257 in employee benefit programs. The petitioner's 2008 corporate tax return indicates that that the U.S. company paid \$7,200 in pension, profit-sharing, etc., plans and \$7,012 in employee benefit programs. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, the instructions for IRS Form 1120-F clearly state:

Salaries and Wages

Enter the total salaries and wages paid for the tax year. Do not include salaries and wages deductible elsewhere on the return, such as amounts included in officers' compensation, cost of goods sold, elective contributions of section 401(k) cash or deferred arrangement, or amounts contributed under a salary reduction SEP agreement or a SIMPLE IRA plan.

If the corporation claims a credit for any wages paid or incurred, it may need to reduce its deduction for officers' compensation and salaries and wages.

If the corporation provided taxable fringe benefits to its employees, such as personal use of a car, do not deduct as wages the amount allocated for depreciation and other expenses claimed on lines 20 and 27 [Depreciation and Other Deductions].

Employee Benefit Programs

Enter contributions to employee benefit programs not claimed elsewhere on the return (e.g., insurance, health, and welfare programs, etc.) that are not an incidental part of a pension, profit-sharing, etc., plan included on line 23 [Pension, Profit-Sharing, etc., Plans].

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the reported salaries and wages on the income tax returns are calculated to include other employee benefits does not qualify as independent and objective evidence. 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). Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

In addition, the director pointed out an inconsistency in the beneficiary's listed address. Neither counsel nor the petitioner addressed the inconsistency raised by the director. The petitioner's U.S. offices are located in Santa Clara, CA and the petitioner indicated that the beneficiary "will operate from this location." However, the beneficiary's personal federal income taxes and W-2 Forms, as well as his dependents' Forms I-539, all list the same address in Plano, Texas.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The discrepancies encountered in the evidence call into question the petitioner's ability to document the requirements under the statute and regulations. For this additional reason, the petition may not be approved.

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.