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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**



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DATE: **FEB 08 2012**

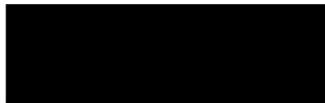
Office: CALIFORNIA SERVICE CENTER

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 employ the beneficiary 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 California corporation established in October 2006, states that it is an information technology business. The petitioner claims to be a subsidiary of [REDACTED] located in Istanbul, Turkey. The petitioner seeks to employ the beneficiary as the chief operations officer of its office in the United States.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in a position that is primarily executive or managerial in nature.

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 states that the director's decision was erroneous in stating that the beneficiary provided no quantifiable definition for his tasks and that the claimed duties of the beneficiary were too broad and nonspecific to convey any understanding of his day-to-day duties. Counsel submits a brief 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. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary has been and will be employed in a position that is primarily executive or managerial in nature.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 16, 2009. The petitioner indicated on the Form I-129 that it is engaged in an information technology business with five

current employees and a gross annual income of \$89,507. In support of the petition, the petitioner submitted a job offer letter describing the duties of the beneficiary at the U.S. company as follows:

As Chief Operations Officer of [the petitioner], [the beneficiary] will function at the highest level of company leadership, exercising full discretion over planning, management, and direction of our operations in the U.S. This function is so essential as to be indispensable to [the petitioner].

The C.O.O. will be wholly responsible for formulating policies, managing daily operations, and planning the use and distribution of resources for our U.S. operations, using the knowledge and experience he gained with [the parent company]. He will be directing and coordinating [the petitioner's] activities including client support, sales and distribution.

The C.O.O. will review financial statements, sales and activity reports, and other performance data to measure goal achievement. He will use this information to set financial forecasts, plan strategies for areas that require improvement, and develop company strategies to meet corporate goals. He will manage and direct [the petitioner's] financial and budget activities to fund operations, maximize investments, and increase efficiency using his knowledge of [the petitioner's] proprietary methodologies and overall company goals.

The C.O.O. will represent company in contract negotiations, authorize and sign contracts on behalf of the company with end-user market clients, and represent executive function of company at trade fairs, if necessary.

The C.O.O. will exercise authority over recruitment, selection and development of executive, managerial and professional staff for our growing U.S. operations. In conformity with established [parent company's] policies and procedures, he will manage the establishment of recruitment systems and procedures, human resource development policies, guidelines and procedures for doing performance reviews as well as the formulation of schemes and methods to improve field operation performance. He will be vested with authority, and charged with responsibility, to hire outside professional contractors, including attorneys, certified accountants, etc., to protect the interests and legal rights of the U.S. company and its parent company, as well as to comply with all U.S. laws and regulations.

The subordinate managers of our operations who will directly report to [the beneficiary] include:

Field Operations Manager: Responsible for identifying, developing, and directing post-sales technical support strategies for our company, and managing on-site tech support personnel at various regions.

Regional Sales Team: Sales Manager position is currently open. The Regional Sales Team will report directly to the C.O.O. until the Sales Manager position is filled [sic].

The Sales Manager would be responsible for coordinating sales distribution by establishing quotas and goals. Analyze sales statistics gathered by Regional Sales Team to determine sales potential and inventory requirements and monitor the preferences of customers.

The petitioner did not submit any additional information describing the duties of the beneficiary on a day-to-day basis.

The petitioner submitted an undated organizational chart for the U.S. company listing the beneficiary as the Chief Operations Officer with the following subordinates: [REDACTED] Eastern U.S. Regional Sales; [REDACTED] Midwest & Western U.S. Regional Sales; and [REDACTED] Field Operations & Tech Support Manager. The Field Operations & Tech Support Manager has two subordinates: [REDACTED] Tech Support for Midwest & Western U.S. Regions, and [REDACTED] Tech Support for Eastern U.S. Region. The petitioner also submitted an employee list for the U.S. company listing the same individuals named above.

The petitioner submitted job descriptions for each of the beneficiary's subordinates stating, in pertinent part, the following:

Field Operations Manager: [REDACTED]
Start Date: 04/01/2008

[REDACTED] exercises full discretion for the day-to-day management of our field operations relating to ongoing sales, marketing, and business strategy functions in the U.S.

* * *

[REDACTED] is in the U.S. pursuant to L-1A status and is a salaried employee, earning \$60,000 per year.

Regional Sales Manager: [REDACTED]
Start Date: 04/01/2008

[REDACTED] is the Eastern U.S. Regional Sales Manager. She directs the sales distribution of [the petitioner's] products by establishing sales, territories, quotas, and goals to ensure the growth and success of our company in the U.S. market.

Regional Sales Manager: [REDACTED]
Start Date: 03/01/2009

[REDACTED] is the Midwest & Western U.S. Regional Sales Manager. He directs the sales distribution of [the petitioner's] products by establishing sales, territories, quotas, and goals to ensure the growth and success of our company in the U.S. market.

Tech Support: [REDACTED]

Start Date: 03/01/2009

██████████ is responsible for pre and post sales engineering support within the Midwest and Western U.S. regions.

Tech Support: ██████████
Start Date: 07/01/2009

██████████ is responsible for pre and post sales engineering support within the Eastern U.S. region.

The petitioner went on to provide a list of additional responsibilities for each of the subordinates, none of which list administrative duties, such as payroll, logistics, office supply inventory, financial reports, etc.

The director issued a request for additional evidence ("RFE") on September 30, 2009, instructing the petitioner to submit, *inter alia*, the following: (1) 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 he 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 in the United States; and (4) a list of the specific goals and policies the beneficiary has established over the last six months along with a day-to-day description of the duties the beneficiary has performed over the last six months.

Counsel for the petitioner submitted a response to the RFE where he addressed several elements of the RFE as follows:

It should be emphasized, again, that the absence of any support or administrative staff on the company payroll at the petitioner's ██████████ office may indicate that the beneficiary, as well as other employees, would therefore be engaged in business activities or duties that do not qualify as "executive" or "managerial" in capacity. However, as indicated by documentation submitted with the original petition (see Exhibit 19), the petitioner's office lease includes bundled support services, such as receptionist and secretary, telecommunications and utilities, etc., and many normal-course-of-business administrative duties and matters are handled via outside-contracted professional services (legal, accounting, banking, and payroll services). Thus far, petitioner has opted to forego hiring administrative support staff in favor of these alternatives.

The AAO notes that the documentation submitted for the petitioner's office lease includes a single page indicating terms and conditions of the lease that is completely illegible. The petitioner also submitted multiple invoices for the office lease where each invoice lists "administrative support/negotiated" and under service notes, it clearly indicates "mail forwarding." This is insufficient evidence to show that the petitioner's office lease includes any administrative support staff for the beneficiary. Additionally, the petitioner failed to submit copies of any contracts or agreements with outside professional services to support counsel's assertions that the beneficiary does not perform any administrative or operational non-qualifying duties.

In response to the RFE, the petitioner submitted a comprehensive listing of the beneficiary's duties similar to those duties listed above. The petitioner did provide some additional detail in the beneficiary's job duties, but failed to quantify the amount of time the beneficiary spends on each duty.

The director denied the petition on November 9, 2009, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in a position that is primarily executive or managerial in nature. In denying the petition, the director found that the petitioner's description of the beneficiary's job duties were vague and general in nature, essentially serving to paraphrase the elements of the regulatory definition of managerial and executive capacity. The director further observed that no concrete description was provided to explain what the beneficiary will do in the day-to-day performance of his duties.

In support of the appeal, counsel submits a brief in which he asserts that the beneficiary will function at an executive level with the U.S. company. In reference to the beneficiary's duties, counsel states the following:

Additionally, in the submission made on September 6, 2009, Petitioner presented the Resolution of the Board of Directors of the Parent Company, which appoints the Beneficiary as Chief Operations Officer (COO). In addition to the Board of Directors' resolution, this counsel submitted a detailed job offer letter from the Petitioner. In the aforementioned letter, Petitioner explained in detail that the Beneficiary will function at the highest level of company leadership; that the Beneficiary will exercise full discretion over planning, management, and direction of the operations in the U.S.; and that the functions of the COO are essential and indispensable to [the petitioner].

* * *

In its initial submission, Petitioner furnished a written job offer that clearly describes the duties to be performed – the letter identifies the Beneficiary's function with specificity, articulates the essential nature of his functions, and establishes the percentage of the Beneficiary's daily duties attributed to managing essential tasks. Furthermore, in response to the [RFE] issued by USCIS, Petitioner submitted a list of specific discretionary decisions that the Beneficiary has exercised over the Parent Company's operations within the last six months, as well as a list and description of detailed day-to-day duties the Beneficiary has performed during that same period of time, as previously mentioned above. Petitioner has provided a formal job description of the Beneficiary as a CEO of the Parent Company through the Articles of Association and the Resolution of the Board of Directors of the Parent Company. Additionally, this counsel submitted copies of the contract executed by the Beneficiary under his capacity as CEO.

Counsel went on to provide the same list of duties previously submitted by the petitioner in response to the RFE. Counsel also provided the same statement in reference to the administrative staff contracted by the petitioner but, again, failed to provide any evidence of such contracts or agreements. The AAO notes that, despite counsel's assertions that the petitioner provided information on the percentage of the

beneficiary's daily duties attributed to managing tasks, the record does not contain any information breaking down the beneficiary's duties by percentage or amount of time he spends completing such tasks.

Neither counsel nor the petitioner submitted any new evidence in support of the appeal.

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. 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.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its chief operations officer. 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 and counsel provided the same statements of the beneficiary's job duties in the initial petition, in response to the RFE, and in support of the appeal. Some of the beneficiary's listed duties are very broad. For example, the petitioner and counsel stated that the beneficiary will "be responsible for establishing [the petitioner's] goals, policies, and strategies;" "review financial statements, sales and activity reports, and other performance data to measure goal achievement;" "ensure preparation of policies for the functional divisions and implementation of the approved policies within the scope of the main strategies of [the petitioner];" "direct and coordinate [the petitioner's] activities including client support, sales and distribution functions at an executive level;" "ensure formation and development of the necessary human resource policies to achieve the goals of [the petitioner];" "control and coordinate management of all functions within [the petitioner];" "bear the main responsibility for preparing [the petitioner's] budget;" "exercise authority over recruitment, selection and development of executive, managerial and professional staff for the growing operations of [the petitioner];" and "hire outside professional contractors, including attorneys, certified public accountants, etc., to protect the interests and legal rights of [the petitioner] and its parent company, as well as to

comply with all U.S. laws and regulations." Some of the duties listed by the petitioner and counsel merely paraphrase the statutory definition of managerial capacity and executive capacity. See section 101(a)(44)(A) and (B) of the Act. 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.).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although the lists of duties presented for the beneficiary do not include extensive administrative or operational duties, the petitioner has not provided sufficient evidence to establish that it has hired, through independent contracts as claimed by counsel, any administrative support staff that will relieve the beneficiary from performing non-qualifying duties. The lists of duties performed by the beneficiary's subordinates also do not establish that any of those subordinates would relieve the beneficiary from performing non-qualifying duties. The petitioner's and counsel's descriptions of the beneficiary's job duties do not establish what proportion of the beneficiary's duties are managerial in nature, and what proportion are actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Therefore, the AAO cannot determine what proportion of the beneficiary's time will be spent in performing non-qualifying administrative or operational tasks for the U.S. company.

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).

Although the beneficiary is not required to supervise personnel, if the petitioner claims that his 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.

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 a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. Here, it appears that the beneficiary is supervising three managerial and professional

employees. However, the petitioner provided multiple invoices from [REDACTED] for a 50% salary share and a 50% L-1A visa fee share of [REDACTED] the petitioner's field operations and tech support manager. The invoices provided were dated April 2008 to December 2008, although [REDACTED] was granted L-1A status on February 29, 2008 to work for the petitioner. The petitioner did not provide any clarification for these invoices. Although the last invoice submitted is dated December 2008, the AAO cannot sufficiently determine that [REDACTED] the petitioner's field operations and tech support manager, is currently dedicating 100% of his time to the petitioner. As such, the AAO assumes that the beneficiary is performing the duties of the field operations and tech support manager for the other 50% of [REDACTED]'s time and thus is not relieved from performing non-qualifying duties. 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).

The petitioner has neither claimed nor established, in the alternative, that the beneficiary is employed primarily as 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 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner did not indicate that the beneficiary performs as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary spends on duties that would clearly demonstrate that he manages an essential function of the U.S. company.

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 employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than day-to-day operations. In fact, the

petitioner has failed to articulate how the beneficiary's subordinates will relieve him from performing non-qualifying administrative and operational duties.

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 her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. 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 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).

The petitioner in this matter has not demonstrated that it will employ the beneficiary in a primarily managerial or executive position. While the AAO notes that the beneficiary appears to be managing three managerial and professional employees, the petitioner has not established that such employees (or outside contracted employees) will relieve the beneficiary from primarily performing non-qualifying duties. As such, 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. Accordingly, the appeal will be dismissed.

III. 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.