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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 11 2013 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 petition seeking to extend the beneficiary's employment 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 2009, is a "trading, service provider and construction company." It claims to be a subsidiary of , located in Ho The beneficiary was previously granted L-1A status for a one-year period in order to open a new office in the United States and the petitioner now seeks to extend his status in the position of chief executive officer for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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. On appeal, counsel asserts that the beneficiary is employed in an executive capacity and 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.

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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

II. The Issues on Appeal

The primary issue to be addressed is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily executive capacity.[1]

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on February 3, 2012. In a letter accompanying the petition dated February 1, 2012, counsel for the petitioner described the nature of the beneficiary's employment in the United States as follows:

> The Beneficiary will be coming to [the petitioner] as the Chief Executive Officer ("CEO"). In this capacity, he will oversee the entire operations of [the petitioner] and will report directly to the board of directors regarding the progress and viability of [the petitioner]. As CEO of [the petitioner] and 15% shareholder of [redacted] [the beneficiary] will also be implementing board decisions and initiatives and will be maintaining the efficient operations of [the petitioner], with the assistance of senior management personnel. *See Company Letter of Support.* As such, he will be coming to the U.S. company to work in an executive position.

The petitioner submitted a letter from the beneficiary's foreign employer, [redacted] ("the foreign entity"), explaining that the intended staffing of the U.S. company will consist of three core executives: the beneficiary as President, Mr. [redacted] as Vice President, and Mr. [redacted] as Secretary, as well as "two or three strong individuals." The petitioner indicated that it had filed visa petitions on behalf of the three core executives.

The director issued a request for additional evidence ("RFE") on February 13, 2012, in which she requested, *inter alia*, additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. The director advised that such evidence may include, but is not limited to, the following: (1) a more detailed description of the beneficiary's duties in the United States including the percentage of time required to perform the duties of the managerial or executive position; (2) U.S. organizational chart showing the organization's hierarchy and staffing levels, listing all employees in the beneficiary's immediate division by name, job title, summary of duties, education level, and salary; and (3) a copy of the U.S. company's state quarterly wage report for the 1st, 2nd, 3rd, and 4th quarter of 2011 that were accepted by the State of California.

In response to the RFE, the petitioner provided a letter explaining the beneficiary's duties and the staff of the U.S. company as the following:

> Duties (% of time):
> Develop strategies for trading, investing and acquiring assets for [the petitioner] (50%)
> Broker business deals to the benefit of [the petitioner] and Parent: [redacted] (30%)
> Meet potential clients, inspect sites and purchased goods for import and export (10%)

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[1] As the petitioner only asserts that the beneficiary will be employed in an executive capacity, the AAO will only analyze the beneficiary's employment in an executive capacity. The AAO will not analyze the beneficiary's employment in a managerial capacity.

Set-up [the petitioner's] internal work flow and develop U.S. specific office procedures (10%)
Supervise and manage support staff to be hired (please see Supervised Staff below)

Supervised Staff:
Mr. [redacted] Vice President of [the petitioner]
Ms. [redacted], Secretary of [the petitioner]
Mr. [redacted], Director of U.S. Operations*
Mr. [redacted], Director of Technology*

Discretionary:
[The beneficiary] has wide discretion as to how [the petitioner] will be managed, including:
Business strategy
Personnel (hire/fire)
Operational control
Location for future offices
Purchasing of operational assets for [the petitioner]
Other decisions necessary for [the beneficiary] to operate [the petitioner]

*Both [redacted] will only be hired if the core Vietnamese executives will receive their L visas. Both [redacted] are U.S. legal residents or citizens, have Vietnamese background and understand how to conduct business in the U.S. However, they lack specific knowledge required, such as high level management, working knowledge with the Vietnamese government, and most importantly the familiarity with [the foreign entity].

Finally, the petitioner provided the U.S. entity's organizational chart depicting the beneficiary on top, directly supervising Mr. [redacted] the Vice President, who directly supervises three employees: Mr. [redacted] Director, U.S. Operations; Ms. [redacted] Secretary; and Mr. [redacted], Director, Technology. The organizational chart reiterates that Mr. [redacted] will be hired "ONLY IF the Core Vietnamese Executives Receive L Visas." The chart further states that Mr. [redacted] is currently a part-time worker "to take care of [the petitioner] [*sic*] errands, such as picking up mail, answering phone calls from Vietnam, handling minor administrative issues, and other small tasks as directed by [the foreign entity]. The organizational chart also states that "the three-executive core team must be in place before [the petitioner] can become fully operational."

The director denied the petition on March 22, 2012, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity under the extended petition. In denying the petition, the director observed that the beneficiary is primarily assisting with the day-to-day non-supervisory duties of the business, thereby precluding him from being considered a manger or executive. The director also noted that, from the record, it appears that Mr. [redacted] are still in Vietnam awaiting their visas, and that Mr. [redacted] (a part-time employee) and Mr. [redacted] will only be hired if the three core executives all receive their L visas. Therefore, the petitioner failed to establish that the petitioner has an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor.

On appeal, counsel for the petitioner reiterates that the beneficiary is employed in an executive capacity. Regarding the beneficiary's job duty of setting up the petitioner's internal work flow and developing U.S. specific office procedures, counsel asserts that this is a responsibility involving the operation of the organization on a macro level and "is not a function that would be served by a low level employee or manager." Regarding the beneficiary's job duty of contacting, preparing, and managing correspondence between U.S. and Vietnamese clients, counsel asserts: "Given the small size of the company, the beneficiary's engagement in these functions is tantamount to establishing the goals and procedures of the organization." Counsel states: "Beneficiary asserts that he handles all administrative tasks and acts as support to US executives. This duty exhibits that the beneficiary is actively engaged on an executive level with coordinating with other executives . . . ." Counsel then asserts:

> When analyzed in context, more specifically, when the lack of employees is taken into account, the functions performed by the beneficiary are elevated to those of an executive. All of the functions performed by the beneficiary at this stage are critical to the future success of the company . . . .
>
> At this infant stage of the company's existence, all of the functions performed by the beneficiary warrant a high level of responsibility. This company is not well established yet. As noted previously, due to the lack of employees, all of the beneficiary's functions are deemed to be directing the management of the organization. . . .

Discussion

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily 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 either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Many of the beneficiary's job duties were vague and overly broad. In particular, the petitioner described the beneficiary's primary job duty as to "[d]evelop strategies for trading, investing and acquiring assets for [the petitioner]." In addition, another one of the beneficiary's job duty is to "[s]et-up [the petitioner's] internal work flow and develop U.S. specific office procedures." These vaguely and broadly stated job duties fail to give any meaningful insight into what the beneficiary actually does on a day-to-day basis. 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 actual duties themselves will reveal the true nature of the employment. *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). 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. *Id.*

Moreover, the beneficiary is responsible for performing the tasks necessary to provide the services of the U.S. petitioner. In particular, the petitioner is responsible for brokering business deals, meeting potential clients, inspecting sites, and purchasing goods for import and export. In the instant matter, it is critical to consider that the U.S. petitioner currently employs only one full time employee, the beneficiary.[2] The petitioner claims to have only one part-time employee, who is responsible for only minor errands such as picking up mail and answering phone calls. Therefore, given its current staffing level, it is reasonable to conclude that the beneficiary is primarily performing the tasks necessary to provide the daily operations and services of the petitioner. As the petitioner is primarily engaged in performing the day-to-day operations and services of the U.S. petitioner, he cannot be considered to be "primarily" employed in an executive capacity.

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).

Although the petitioner asserts that it will hire additional employees once all three core executives are granted L visas, this contingent future hiring of additional employees does not establish eligibility for the benefit sought. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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'r 1978).

Counsel correctly observes 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). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size and 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In the instant matter, the conclusion that the beneficiary is not primarily employed in an executive capacity is based on a variety of factors, including the vague and broad job duties of the beneficiary, his performance of daily operational tasks, the lack of other employees to perform the daily operational tasks of the U.S. petitioner, and the petitioner's contingent future hiring plans.

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.

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[2] As noted by the director, and as apparently conceded on appeal through counsel's repeated statements that the petitioner has a "lack of employees," the petitioner's two other "core executives" are still in Vietnam awaiting visas and the proposed Director of U.S. Operations and Director of Technology will only be hired only if the two other core executives are granted visas.

Finally, on appeal counsel asserts that all of the beneficiary's job duties should be considered executive when considered in the context of the U.S. company's "lack of employees" and "infant stage of the company's existence." However, counsel's assertions are unpersuasive. Counsel cites to no legal authority to support the proposition that the duties of the beneficiary – including those that counsel concedes can be performed by lower level employees – can be "elevated" to an executive level based solely on the company's small size and stage of development.

The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up new businesses. The regulations allow for a one-year period for a business organization to commence doing business and develop to the point that it will support a managerial or executive position. There is no provision in USCIS 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 the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly executive position. Therefore, it is ineligible for the requested extension.

For the foregoing reasons, the petitioner failed to establish that the beneficiary will be employed in a primarily executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer, [redacted] ("the foreign entity"). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

According to Form I-129, the petitioner claims to be a subsidiary of the foreign entity based upon the foreign entity's 100% stock ownership in the petitioner. As evidence of the foreign entity's ownership interest, the petitioner submitted a copy of its stock certificate number 1, reflecting the issuance of 100,000 shares to the foreign entity. However, this stock certificate is *prima facie* invalid. Foremost, the certificate clearly states that the petitioner is authorized to issue 2,000 shares of stock, in contrast to the 100,000 shares of stock purportedly issued to the foreign entity. The petitioner's Articles of Incorporation confirms that the maximum number of shares that the corporation is authorized to issue is 2,000. The petitioner failed to explain why or how it could have legitimately issued 100,000 shares to the foreign entity, as depicted by this stock certificate. The petitioner submitted no evidence to establish that it amended its capital structure. In addition, the stock certificate is not dated.

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.*

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.