



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 09 2013** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner filed a motion to reopen and reconsider to the service center. The director granted the motion to reopen the petition and subsequently affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company established in November 2009, states that it engages in "all types of IT investments in the United States and export of electronics." The petitioner claims to be a subsidiary of [REDACTED] located in Venezuela. The petitioner seeks to extend the beneficiary's employment as its president for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner filed a motion to reopen and reconsider the denied petition. The director granted the motion to reopen and reconsider and affirmed his decision to deny the petition on the same grounds.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner contends that the director failed to consider evidence and explanations submitted in response to the request for evidence and on motion, which establish that the beneficiary will be employed in an "executive/managerial capacity." The petitioner 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.

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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (v) establishes the goals and policies of the organization, component, or function;
- (vi) exercises wide latitude in discretionary decision-making; and
- (vii) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 30, 2012. The petitioner indicated on Form I-129 that it engages in "all types of IT investments in the United States and export of electronics" with five current employees and a gross annual income of \$1,000,000. In its letter of support, the petitioner described the beneficiary's job duties as follows:

The position being offered to [the beneficiary] in the United States with [the petitioner] located in our office in [redacted] Florida will be as President; he will continue to control and direct the overall business of the company, its subsidiaries and alliances considering the new target market (Electronics Wholesale Distribution) and products to be placed from the U.S. We expect [the beneficiary] will orient [*sic*] and be responsible for expanding, organizing, directing, and developing [the petitioner] and its DBA [redacted] to the new business challenge. As such, [the beneficiary's] duties would consist of the following priorities and percentage of time on a weekly basis:

- Direct the development and growth of the export industry to Venezuela and later to South America in the area of electronics and later to other related segments. As such, he will be responsible for directing and managing the negotiations with our providers in the United States . . . as well as with principal customers In addition, he will supervise one international business transactions specialist, one accountant, a business development specialist, and two accounts executive specialists; further, he will hire an IT specialist full-time for the current IT contractor is not completing the task assigned as he expected in the extend [*sic*] of networking and web page in addition to other related IT work. He will also re-take the coordination for the export of auto parts with all providers such as [redacted] etc, in addition to make sure that all regulations are met in this field. . . . In this activity he would spend about 40% of his time.

- Offer to our client's products of excellent quality and state-of-the-art technology in the electronics field. As such he will develop current company's policies and procedures, local policies establish by US customs, etc In coordination with the international business specialist he would work in setting up process, transportation expenses, etc. He would spend about 10% of his time on it.
- He will be responsible for liaison between our company, provider/s, which currently provide support to the organization using the appropriate networks in the U.S. and abroad. He will hire an IT specialist to work on this; i.e. he will centralize the control management of parent company through the Internet, using conference meeting with Skype; he would also recommend alternatives and solve medium complex issues that needs his attention; he will use Cisco cameras to maximize communication with parent company's key employees, and on Fridays he will conduct corporate training to managers abroad. Furthermore, he will be responsible for providing information, advice, and counsel to the Board of Directors in the U.S. and abroad; maintaining close contact and exchange of opinions to create also but not limited to programs, and strategic direction of the corporation which needs to move forward in the business areas that we are already into. He would spend about 30% of his time;
- Supervises the implementation of marketing programs, assuring their timely, effective, and efficient execution in the marketplace; directs the company's strategies, ensuring quality performance in the workplace, promotions, special prices for new products for our subsidiary in [REDACTED] Create and adequate [sic] business international transactions for clients in Venezuela including but not limited to licensing agreement, franchising, etc; Procure the development and growth of existing business alliances for clients in industries related with cell phones. He would spend 10% of his time;
- Coordinates services by establishing territories and goals as well as control system for managers and other key employees. He will continue maintaining the weekly conference meetings with Petitioner' [sic] employees to evaluate goals and objectives reached and make necessary adjustments in addition to training. He will contribute our company's knowledge and experience in management to orient our market research, providing the appropriate employment opportunities within the company's zone of influence, and contribute to strengthening the economic conditions in this area. He would spend 10% of his time.

The petitioner provided an organizational chart for the U.S. company depicting the beneficiary as the president supervising one accountant, [REDACTED] one international business specialist, [REDACTED] and one business development specialist, [REDACTED] who supervises two account executives, [REDACTED] and one proposed marketing analyst. The chart also depicts proposed positions for an IT specialist and an administrative manager, who would also report to the beneficiary.

The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, and Florida Employer's Quarterly Report, for the fourth quarter of 2011 indicating that the petitioner had one employee the first and second months of the quarter and two employees on the third month of the quarter, the beneficiary and [REDACTED]

The Employer's Quarter Report indicates that the petitioner paid \$14,000 in wages, tips, and other compensation for the fourth quarter of 2011, \$12,000 to the beneficiary and \$2,000 to [REDACTED]. The petitioner also submitted IRS Form W-2, Wage and Tax Statement, for 2011 indicating that it paid \$24,000 to the beneficiary and \$2,000 to [REDACTED].

On February 10, 2012, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to provide additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. The director asked that the petitioner explain the apparent discrepancy between the number of employees claimed on the Form I-129 and the number of employees who received IRS Forms W-2 in 2011. The director also requested detailed position descriptions for the beneficiary and all other U.S. employees.

In response to the RFE, the petitioner provided the following explanation regarding its current employees in the United States:

Some of the employees currently working for Petitioner . . . include: [REDACTED]

[REDACTED]

employees such as [REDACTED] worked with Petitioner in 2011 and some weeks of 2012 but they have been replaced; since the IRS gave us a PIN for adding on payroll, it took so long in processing the new employees and that is why we gave them 1099. In addition, the corporate income taxes also shows [sic] that the parent companies . . . are the owners of subsidiary [the petitioner] as per the membership certificates also established so [sic].

The petitioner submitted the following description of the beneficiary's duties:

In this capacity, [the beneficiary] is responsible for directing the overall operations and activities of each company. He is also responsible for planning, developing, and establishing the policies and objectives of the organization in accordance with the board of directors. Through the company's subordinate managerial personnel including the General Manager, Sales Manager, Administrative Manager, Parts Manager and Service Manager, [the beneficiary] directs the principal executives of the Parent Company and other entities (members of the [REDACTED] as well; he also ensures that our company consistently provides the highest levels of service for which we are known for [sic].

[The beneficiary] will report generally to the Board of Directors abroad, and he will have however complete autonomy over the decisions he makes on behalf of [the petitioner]. It is anticipated that by the coming months of operations under his direction, the company will hire additional professional employees (IT Specialist, Administrative Manager, Marketing Analyst, etc.) to facilitate the technical work, financial, and strategic planning to reach the company's goals. [The beneficiary] spends 100% of his time functioning in an executive capacity.

The petitioner also provided the same list of job duties and percentage breakdown of time allocated to those duties submitted with the petition for the beneficiary along with a quasi-breakdown of how the beneficiary spends his time during a workweek. The petitioner also provided position descriptions for the administrative manager, marketing analyst, accountant, account executives, international transactions specialist and business development specialist.

The petitioner submitted its IRS Form 1065, U.S. Return of Partnership Income, for 2011. The Form 1065 indicated that the petitioner paid \$28,286 in salaries and wages for 2011. The petitioner submitted IRS Form 1099-MISC, Miscellaneous Income, for 2011 indicating that the following individuals received monies deemed "non-employee compensation" from the petitioner: [REDACTED] received \$2,137; S&J [REDACTED] received \$1,650; [REDACTED] received \$2,289; Lisbet Alfonso received \$2,700; [REDACTED] received \$2,700; [REDACTED] received \$1,150; and [REDACTED] received \$2,700.

On March 26, 2012, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director found that, although the petitioner claimed it had five employees, most of them were issued "nonemployee compensation" for the time period in question. The director further found that the petitioner does not have permanent employees other than the beneficiary to perform the day-to-day tasks required to operate the petitioner business, including export operations and a retail cell phone store. The director observed that the petitioner claimed to have invested in real estate, but failed to indicate what types of duties are involved in managing said real estate and what the beneficiary's role is.

The petitioner filed a motion to reopen and reconsider the denied petition. The director granted the motion to reopen and reconsider and subsequently affirmed the denial of the petition making the same observations as in the initial denial. The director also considered the petitioner's claim that the beneficiary would be a function manager. However, the director found that the petitioner failed to submit any evidence detailing the essential function managed by the beneficiary or a detailed position description specifying exactly what the management of those various business functions would entail, and what percentages of the beneficiary's time would be spent performing managerial or executive duties or as a function manager. The director further found that the petitioner failed to demonstrate that the beneficiary would be primarily managing or directing, rather than performing the "function" as there are no employees to relieve the beneficiary from performing non-qualifying duties.

On appeal, the petitioner asserts that the beneficiary will be employed in an executive capacity. The petitioner contends that the director failed to properly review the documentation submitted in support of the petition. The petitioner further contends that the comprehensive description of the beneficiary's duties demonstrates the beneficiary's managerial and executive position.

The petitioner submits a brief addressing the beneficiary's role as follows:

Beneficiary will be primarily involved with executive tasks . . . with occasional managerial supervisory duties over professional personnel. Please find enclosed copies of College or higher degrees belonging to several employees that are or will be under direct supervision of Beneficiary.

The petitioner went on to describe the beneficiary's duties and those of his subordinates as described in response to the RFE.

The petitioner also submits two organizational charts for the U.S. company. One titled "prior" and one titled "current." The organizational chart titled "prior" depicts the beneficiary as the president supervising "accounting," [REDACTED] one international business specialist, [REDACTED] and one business development specialist, [REDACTED] who supervises one account executive, [REDACTED] and one marketing analyst, [REDACTED]. The beneficiary also supervises one proposed administrative manager and one IT specialist, [REDACTED]. The organizational chart titled "current" depicts the beneficiary as the president supervising "accounting," [REDACTED] one international business specialist, [REDACTED] one business development specialist, [REDACTED] who supervises two account executives, [REDACTED] and one marketing analyst, [REDACTED] one administrative manager, [REDACTED], and one business systems analyst, [REDACTED].

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary 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 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").

At the time of filing the petition, the petitioner did not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. In response to the RFE, the petitioner claimed that the beneficiary will be employed in an executive capacity. Then, on motion, the petitioner claimed that the beneficiary will be employed as a function manager. On appeal, the petitioner again claims that the beneficiary will be employed in an executive capacity. A beneficiary may not claim employment as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to

represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

On review, although the petitioner's descriptions of the beneficiary's duties have remained fairly consistent throughout the record, it appears that the petitioner has attempted to change the beneficiary's role at the U.S. company in order to make him eligible for the classification sought. At the time of filing and in response to the RFE, the beneficiary's job duties were described as "[d]irect the development and growth of the export industry . . . in the area of electronics and later to other related segments. . . . 40% of his time"; "develop current company's policies and procedures . . . [and] in coordination with the international business specialist he would work in setting up process, transportation expenses, etc. . . . 10% of his time"; "responsible for liaison between our company, provider/s, which currently provide support to the organization using the appropriate networks in the U.S. and abroad. . . . he will use Cisco cameras to maximize communication with parent company's key employees, and on Fridays he will conduct corporate training to managers abroad. . . . 30% of his time"; "[s]upervises the implementation of marketing programs, assuring their timely, effective, and efficient execution in the marketplace . . . 10% of his time"; and "[c]oordinates services by establishing territories and goals as well as control system for managers and other key employees. . . . 10% of his time." On motion, the petitioner referenced the beneficiary as a functional manager but failed to elaborate on what the essential function is and what duties the beneficiary performs specifically related to that function. On appeal, the petitioner again refers to the beneficiary as an executive and provides the same list of job duties previously provided with the petition.

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in a primarily managerial or executive position. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its owner and president, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as an executive. Here, the petitioner characterized the beneficiary's role as president and identified his duties as described above. While these tasks are undoubtedly necessary in order to operate the U.S. company, the petitioner has not indicated how such duties qualify as either managerial or executive in nature. 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. Although the petitioner provided a quasi-breakdown of the beneficiary's workweek, the petitioner failed to provide any detail or explanation of the beneficiary's activities; the petitioner simply listed the same or similar duties previously submitted and attached days and times to them. 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).

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). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed 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. Further, on appeal, the petitioner submits a "current" organizational chart indicating that some employees have changed positions and that additional employees have been hired in the proposed positions at the time of filing the petition. As those employees were hired after the filing of the petition, they cannot be considered in this proceeding. 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).

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'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, although the beneficiary's direct subordinate, [REDACTED] holds a master's degree, the job duties provided by the petitioner for the international transactions specialist demonstrates that the position itself does not require a professional degree. The position description for the beneficiary's direct subordinate includes tasks that are not indicative of a managerial, supervisory, or otherwise professional position, such as "overseeing the preparation of the day-to-day business and corporate documents, accounts payable and accounts receivables," "sell financial products such as stocks, bonds, mutual funds, and insurance," "recommend strategies that can be used to achieve financial goals and objects," and "research and investigate available investment opportunities to determine whether they fit into our financial plans." Thus, the petitioner has not established that the beneficiary's direct subordinate requires a bachelor's degree, such that he could be classified as professional. Nor has the petitioner shown that any of the beneficiary's subordinates supervise subordinate staff members, other than in the organizational chart, or manage a clearly defined department or function of the petitioner, such that he or she could be classified as a manager or supervisor. Although the petitioner's organizational chart indicates that the business development specialist has three direct subordinates, two account executives and one marketing analyst, the business development specialist's list of duties and position description do not demonstrate that she supervises any subordinate employees. The business development specialist's position description does not list any duties related, directly or indirectly, to the supervision of subordinate employees. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted an organizational chart depicting himself as president supervising an accountant, an international business specialist, an

administrative manager (not hired at the time of filing), an IT specialist (not hired at the time of filing), and a business development specialist, who supervises two account executives and one marketing analyst (not hired at the time of filing), the petitioner has not shown how the subordinate employees would free the beneficiary from performing non-qualifying operational duties. The petitioner has not provided credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The petitioner has not 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). 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 position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 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.

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. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

Here, the petitioner made a brief claim that the beneficiary will be a "functional manager." However, the petitioner failed to explain the essential function to be managed by the beneficiary or provide a breakdown of the beneficiary's job duties to support such a claim and failed to demonstrate that the beneficiary will allocate at least 51% of his time to managing the essential function of operations. On appeal, the petitioner did not claim that the beneficiary is a function manager. In fact, the petitioner clearly indicated that the beneficiary is an executive at the U.S. company.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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 managerial 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.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff

comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, the petitioner asserts that the beneficiary is an executive; however, the beneficiary 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 on its day-to-day operations. In fact, although the petitioner has shown that some of the beneficiary's subordinates have been hired, the petitioner has not established that the beneficiary's subordinate employees relieve him from performing non-qualifying operational duties. The job duties provided for the beneficiary and his subordinates fail to demonstrate that the beneficiary will focus 51% of his time on executive duties rather than the day-to-day operations of the business.

The AAO 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, 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).

Further, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in 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 managerial or executive position.

Here, the petitioner also indicates that it operates a cell phone store and is doing business as [REDACTED]. According to the storefront photos submitted in response to the RFE, the store engages in "parts, repairs, service, [and] wholesale and retail." The store's hours of operation are unknown but the photos show unidentified individuals behind the counter helping customers and another unidentified individual sitting behind a desk. The petitioner did not indicate that any of the beneficiary's subordinates manage the store or engage in the store's activities. This failure of documentation is important because a lack of employees for the store indicates that either the beneficiary is performing non-qualifying duties in working at the store, or his subordinate are working at the store and thus not relieving him from performing non-qualifying operational or administrative duties. The petitioner's failure to identify any employees performing duties

associated with the store raises questions regarding the credibility of the position descriptions submitted for the beneficiary and his subordinates. 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 not established that the beneficiary will be employed in a primarily managerial or primarily executive capacity or as a function manager. Accordingly, the appeal will be dismissed.

III. CONCLUSION

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.