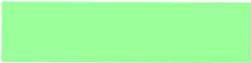


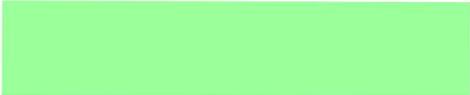


U.S. Citizenship
and Immigration
Services

(b)(6)

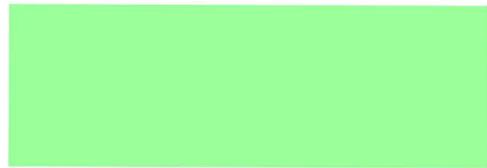


DATE: **SEP 22 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker under 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. 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 classify 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 Texas limited liability company established in [REDACTED] states that it provides information technology and web technology services. The petitioner claims to be a subsidiary of [REDACTED] located in [REDACTED] Egypt. The beneficiary was previously granted one year in L-1A classification to open a new office and the petitioner now seeks to extend the beneficiary's employment as president for three additional years.

The director denied the petition, concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; (2) that the U.S. company has been and will continue to conduct sufficient business to support the beneficiary's position in the United States; and (3) that the beneficiary was employed by the foreign entity for one continuous year in the three years preceding his admission to the United States as an L-1A nonimmigrant.

The petitioner filed the instant appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence is sufficient to demonstrate that the beneficiary is employed in an executive position. Counsel further asserts that the evidence is sufficient to show that the petitioner is actively engaged in business operations sufficient to support the beneficiary's executive position and that the director erred in placing undue emphasis on the petitioner's staffing levels. Finally, counsel contends that the evidence establishes the beneficiary's full-time employment with the foreign entity for one continuous year within three years prior to his application to admission into the United States.

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(1)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, 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.

II. Issues on Appeal

A. Employment with the petitioner in a managerial or executive capacity

The first issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a qualifying executive capacity under the extended petition. The petitioner does not claim that the beneficiary will be employed in a managerial capacity.

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.

1. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, to extend the beneficiary's L-1A status on July 3, 2013. The petitioner indicated on the Form I-129 that it operates a software business with two employees.

In support of the petition, counsel for the petitioner submitted a letter stating that, as president, the beneficiary will "continue to be responsible for managing, directing, and overseeing the company to ensure its mission and objectives are met as well as oversee operations to ensure production efficiency, quality, service, and cost-effective management of resources." The petitioner provided the beneficiary's resume and a description of the beneficiary's current job duties.

Counsel's letter states that since the company's establishment in [REDACTED] the beneficiary has performed the following actions: secured several contracts with local school districts; negotiated a service contract with [REDACTED] finalized the company service agreements to cover support for existing customers and the development of new products; attended an industry conference to demonstrate the curriculum planner software and [REDACTED] software; developed curriculum planners for the [REDACTED] planned and developed the specifications for the implementation of Active Directory and created a private cloud

environment for [REDACTED]; and hired a technical support employee who will act as a manager for the U.S. support team.

On the Form I-129, the petitioner indicated it has two employees. The business development plan indicates that the beneficiary hired a technical support manager in April 2013. The petitioner's organization chart places the technical manager directly subordinate to the beneficiary. The chart also includes a sales manager position and two technical support positions, however the organization chart and the supporting addendum indicates that these positions are vacant.

The supporting addendum provides job descriptions for the positions represented in the petitioner's organization chart. According to the addendum, the technical support positions will: provide one-on-one end-user problem resolution over the phone via e-mail, and through other electronic media; provide on-site support for software issues; provide training to clients in the use of system and applications; identify, diagnose, and resolve level one problems for users of the petitioner's software; diagnose and resolve end-user issues with software implementations and services; perform basic installations of software for new customers; and perform updates and upgrades for existing customers.

The petitioner indicated that the sales position will: work with existing accounts; obtain orders; establish new accounts by planning and organizing daily work schedules to call on existing or potential customers; contact customers following sales to ensure ongoing customer satisfaction and resolve any complaints; adjust content of presentations by studying the type of customer; keep management informed by submitting activity and results reports, such as daily call reports, weekly work plans, and monthly and annual territory analyses; and monitor competition by gathering current marketplace information on pricing, products, new products, delivery schedules, merchandising techniques, etc.

The petitioner's supporting evidence included a copy of a letter of intent from [REDACTED] Inc. indicating that company's intention to continue doing business with the petitioner, which will provide [REDACTED] with services including software development outsourcing, support for [REDACTED] system, and Data Center remote management and support. The letter indicates that software will be developed by the petitioner's affiliate in Egypt, while the U.S. office will act as a front line support for the team working in Egypt. The petitioner also provided a letter from [REDACTED] addressed to the beneficiary, highlighting the achievements of the beneficiary and his staff. The letter mentions "your continued consultation and development of new features for our Curriculum Planner software," "your tireless work during the Share Point Server implementation," "your team implementation of a Private Cloud Solution for [REDACTED]" "your expertise and guidance" in implementing a district wide move from Novell to Active Directory at [REDACTED], and "the work you and your team have done for our Manufacturing System Software." Both letters mention a three-

year service agreement between the petitioner and [REDACTED] but the petitioner did not provide a copy of the agreement.

The petitioner also submitted an e-mail from the Executive Director of [REDACTED] at the [REDACTED] who states that the beneficiary "has been working on the development of our Physical Education and Wellness on-line curriculum planner as a sub-contractor to [REDACTED] since January 2013."

The director found that the evidence was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity and issued a Request for Evidence ("RFE") on August 9, 2013. The director requested the following: (1) a statement of the beneficiary's duties for the previous year and the duties to be performed under the extended petition; (2) a statement describing the petitioner's staffing to include the number of employees and full position descriptions; (3) evidence of the financial status of the U.S. operation; and (4) evidence of wages paid to employees while the beneficiary acted in a managerial or executive capacity.

The petitioner's response to the RFE included: an organization chart and position descriptions for the foreign entity's board of directors; copies of email communications; position descriptions for the beneficiary and the technical service manager; federal tax documents for 2012; invoices; purchase orders; pay statements from May 19, 2013 through September 29, 2013; checks for salary paid to the technical service manager; and letters from the petitioner's clients.

In response to the RFE, the petitioner reiterated the position description provided at the time of filing and added the percentage of time he allocates to each duty:

- Manage, direct and oversee [the petitioner] to ensure its mission and objectives are met. (20%)
- Manage, direct and oversee [the petitioner's] operations to insure production efficiency, quality, service, and cost-effective management of resources. (20%)
- Develop a strategic plan to advance the [petitioner's] mission and objectives and to promote revenue, profitability, and growth as an organization. (5%)
- Plan, develop, and implement strategies for generating resources and/or revenues for the company. (5%)
- Identify acquisition and merger opportunities and direct implementation activities. (3%)
- Approve company operational procedures, policies, and standards. (8%)
- Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. (8%)

- Promote the company to local, regional, national, and international constituencies. (2%)
- Manage, direct and oversee the development of curriculum planning software for various independent school districts (ISD). (15%)
- Screen potential business deals by analyzing market strategies, deal requirements, potential and financials, evaluating options, resolving internal priorities and recommending equity investments. (7%)
- Close new business deals by coordinating requirements; develop and negotiate contracts, integrate contract requirements with business operations (7%)

The petitioner provided a resume for the technical manager and stated that the position requires a bachelor's degree in computer engineering, computer information systems, or a related field. The technical manager's duties are described as the following:

- Oversees the provision of one-on-one end-user problem resolution over the phone, via e-mail, and using other electronic medium.
- Oversees the provision of on-site support for complex software maintenance and issue resolution.
- Directs the provision of training to clients regarding the use of software and their applications.
- Manages the identification, diagnosis and resolution for problems for users [the petitioner's] software.
- Oversees the diagnoses and resolution of end-user issues with [the petitioner's] implementations and services.
- Oversees the installations of software for new customers and updates and upgrades for existing customers.
- Protects the organization's value by keeping information confidential.
- Updates job knowledge by participating in educational opportunities; reading professional publications; maintaining personal networks; participating in professional organizations.
- Enhances organization reputation by accepting ownership for accomplishing new and different requests; exploring opportunities to add value to job accomplishments.
- Monitors and reports on activities and provide relevant management information.

The petitioner emphasized that it works with its Egyptian affiliate to provide clients with software applications and related professional technical support and services. The petitioner explained that the purpose of the U.S. company is to: (1) provide front line support for existing [REDACTED] customers; and (2) to develop relationships with additional [REDACTED] customers and provide those customers with [the petitioner's] advanced software and related services.

The petitioner stated that the beneficiary travels frequently to Egypt and remains in daily contact with the foreign entity's board of directors, who support the beneficiary in his position of president of the U.S. company. The petitioner provided brief position descriptions for six of the foreign company's employees. The petitioner stated that the vice president of sales covers all sales and vendor relations issues for the beneficiary; the admin and finance manager covers all administration issues for the beneficiary; the development team leader manages software development team in Egypt to support the development needs of the petitioner; and the technical services team leader is responsible for all technical issues, manages the data centers in Egypt and the U.S., and provides back office technical support to the technical manager subordinate to the beneficiary. The position descriptions also indicate that the international sales [REDACTED] will, in the future, provide remote assistance in managing sales efforts in the U.S.

The director denied the petition on October 22, 2013, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director found that "while the beneficiary's title may be executive, the description of the proposed duties and the lack of personnel suggest that his actual daily activities will not be primarily executive." The director noted that the evidence failed to demonstrate that the business conducted "is sufficient to support the beneficiary's position and those of other employees."

On appeal, counsel for the petitioner asserts that the client endorsements, invoices for the purchase of business inventory, purchase orders with key business partners, tax returns, financial statements, bank statements, and evidence of service contracts are sufficient to demonstrate that the company is active and fully operational. Counsel asserts that the denial is erroneously based on the small size of the U.S. company and explains:

[S]mall business owners most often wear several hats, and may be, at first, responsible for product development, sales and marketing, human resources, and customer relations, as well as invoicing, ordering office supplies and answering phones. As the business grows, the small business owner is able to hire individuals to take care of these more administrative tasks, which allows the owner to concentrate on the business functions of the company. Over time, more individuals may be hired to cover the human resources, sales and marketing, and customer relations, allowing the owner to further concentrate on developing and growing the business. This is the reality of operating a small business; a reality which the Service seems to overlook in their adjudication of these small business L-1A petitions.

Counsel states that because the petitioner has only been fully operational for just over one year, is still in its initial stages of development and, considering the petitioner's ability to rely on its foreign affiliate for sales and technical support needs, the petitioner provided sufficient evidence that the beneficiary's job duties are primarily executive in nature.

Moreover, counsel asserts that the beneficiary's position:

. . . involves his executive oversight of the company's operations and the formation of financially and operationally effective administrative policies, procedures, and goals. As President, he has a wide latitude of discretionary authority and is responsible for monitoring the company's progress in light of the clear budgetary and procedural goals he has set on behalf of the company. His executive oversight is critical to the development of the U.S. enterprise, as it nurtures its existing relationships with U.S. based customers, and enters into new business relationships in hopes of market expansion."

On appeal, the petitioner submits: letters from [REDACTED] stating that the district is in discussions with [REDACTED] and the petitioner for the development and hosting of on-line curriculum planners; a letter from [REDACTED] stating that [REDACTED] partnered with the petitioner to develop its website and tools; and a letter from [REDACTED] stating that the company has had a relationship with the foreign entity since [REDACTED] and has worked together with the petitioner on software development projects, directory development, and server development for [REDACTED] customers.

2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a 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(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The broad and non-specific terms used to describe the beneficiary's responsibilities suggest the beneficiary's level of authority, but provide little insight into the actual daily tasks required of the beneficiary's position. For example, the petitioner states that beneficiary's responsibilities include: "manage, direct, and oversee" the petitioner, the petitioner's operations, and software development; and "plan, develop, and implement" strategies for generating revenue or resources. The petitioner also states that the beneficiary's position involves "executive oversight" and "wide latitude of

discretionary authority." These conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Without a detailed statement of the beneficiary's job duties, it cannot be determined whether the job duties involved in these broadly stated responsibilities would be outside the realm of what would be deemed as being within a qualifying executive capacity. 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.).

The petitioner also indicated that the beneficiary is responsible for activities that are not typically executive level duties, such as: "promote the company to local, regional, national, and international constituencies;" "screen potential business deals by analyzing market strategies, deal requirements, potential and financials, evaluating options, resolving internal priorities, and recommending equity investments;" and "develop and negotiate contracts." The petitioner has not provided evidence that the beneficiary's performance of the company's sales, marketing, financial, and administrative functions require an executive level capacity. Further, the petitioner's description of the beneficiary's duties indicates that the beneficiary allocates only 15% of his time to overseeing software development activities and no additional time on any technical functions. However, the letters from the petitioner's partner and clients suggest that the beneficiary has been directly involved in providing consulting and implementation services. For example, the letter from [REDACTED] indicates that the beneficiary "has provided hands-on guidance and input into the design of our web presence and interactive tools" and a letter from [REDACTED] references the beneficiary's "tireless work during the Share Point Server implementation." While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008).

Without a further breakdown of the amount of time the beneficiary spends performing specific activities, it is impossible to determine how the beneficiary spends the majority of his time. The petitioner provided a single percentage for a broadly described responsibility that potentially encompasses both executive and non-executive activities. Further, the job description as written does not clearly encompass all of the tasks the beneficiary actually performs such as the technical functions referenced in the client letters. The petitioner indicates that one of the primary purposes of its office is to develop and expand its U.S. client base, but the petitioner indicates that the beneficiary spends very little time on duties related to this purpose. Overall, the vague description, when considered in light of the totality of the evidence, does not support a determination that the beneficiary primarily performs executive functions, rather than the day-to-day activities required to provide and expand the petitioner's services. Absent a clear and credible breakdown of the time spent by the beneficiary performing specific tasks, the AAO cannot determine what proportion of

her duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 understanding a beneficiary's actual duties and role in a business.

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 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.*

The petitioner indicates that it employs the beneficiary and one contracted technical manager subordinate to the beneficiary. The organization chart indicates that the petitioner plans to hire a sales manager and two additional technical services employees; however, the petitioner cannot rely on future employment plans to establish eligibility. A petitioner must establish eligibility as of the time of filing the petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The business plan and supporting letters from clients indicate that the beneficiary meets with potential clients, attends trade shows, negotiates contracts, participates in design activities, and performs product demonstrations. In light of the vacant sales position, and the stated purpose of the U.S. office, which was established in part to expand the company's client base, the petitioner has failed to establish that there is sufficient staff to relieve the beneficiary from performing routine administrative, sales, and marketing functions. Further, there is insufficient evidence that the sole technical employee hired to date, or the foreign staff, fully relieve the beneficiary from performing higher-level technical duties that are outside the scope of the definition of "executive capacity."

In response to the RFE, the petitioner claimed that its foreign affiliate provides sales, administrative, and technical support to the beneficiary. However, the organization charts and position descriptions initially submitted indicated that sales and technical service functions were to be performed by a sales manager and technical services employees that were not yet hired. The petitioner did not state that employees of the foreign entity would provide sales or technological support services for the U.S. company until the director informed the petitioner that it did not appear to have sufficient staffing to relieve the beneficiary from performing non-qualifying duties. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Furthermore, the petitioner failed to provide evidence to support counsel's assertions that the petitioner's non-executive duties are performed by the employees of the foreign entity. While the petitioner has consistently stated that the foreign staff performs much of the software development work, the record does not support a finding that foreign employees are involved in the daily sales, administrative duties, or the front-line technical support that the petitioner claims are a key part of its business. Without a clear description and evidence of the work performed by the foreign entity to support the beneficiary's executive position, and evidence of the beneficiary's oversight of this work, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not clearly delineate the extent to which the foreign staff performs duties in support of the petitioning company. The petitioner submitted copies of e-mail correspondence between the beneficiary and the staff of the foreign entity, but the subject of the correspondence did not appear to relate to the functions of the petitioner's office.

Counsel correctly asserts 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 nonimmigrant 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). In the instant matter, the evidence is insufficient to establish

that the beneficiary's sole subordinate relieves the beneficiary from performing the non-executive duties required for the operation of the U.S. business.

Further, the evidentiary requirements for the extension of a "new office" petition 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.

We do not doubt that the beneficiary exercises discretion over the petitioning entity as owner and president of the organization. However, the petitioner has not demonstrated that the beneficiary would spend the majority of his time focused on the broad goals of the organization. The petitioner has not established that it has the subordinate staff in place to relieve the beneficiary from many day-to-day non-executive tasks associated with operating the business. Instead, many of the tasks attributed to the beneficiary, as discussed above, indicate that he is involved in the day-to-day operations of the company. The fact that the beneficiary owns and 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").

Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

B. Doing Business

The next issue addressed by the director is whether the petitioner established that the United States entity has been doing business for the previous year.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. At the time the petitioner seeks an extension of the new office petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year as necessary to support the beneficiary primarily in an executive or managerial capacity. The term "doing business" means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In support of the Form I-129, the petitioner states that its first year business activities included the following: renting office space; installing hardware and establishing connectivity to company in Egypt; meeting with customers; negotiating service agreements and contracts; developing and implementing software; planning, developing, and migrating service infrastructures; customizing software for private cloud creation; attending trade shows; and hiring a new employee.

Evidence of the petitioner's U.S. business operations included: the petitioner's business plan with a list of the business activities completed in the first year; the petitioner's commercial lease and evidence of rent payments; a letter of intent between [REDACTED] and the petitioner dated May 21, 2102; promotional information for [REDACTED] and other software developed by the foreign entity; a work ticket from [REDACTED] dated December 17, 2012; a July 12, 2013 e-mail correspondence from [REDACTED] stating that the beneficiary, as president of the petitioner, has been working on the development of an on-line curriculum planner as a sub-contractor to [REDACTED] since January 2013; photographs of the beneficiary attending trade shows; and invoices from the staffing company for the salary payments to the contracted technical manager in June 2013. The petitioner also provided numerous invoices and purchase orders for the foreign entity's business operations.

The petitioner also provided a letter from [REDACTED] dated July 12, 2013. The letter states that the beneficiary contributed to the design and execution of the software for [REDACTED]. [REDACTED] worked on the implementation of the [REDACTED] provided expertise and guidance to implement [REDACTED] move from [REDACTED] to Active Director; and offers continued consultation and development for [REDACTED] curriculum planner. The letter also states that the beneficiary provided "team implementation" of a Private Cloud Solution for [REDACTED] and worked with his team on [REDACTED].

In the RFE, the director informed the petitioner that the evidence provided in support of the petition was insufficient to show that the U.S. company has been doing business. The director requested *inter alia*, the following: (1) the most recent annual report, which describes the state of the U.S. entity's finances; (2) Securities and Exchange Commission Form 10-K; (3) federal or state income tax reports; (4) audited financial statements, including balance sheets and statements of income and expenses describing the U.S. entity's business operations; and (5) major sales invoices identifying gross sales amounts reported on the income and expenses statement or on corporate income tax returns.

In response to the RFE, the petitioner provided invoices and purchase orders for services provided to [REDACTED] copies of the [REDACTED] website; invoices for office supplies and computer equipment; client letters; the beneficiary's 2012 IRS Form 1040, U.S. Individual Income Tax

Return; the petitioner's 2012 financial statement; the petitioner's bank statements from January 2013 through September 2013; and invoices and checks for salary paid to the technical manager.

In denying the petition, the director concluded that the provided documents fail to establish that the petitioner has been conducting business in the United States for the previous year. The director noted that the petitioner provided purchase orders, invoices, and bank statements, but stated that the unidentified withdrawals and deposits fail to establish that the petitioner has been doing business in the United States.

On appeal, counsel for the petitioner reasserts that the petitioner works closely with [REDACTED] to provide software, technical support, and IT services to educational institutions. The petitioner submits letters from [REDACTED]

Upon review, the director's determination will be withdrawn with respect to this issue will be withdrawn. The petitioner provided tax documents, invoices, client letters, bank statements, and checks sufficient to establish that the petitioner has been doing business for the previous year. The director stated that the unidentified withdrawals and deposits were failed to demonstrate that the petitioner was doing business for the previous year; however, when considered with the checks, invoices, and tax documents provided the evidence is sufficient to establish the petitioner's business operations for the previous year.

C. One year of continuous employment abroad with a qualifying organization:

The director's determination will also be withdrawn as to whether the petitioner established that the beneficiary 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 as required by 8 C.F.R. § 214.2(1)(3)(iii).

The petitioner indicates that the beneficiary has been the president and sole owner of its Egyptian affiliate since [REDACTED]. As evidence of the beneficiary's employment with the foreign entity, the petitioner has submitted: documents from the Egyptian Commercial Registration Authority; documents from the Egyptian Tax Authority, Ministry of Finance; the foreign entity's financial audits from [REDACTED]; contracts, checks, and purchase orders from the foreign entity's business operations from [REDACTED]; an organization chart for the foreign entity; the beneficiary's resume; and email correspondence demonstrating the foreign entity's internal and external operations.

The director concluded that the petitioner failed to establish the beneficiary's employment with the foreign entity based on the petitioner's failure to submit payroll records from the foreign entity identifying the beneficiary as an employee. On appeal, the petitioner submitted a letter from an

Egyptian attorney explaining that under Egyptian tax law, the sole owner of a business "shall not" receive a monthly salary from the business because of the country's laws regarding the taxation of business profits.

Upon review of the totality of the record, the petitioner has established by a preponderance of the evidence that the beneficiary had more than one continuous year of full-time employment abroad with its affiliate in Egypt in the three years preceding his admission in L-1A status. While the petitioner was unable to provide payroll evidence identifying the beneficiary as an employee of the foreign entity, the petitioner has provided a credible explanation the unavailability of payroll evidence and submitted substantial secondary evidence establishing the beneficiary's employment with the foreign entity during the requisite time period.

Accordingly, the AAO will withdraw the director's determination regarding the beneficiary's employment with the foreign entity.

III. Conclusion

The appeal will be dismissed based on the petitioner's failure to establish that it will employ the beneficiary in an executive capacity under the extended petition. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.