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U.S. Citizenship
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Services

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File: EAC 07 055 51602

Office: VERMONT SERVICE CENTER

Date: NOV 06 2007

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a limited liability company organized in Delaware, is described as an international marketing and business development consulting company. It claims to be an affiliate of Rizalti Plus DKD, located in Moscow, Russia. The petitioner seeks to employ the beneficiary as its president and chief executive officer for a three-year period.¹

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director also observed that the photographs submitted by the petitioner of the U.S. business "clearly do not depict the organization and operation of the entity."

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity, with responsibility for managing "productive professional employees," who will relieve her from performing the non-managerial, day-to-day operations of the company. Counsel asserts that given the newness of the company and the nature of its services, the petitioner does not require a large team of employees. Counsel also suggests that the director overlooked certain photographs and the petitioner's sub-lease agreement in concluding that the submitted evidence did not depict the U.S. petitioner's business. Counsel submits a brief and additional evidence in support of the appeal.

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.

¹ The petitioner previously filed an L-1A classification petition on behalf of the beneficiary, in order to allow her to open a "new office" in the United States. The approved petition was granted from December 21, 2004 until November 19, 2005 (EAC 04 032 52687).

- (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 primary issue in this matter is whether the petitioner established that the beneficiary will be employed by the United States entity 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;

- (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 nonimmigrant petition was filed on December 20, 2006. In a letter dated October 10, 2006, the petitioner described the beneficiary's proposed position as follows:

[The beneficiary's] chief purpose in her position as president and CEO will be to provide executive leadership for the company and develop strategies to ensure its continued growth and profitability. Specifically, she will be dedicated to the development of new relationships and building on existing relationships with U.S. and Russian firms in order to help introduce them to and facilitate their success in overseas markets. She will also help build partnerships between U.S. and Russian firms and our foreign parent company. She will be the public face of [the petitioning company] in the media and at gatherings of business leaders. Additionally, she will oversee the day-to-day corporate activities of [the petitioner], including managing the company's administration, supervising audits of the company's finances, ensuring legal and regulatory compliance, and various other executive responsibilities.

The petitioner further stated that the beneficiary would have "independent discretionary authority over all of the duties of her position as President and CEO" and would "dedicate approximately 100% of her time to the performance of these particular functions."

The petitioner stated that the U.S. company specializes in consulting with U.S. and Russian firms seeking to expand their customer base abroad. The petitioner noted that its specific services include: (1) marketing research tailored to the clients' customer base in the United States and Russia; (2) consulting on corporate organization to maximize productivity; (3) comprehensive development of business plans to meet clients' needs; (4) establishing strong relations between its clients and commercial and governmental institutions; (5) arranging meetings, contract negotiations and sales and marketing presentations for clients; and (6) providing consulting services to build and strengthen its clients' corporate image.

The petitioner noted in its letter dated October 10, 2006 that it was providing more than 20 attachments with supporting documentation with the petition. However, the only documents incorporated into the record included the beneficiary's prior approval notices for an L-1A petition and an H-1B petition, two organizational charts, and a copy of the beneficiary's B1/B2 visa and current Form I-94, Departure Record. One organizational chart depicts a chief executive officer over a chief financial officer/treasurer, a secretary, a market research department, and a business development department. The lower-level positions depicted include a senior market analyst, a market analyst, a senior consultant, and a consultant.² The other organizational chart depicts a president/CEO who supervises a senior market analyst, a director of operations,

² The AAO notes that this organizational chart was excerpted from the petitioner's business plan dated October 2005, a complete copy of which has been provided for review on appeal.

and a chief financial director. The chart indicates that the director of operations supervises outside legal counsel, outside IT counsel and outside accounting and audit personnel. The chart also includes a vacancy for a junior market analyst position. No employees were identified by name on either organizational chart.

The director issued a request for additional evidence on December 28, 2006, in which he instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's proposed duties; (2) a list of the U.S. company's employees identifying each person by name and position title; (3) a complete position description for all employees, including the beneficiary, with a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; and (4) a current organizational chart for the U.S. company.

In a response dated February 16, 2007, counsel for the petitioner described the beneficiary's duties as the following:

[The beneficiary] will be providing executive services to [the petitioner] via her position as President/Corporate Executive Officer of the company. She will be an executive who will primarily:

1. Direct management of the [petitioning organization].
2. Establish the goals and policies of [the petitioner]
3. Exercise wide latitude in discretionary decision-making at [the petitioner] and
4. Receive no supervision or direction from other executives, board of directors or stockholders, as [the beneficiary] is the owner of 100% of the member shares of [the petitioner] and is therefore the sole member of this limited liability company.

Following are the job duties and approximate time allowances for each of these duties of [the beneficiary]:

- Develop goals and objectives for [the petitioner]. 20%
- Serve as the principal spokesperson for the company. 20%
- Represent the company at business events, meetings, etc. 20%
- Build partnerships with other organizations. 20%
- Direct the annual and long-term planning process for [the petitioner]. 10%
- Identify and develop revenue generation programs and products. 10%

Counsel emphasized that the petitioner employs a chief financial director, a senior market analyst and a director of operations, thus the beneficiary "clearly has sufficient professional staff that are able to perform the day-to-day operations of [the petitioning company] that would allow for the Beneficiary's primarily employment as an executive." Counsel further explained the beneficiary's role as follows:

[The beneficiary] will be working to build and expand [the petitioner's] client base to U.S. and foreign firms that wish to promote their products and services in markets within Russia as well as U.S. and Russian companies that wish to market their goods and services abroad. Part of her executive duties is to serve as the company's primary spokesperson. During her travels

between the U.S. and the Russian Federation and Europe, she will come into regular and frequent contact with current and prospective clients in order to acquaint them with [the petitioner's] services and to have further dialogue with such clients on the facilitation of their expansion into those foreign markets.

Her expansion of [the petitioner's] client base, her development of [the petitioner's] goals, objectives and revenue building tools are part of her executive duties that will promote and propel [the petitioner] into a larger and more substantial segment of the consulting market for clients wishing to market their goods and services in Russia. Beneficiary's educational and work background provide her with the basis for providing her expertise regarding the unique concerns facing businesses seeking to enter the Russian market. She has significant and valuable knowledge of the market conditions and demands placed on firms who wish to do business in Russia.

Counsel indicated that the petitioner employs a chief financial director who has the equivalent of a master's degree in civil engineering, and who works for the petitioner 30 to 40 hours per week performing the following duties:

- Controlling accounts payable, accounts receivable, cash flow and collections. 40%
- Review of current internal invoicing practices. 10%
- Negotiating contracts and leases on behalf of [the petitioner]. 30%
- Interfacing with the outside accounting firm. 5%
- Assisting in creating strategic 5 year plan for [the petitioner] 15%

Counsel further provided the following position description for the petitioner's senior market analyst, who holds a master's degree in journalism and also is claimed to work 30 to 40 hours per week:

- Maintain current and prospective customer's database. 20%
- Prepare market reports on products and services segments. 20%
- Develop content for future company website. 20%
- Conduct competitive and industry analysis. 20%
- Prepare marketing and sales materials. 5%
- Build and maintain excellent relationships with business contacts and clients. 10%
- Participate in sales events. 5%

Finally, counsel indicated that the petitioner employs a director of operations who holds a master of business administration degree and is responsible for the following duties during the 20 to 30 hours per week he works for the petitioner:³

³ According to a resume provided for this employee, available for review on appeal, he is concurrently employed as owner/president of an unrelated company, "Intelecs, Inc.," providing engineering and consulting services for electronics industries.

- Running day-to-day operations of the company. 50%
- Interfacing with existing clients. 20%
- Developing new clients and accounts. 20%
- Supervising outside consultants. 5%
- Participating in sales meetings and marketing events. 5%
- Hiring new staff – as needed.

The record contains the petitioner's federal quarterly tax returns and state quarterly wage reports through the third quarter of 2006. The documents show that, in that quarter, the director of operations received a quarterly salary of \$3,000, the market research analyst received \$3,585, and the chief financial director received \$13,500. The AAO notes that the petitioner appears to have been paying payroll taxes in Delaware, while claiming to operate its business in Virginia. 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 director denied the petition on February 27, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director acknowledged the position descriptions submitted for each employee, but found "the small number of employees suggests that the beneficiary would not be relieved from performing the non-managerial, day to day operations involved in producing a product or providing a service." The director also determined that all of the petitioner's claimed employees were represented as managers, with "no productive employees" available to provide services to customers.

The director further noted that the petitioner's organizational chart indicated a junior market analyst position that had yet to be filled, as well as outside contract workers whose employment had not been substantiated by documentary evidence, and noted that these additional workers would therefore not be considered. The director concluded that the beneficiary would be engaged primarily in the non-managerial, operational tasks required by the business, "with occasional first-line supervisory duties over nonprofessional employees." The director also found the position description provided for the beneficiary to be too vague and general to establish her employment in a qualifying capacity.

On appeal, counsel for the petitioner reiterates the position description submitted in response to the director's request for evidence and asserts that the beneficiary will be employed in an executive capacity. Counsel contends that the beneficiary's extensive authority is "above and beyond" the level normally invested in a first-line supervisor.

Counsel further objects to the director's conclusion that the beneficiary will not supervise productive, professional employees. Counsel notes that each of the beneficiary's subordinates possesses a master's degree and notes that the director disregarded evidence of their professional qualifications. Counsel further states that each employee provides productive services by keeping the company fiscally responsible, providing market research to guide clients in their investments in the Russian market, and providing "guidance on the day-to-day operations of the company." Counsel attempts to clarify the nature of the duties performed by

the director of operations, noting that he interfaces with new clients, attempts to sell the services of the company, makes phone calls, attends meetings to discuss questions and concerns, and provides "the necessary client contact." Counsel states that the employees provide the actual services of the business while the beneficiary "performs the more global executive tasks of public relations and goal setting."

In addition, counsel stresses that the director is required to review the totality of the evidence in determining whether the business requires an executive, and states that, due to its specialized service of providing market analysis in the Russian markets, "only specific and skilled employees" are required. Counsel asserts that "it would be unduly difficult for a U.S. staff to try to perform Petitioner's services to its customers without Beneficiary's executive knowledge of the Russian market and her extensive experience dealing with Russian business." Counsel asserts that the nature of the company "does not reflect a need for a large team."

Counsel submits on appeal a copy of what is identified as the initial petition filing, which included a total of 22 exhibits. As noted above, this supporting evidence was not incorporated into the record prior to the director's decision. All relevant documentation will be considered in the AAO's analysis.

Upon review, counsel's assertions are not persuasive. Upon review of the petition and the evidence, the petitioner has not established that the beneficiary would be employed by the petitioner in a 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 either in an executive or managerial capacity. *Id.* In addition, the definitions of executive and managerial capacity have two separate requirements. 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 petitioner claims that the beneficiary qualifies as an executive because she will occupy the highest-level position within the company, manage its employees, and will be responsible for expansion of the business. However, the fact that an individual has an executive job title and exercises discretion over a company's operations, or 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 section 101(a)(44) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The actual duties themselves 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 petitioner's and counsel's descriptions of the beneficiary's proposed duties convey little understanding of what types of tasks the beneficiary would perform in a day-to-day basis, such that they could be classified as managerial or executive in nature. For example, the petitioner initially indicated that the beneficiary "will be dedicated to the development of new relationships and building on existing relationships," "help build

partnerships," and "be the public face of [the petitioner] in the media." These statements fall significantly short of describing the actual managerial or executive duties to be performed by the beneficiary and suggested that she may be directly involved in the petitioner's marketing, sales and promotional activities. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Accordingly, the director reasonably requested a comprehensive description of the beneficiary's duties and an explanation as to how the beneficiary's time would be allocated among her duties. Counsel responded by paraphrasing the statutory definition of executive capacity, noting that the beneficiary would direct the management of the company, establish its goals and policies, exercise wide latitude in decision-making, and receive no supervision in performing her duties. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although counsel provided a breakdown of how the beneficiary's time would be allocated, she simply reiterated the petitioner's vague statements that the beneficiary would "develop goals and objectives," "serve as the principal spokesperson," "represent the company at business events," and "build partnerships with other organizations." The petitioner provided no examples or supporting documentary evidence with respect to the beneficiary's goals or objectives, nor did it describe any occasions or events at which the beneficiary would have the opportunity to "represent the company" or serve as its spokesperson, or provide evidence of any partnerships to be pursued by the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. As noted above, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, counsel indicated in response to the request for evidence that the beneficiary will "come into frequent contact with current and prospective clients in order to acquaint them with [the petitioner's] services," and "will be working to build and expand [the petitioner's] client base to U.S. and foreign firms." These duties again suggest the beneficiary's direct involvement in sales, marketing and other client-related activities that would normally be delegated to a lower-level employee, and these duties were not included in the breakdown of how the beneficiary would allocate her time.

Overall, the limited position description provided is insufficient to establish that the beneficiary's duties would be primarily managerial or executive in nature. Beyond the required description of the job duties, United States 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.

Although the beneficiary is not required to supervise personnel, if it is claimed that her managerial 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. On appeal, counsel asserts that the beneficiary supervises three professional employees, including: a director of operations who possesses a master of business administration degree; a senior market analyst who possesses a master's degree in journalism; and, a chief financial director who possesses a master's degree in civil engineering.

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: "The term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

While the record demonstrates that all three of the petitioner's employees possess master's degrees, the record does not establish that a chief financial director who is primarily responsible for accounts payable and receivable actually requires a university degree in civil engineering. Similarly, it has not been established that a journalism degree is required to perform the duties attributed to the senior market analyst, which include participating in sales events, maintaining a customer database, preparing market reports and conducting competitive and industry analysis. Finally, while the director of operations possesses a master of business administration degree, it is not clear that his primary duties of "directing the day-to-day operations," and providing "necessary client contact," actually require the services of a professional. The lack of evidence in the record regarding the exact nature and scope of the petitioner's business activities further precludes a determination that the beneficiary's subordinates should be deemed professionals.

Finally, the AAO notes that the petitioner's description of how the beneficiary's time is allocated among her various responsibilities does not include any personnel supervision duties. Even if the petitioner had established that the beneficiary's subordinates are professionals, there would be no basis to conclude that her primary duties involve supervising professional staff. Nor has the petitioner shown that any of the company's employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. 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.

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, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. See *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003).

At the time of filing, the petitioner was a two-year-old company that claims to be engaged in the provision of international marketing and business development consulting services to U.S. and Russian companies. At the time of filing, the petitioner employed a part-time director of operations who appears to have a full-time position with an unrelated company, a senior market analyst who may have been employed on a less than full-time basis, and a chief financial director, whose duties are limited to the company's financial concerns. The petitioner has submitted a business plan dated October 2005, in which the petitioner outlined its need for an administrative employee, two market analysts and two consultants. Given that the petitioner claims to be operating as a consulting company, and has not yet hired any consultants, it is unclear who would be providing the actual services of providing the company's clients with "business solutions," marketing research, organizational recommendations, business plans and other services outlined in the petitioner's supporting letter and business plan. At best, it appears that the petitioner's senior market analyst may provide market research, but there is nothing in the record to suggest that this employee produces the company's primary work product for its clientele. The role of the part-time director of operations appears to be limited to sales and marketing of the petitioner's services. The emphasis placed on the beneficiary's "knowledge of the Russian market and her extensive experience dealing with Russian business," suggests that she would be the employee providing the consulting services to clients, and perhaps the only employee qualified to do so. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

While the AAO acknowledges counsel's claim that the nature of the petitioning company may not require the services of a large team of employees, the petitioner must still provide probative evidence that someone other than the beneficiary would be providing the consulting services of the company. The petitioner has not established that its reasonable needs would be met by a chief financial director, a market analyst, a part-time director of operations, and a president who performs primarily executive duties. Collectively, the lack of a subordinate staff assigned to providing the actual consulting services of the company brings into question how much of the beneficiary's time could be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See

sections 101(a)(44)(A) and (B) of the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

The 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.*

As noted above, the petitioner's claim that the beneficiary will be employed in an executive capacity is based primarily on her position title, her status as the sole owner of the company, and a position description which simply paraphrases the statutory definition of executive capacity. The petitioner has not demonstrated that the beneficiary will be removed from involvement in day-to-day operations of the enterprise, and it cannot be concluded that she would be employed in an executive capacity.

The petitioner claims that the U.S. company expects to hire at least one additional employee in the near future. 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. 1978).

Based on the foregoing discussion, the petitioner has not established that the petitioner would employ the beneficiary in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

A secondary issue addressed by the director concerned the petitioner's photographic evidence of its claimed business premises located at [REDACTED] Virginia. In the request for evidence, the director had instructed the petitioner to provide photographs of the interior and exterior of all of the premises secured for the U.S. company, including photographs that "clearly depict the organization and operation of the entity."

In the decision dated February 27, 2007, the director stated:

These exterior photographs depict what could be any office anywhere. Nothing in the photographs suggests that the business inside is [the petitioning company]. In fact, the one exterior photograph with a business name included is a business named Xcom. The interior photographs consist of two empty hallways, one empty room, and one room with a desk and a

laptop computer. These photographs clearly do not depict the organization and operation of the entity.

On appeal, counsel for the petitioner asserts that the petitioner provided a copy of its commercial sublease agreement with X-Com Technologies with the initial petition. Counsel asserts that the director overlooked the sublease agreement and erroneously concluded that the photographs did not depict the petitioning company. Counsel asserts that the sublease agreement serves as "competent and objective evidence that points to the truth regarding the actual ownership of the premises."

Counsel re-submits a copy of the entire initial petition filing dated December 1, 2006, with attachments, which includes at exhibits G and H the sublease agreement in question and copies of photographs. The sublease agreement was executed by the petitioner and X-Com Technologies, LLC in June 2005 for a two-year term.

Upon review, the AAO notes that the evidence submitted on appeal explains the appearance of the name "X-Com" on the photographs of the petitioner's claimed business premises. However, there is insufficient evidence in the record to establish that the petitioner is in fact doing business at that address, or that it has been doing business in the United States for the year preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(i). In order to establish that it is a qualifying organization for the purpose of this visa classification, the petitioner must establish that it has been doing business as defined in the regulations. See 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H).

The petitioner is a Delaware limited liability company established in 2004. The petitioner provided evidence that it prepared a Delaware state income tax return for the 2005 year, and filed Delaware quarterly tax reports for the last two quarters of 2005 and the first three quarters of 2006, a period of time that coincides with its lease agreement for office space in Virginia. The petitioner's business plan prepared in October 2005 indicates that the company was operating in Delaware, and states that in 2006, the company would be located at [REDACTED]. The petitioner has not submitted evidence that it has registered to do business in Virginia, paid taxes in Virginia, or obtained any necessary occupational licenses or occupancy permits in Virginia. 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).

Furthermore, the minimal documentation submitted regarding the petitioner's business activities raises questions as to whether the company is doing business. The petitioner submitted a copy of its 2005 Form 1120, U.S. Corporation Income Tax Return, showing gross receipts in the amount of \$137,000. The only other evidence submitted was a consultant service contract between the petitioner and a client company that was valid from March 5, 2005 until March 6, 2006. The petitioner did not provide any probative evidence of business activities conducted within the twelve months preceding the filing of the petition on December 20, 2006. Upon review of the totality of the evidence, the petitioner has not established that it was a qualifying organization doing business in the United States. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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