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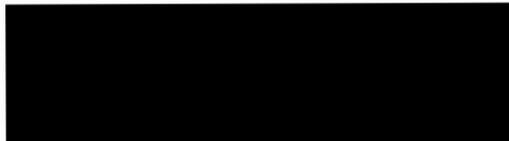
Petitioner:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa 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 employment of its operations manager 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, states that it is engaged in the design, manufacture, sales and distribution of communications equipment. The petitioner claims to be a subsidiary of [REDACTED], located in Chile. The beneficiary was initially granted L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend his status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director abused his discretion in denying the petition and did not clearly explain the specific reasons for denial. Counsel further contends that the director appears to have inappropriately relied upon his own business judgment and other irrelevant factors, such as the beneficiary's salary, in concluding that the beneficiary would not be employed in a qualifying capacity under the extended petition.

Subsequent to the filing of the appeal, the AAO issued a request for additional evidence to further clarify the nature and scope of the petitioner's business operations and the beneficiary's role within the company. The petitioner submitted a timely response, and the AAO has reviewed the record in its entirety before issuing this decision.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate in a managerial, executive or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training and employment qualifies him/her to perform the intended services in the United States; however the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 petitioner filed the nonimmigrant petition on December 13, 2007. In a letter dated November 29, 2007, the petitioner stated that it has four employees and achieved gross sales of \$113,500 for the period from January 2007 through September 30, 2007. The petitioner indicated that the beneficiary, in his capacity as operations manager, "has been responsible for establishing the successful operations of the U.S. subsidiary."

The petitioner further stated that the beneficiary supervises a marketing manager, who in turn supervises a technical sales employee and an administrative assistant. The petitioner indicated that the beneficiary also hired a software engineer and "is further responsible for the complete management of the company, in keeping with the traditions established by the Chilean company."

The petitioner submitted its Florida Form UCT-6, Employer's Quarterly Report, for the third quarter of 2007, which shows wages paid to three employees, not including the beneficiary.

The petitioner submitted a brochure describing its services, which include custom development and manufacturing of hardware, firmware and software; manufacture of electronic boards; and consulting services in strategic business planning, project planning, network sizing, budget preparation, development of new services and products, business plan development, service planning, project deployment, assistance with strategic partnering, legal analysis and process development. The petitioner submitted copies of its invoices dated between April 2007 and October 2007. During this time, the petitioner billed two companies, [REDACTED] and [REDACTED] for "engineering consulting services" totaling approximately \$97,000. The record shows that the petitioner shares an office space with both of these companies.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the director issued a request for additional evidence on December 18, 2007. The director instructed the petitioner to provide a detailed description for each employee in the company, and, if applicable, to indicate how the beneficiary's subordinates qualify as managers or professionals. The director also requested that the petitioner justify the beneficiary's proffered salary of \$35,000, which he deemed a "substantially smaller amount than what is normally meted out to a manager or executive who receives L-1A nonimmigrant status."

In a response dated January 31, 2008, counsel for the petitioner explained that the petitioner is not merely a "seller of communications equipment," as stated by the director, but rather is engaged in the design and manufacture of electronic communications equipment, in addition to sales. Counsel emphasized that the nature of the business requires that its employees possess "highly technical backgrounds in telecommunications, engineering, computer software design, and marketing."

The petitioner submitted an affidavit from the beneficiary, who further described his duties and responsibilities as operations manager:

As Operations Manager, I am responsible for the complete management of the Company, including banking relations and establishing the goals and policies for the business to further and expand operations. The goals and policies, which are directly based on the successful formula of [the foreign entity], including staffing, developing and implementing sales plans and objectives, new account development, establishing and working within budget projections, personnel management, initiating and ensuring continual quality improvement, and overall growth and profit retention. I also direct and coordinate the activities of subordinate managerial personnel; manage staff; prepare and oversee work schedules and assign specific duties; interview and hire personnel to fill managerial vacancies; terminate employment of employees whose performance does not meet Company standards; determine goods and services to be sold; and set prices and credit terms, based on forecasts of customer demand. I am also responsible for entering into contracts for the sale and purchase of equipment, review operational records and reports to project sales and determine profitability; analyze marketing potential of new and existing locations; and recommend additional

products and locations. In addition, I direct, through subordinate managerial personnel, compliance of our workers with the Company's established policies and procedures and coordinate sales and promotional activities with their assistance.

On a daily basis, I meet with the Marketing Manager to coordinate and review activities of the Technical Salesperson in an effort to oversee the status of individual customer accounts; to review customer complaints or disputes, if any, and offer advice on how to resolve these problems. Often, I develop leads for new customers and I update the Marketing Manager with the new accounts. In my daily meetings with the Marketing Manager, I ensure that the Administrative Assistant is keeping up with her daily tasks.

Usually on a daily basis, I meet with our Software Engineer regarding ongoing projects, development of software, to review specifications, and provide him with expert advice if needed. I also ensure that the company complies with all federal, state and local regulations. Further, I oversee and analyze the [petitioner's] books and records for updates, errors, compliance and to ensure that expenditures are within our budget projections.

The beneficiary further indicated that he meets with the petitioner's accountant to ensure that tax filings and requirements are met, and keeps updated on "all incoming information regarding the IT industry, new technology, and new procedures in an effort to keep abreast of what our competitors are doing." The beneficiary explained that he receives and pays taxes on a total compensation package of \$78,000 annually, which includes his \$35,000 base salary, \$24,000 in rent payments, \$9,000 for medical insurance, \$5,000 for transportation and \$5,000 for telephone and internet services.

The petitioner submitted a copy of its Form UCT-6, Employer's Quarterly Report, for the fourth quarter of 2007, which confirms payments to the employees identified as marketing manager, software engineer, technical sales, and administrative assistant.

The petitioner submitted an affidavit from its marketing manager, _____ who indicated that she was hired by the petitioner in May 2007 and performs the following duties:

Help define product development RoadMap; Analyze and define customer requirements for contract engineering and manufacturing services; Assist Operations Manager in developing marketing strategies and business relationships with clients; Develop cost analysis of product engineering and manufacturing services for bids; Evaluate financial aspects of product development; research and select venues for trade shows and products to be displayed; direct the hiring, training and termination of Technical Sales staff and Administrative Assistant and oversee their daily activities.

_____ indicated that she has a bachelor's degree in electronic engineering, and that she was employed as Vice President for Sales and Marketing for _____ for four years just prior to joining the petitioning company.

The petitioner also submitted an affidavit from its software engineer, [REDACTED], who indicates that he was hired by the company in May 2007. He states that he performs the following duties:

Research, design, develop and test operation systems and application levels, compilers and network distribution software for IP Telephony, WI FI and customer oriented requirements. I further define operational specifications based on customer requirements, formulate and analyze solutions I am also responsible for development of WIFI radius real-time billing interface to cable access point. I assist with design manufacture and field test system for deployment. I also oversee large scale installation of Linux based cable modem SNMP software system, including troubleshooting complex software, hardware issues to assure customer's satisfaction. . . .

[REDACTED] indicated that he "studied computer science programming" in 1981. He stated that he worked for [REDACTED] for approximately 20 months immediately prior to joining the petitioning company.

The petitioner's technical salesperson, [REDACTED] also submitted an affidavit, describing his duties as follows:

As the person in charge of Technical Sales for a multinational company focused on high-end hi-tech electronic systems development, integration, and manufacturing, I am responsible for contacting new and existing customers to obtain their requirements, make evaluations including specifications, prices and delivery time requirements, determining quantities of products needed, and quote and price for our products and services. I work closely with the Operations manager to determine best strategy to approach customer. I regularly contact customers to discuss their needs and to explain how their needs could be met by specific [company] products and services. I maintain the customer records on [the petitioner's] database, for use by other Company employees.

[REDACTED] indicates that he holds an "Advanced Certificate Degree in Sales and Negotiations."

Finally, the petitioner submitted an affidavit from its administrative assistant, [REDACTED] who indicates that she was hired in October 2007 and performs the following duties:

I provide high-level administrative support to my immediate supervisor, the Marketing Manager, and to the Operations Manager, by conducting research on given projects, preparing statistical reports, handling information requests, preparing correspondence, receiving visitors, arranging conference calls and scheduling meetings. I also maintain employees' schedules, prepare invoices, reports, memos, letters, financial statements, and other miscellaneous documents. . . .

[REDACTED] indicates that she also performs bookkeeping work, orders supplies, and makes travel arrangements for employees.

The director denied the petition on February 13, 2008, concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director found that the petitioner failed to establish that the beneficiary would be managing bona fide managers or professionals, noting that a company of the petitioner's size would "normally contract out for the services of marketing manager or software engineer on an as-needed basis." The director also found the beneficiary's proffered salary to be "incongruous with that of an employee who is actually managing other bona fide managers or professionals." The director acknowledged that the petitioner listed a number of duties that would normally be required of or associated with a manager or executive, but stated that "USCIS is not convinced that the beneficiary will actually be carrying out these duties." The director concluded that the beneficiary would be engaged in the non-managerial, day-to-day operations of the business, rather than performing qualifying duties on a full-time basis.

On appeal, counsel for the petitioner asserts that the director abused his discretion in denying the petition and "offered no rational connection between the record and the denial other than to state that USCIS is not convinced." Counsel asserts that the director failed to consider relevant evidence establishing the reasonable needs of the petitioner's business in light of its stage of development, and placed undue emphasis on irrelevant factors such as the beneficiary's proffered salary. Counsel also argues that the director substituted his own business judgment by noting that companies similar to the petitioner would "normally contract out" for services from a marketing manager or software engineer.

Counsel further contends that the director provided no support for his conclusion that "USCIS is not convinced" that the beneficiary will perform primarily qualifying duties. Counsel notes that the petitioner was never requested to quantify the amount of time the beneficiary would devote to managerial or executive duties and asserts that "without a proportional delineation of the beneficiary's duties, USCIS' conclusion that the beneficiary would not actually be carrying out those duties is unreasonable and lacks the requisite rational connection between the record and denial."

Upon initial review of the record of the totality of evidence in the record, the AAO had some questions as to the nature and scope of the petitioner's business. The AAO noted the relationship between the petitioner, and [REDACTED] particularly the facts that the petitioner shares office space with [REDACTED] and appears to provide "engineering consulting services" exclusively to these two companies, with no other apparent source of income. A simple Internet search revealed that three of the petitioner's employees, including the beneficiary, are identified on the "contact" page of [REDACTED] corporate web site. Specifically, the beneficiary is identified as chief technology officer of [REDACTED], Ms. [REDACTED] is identified as vice president for sales and marketing for [REDACTED], and [REDACTED] is identified as an accounts receivable employee of [REDACTED] and [REDACTED] is identified as [REDACTED] business development manager.

The AAO also noted that the petitioner indicated a Federal Employment Identification Number (FEIN) of [REDACTED] on its IRS Forms 941, W-2 and Florida Forms UCT 6 and utilized the number [REDACTED] on its Form I-129, invoices and its annual report filings with the Florida Secretary of State.

Therefore, the AAO advised the petitioner that the inconsistencies on the tax documents and the information suggesting that the petitioner's employees are actually working for an unrelated company, raised questions

regarding the petitioner's claimed staffing levels and business activities. Because much of the information did not derive from the record of proceeding, the AAO gave the petitioner an opportunity to address the issues raised in the RFE.

The AAO specifically requested, *inter alia*, copies of any and all contracts for services executed between the petitioning company and [REDACTED] and the petitioning company and [REDACTED]. The AAO noted that if the petitioner's activities are limited to providing consulting services for these companies, it should explain who on the petitioner's staff provides such services and explain why the petitioner requires the services of a marketing manager and technical sales personnel.

In response, counsel for the petitioner submitted a letter dated January 7, 2009, in which she explains that the petitioner, [REDACTED] and [REDACTED] entered into an extensive agreement on December 1, 2006, under which the petitioner is required to provide "engineering, product development, sales, marketing and support services."

Specifically, under the agreement, [REDACTED] and [REDACTED] agree to market, sell and support products manufactured by the petitioner under [REDACTED] name brands, and agree to purchase "product development or Services" from the petitioner. The agreement provides that "all product and services marketing and promotions shall be carried out exclusively under the [REDACTED] and [REDACTED] brand names." If requested, the petitioner shall provide sales support to [REDACTED] and provide assistance with product demonstrations and trade exhibitions."

Counsel asserts that "the parties agreed that [the petitioner's] employees are to be trained to market, sell and support the products produced and developed by [the petitioner] for the use of [REDACTED] and [REDACTED]. Counsel notes that it appropriate for the petitioner's staff members to be identified as employees of [REDACTED] on the company web site because all marketing and promotions are to be carried out under the [REDACTED] and [REDACTED] brand names.

Upon review of the totality of the evidence in the record, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

Preliminarily, the AAO concurs with counsel's contention that the director relied on inappropriate and irrelevant factors in making his determination. The director's determination that the beneficiary's salary is "incongruous" with an executive or managerial position is not supported by the statute and regulations, which do not provide for consideration of the beneficiary's salary as a factor in determining the beneficiary's employment capacity. The AAO also agrees that the director's conclusion that a company the size and nature of the petitioner's would normally contract out marketing and engineering services was inappropriate. The director should not hold a petitioner to his undefined and unsupported view of "normal" business practices. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although USCIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. For these reasons, the director's decision

will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business and the beneficiary's salary.

As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.*

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). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's business as its operations manager, the totality of the evidence submitted does not demonstrate that the beneficiary's duties will be primarily managerial or executive in nature. It is not sufficient for the petitioner to establish that the beneficiary performs *some* managerial or executive duties.

While the petitioner provided a lengthy description of the beneficiary's position, many of the listed duties are either excessively vague or are not adequately explained within the context of the petitioner's business, particularly in light of the service agreement submitted on appeal, which will be discussed further below. The vague duties include the beneficiary's responsibilities for "establishing the goals and policies of the business to further and expand business operations," "developing and implementing sales policies and objectives," "initiating and ensuring continual quality improvement," and "overall growth." Broad assertions such as indicating that the beneficiary will be responsible for "complete management of the company," are not probative descriptions of the beneficiary's actual day-to-day responsibilities. 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner indicates that the beneficiary also determines goods and services to be sold, sets prices and credit terms based on forecasts of customer demand, enters into contracts for sale and purchase of equipment, and analyzes market potential of new and existing locations, and coordinates sales and promotional activities. Many of these duties are not adequately explained in light of the "services agreement" submitted on appeal. Pursuant to the terms of the agreement, the petitioner agrees to sell "product development or services," based on forecasted product requirements provided by [REDACTED] and [REDACTED] on a quarterly basis. [REDACTED] and

██████████ "will order Product Development and Services . . . via day to day discussions of requirements," and "all Products will be designed, engineered and built at the joint company's facility" unless a different manufacturing and development site is agreed upon. The petitioner "agrees not to develop, engineer, assess, support, sell, represent, or promote similar products made by ██████████ and ██████████ competitors." The agreement indicates that pricing for services has been "previously agreed to," and indicates that there will be no "product specific pricing."

The petitioner's invoices show that "engineering consulting services" provided to ██████████ and ██████████ are the company's only source of revenue. The goods and services to be sold and prices appear to have been determined by agreement a year prior to the filing of the petition, and there is no evidence of any other contracts for sale in the record, or evidence that the petitioner is engaged in sales and promotions of its own products or services in the United States outside of the agreement with ██████████ and ██████████. In view of the circumstances, the above-described duties for identifying products and services to be sold, forecasting, setting prices and credit terms, entering contracts for sale and analyzing market potential for new locations, which have been attributed to the beneficiary, have not been adequately explained.

The petitioner indicates that the beneficiary meets daily with the marketing manager to coordinate the activities of the technical salesperson, to oversee the status of individual customer accounts, to review customer complaints, and to update her about new accounts he has developed. The evidence of record indicates that the petitioner has a single customer, ██████████, and that the petitioner's employees work on the customers' premises. In light of the service agreement, it is not clear why the beneficiary needs to obtain information about customer accounts or disputes through subordinate personnel. There is no evidence that the petitioner has customer accounts other than ██████████. Furthermore, the beneficiary's claimed responsibility to develop leads for new accounts, without further explanation, appears to be more akin to a sales or marketing function rather than a managerial function. The petitioner has not described the specific tasks involved in developing leads for new accounts and the AAO cannot conclude that this responsibility falls under the statutory definitions of managerial or executive capacity. 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)).

The petitioner also indicates that the beneficiary meets with the software engineer on a daily basis regarding "ongoing projects, development of software, to review specifications, and to provide expert advice." Based on this description, the AAO cannot discern the extent of the beneficiary's involvement in day-to-day non-managerial engineering functions, or whether his contributions would be primarily at a managerial level. According to the services agreement, the petitioner is responsible for designing, engineering and building products at the premises it shares with ██████████ and ██████████. The petitioner has not established that the software engineer, the sole technical employee working for petitioning company, single-handedly performs all of the engineering work required by the services agreement. The beneficiary's daily responsibilities for "reviewing and keeping updated on all incoming information regarding the IT industry, new technology and new procedures," also have not been shown to be managerial or executive in nature.

Based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not clearly fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO acknowledges counsel's assertion that the petitioner "was never requested to quantify the time spent by the beneficiary on the duties." Counsel asserts that "without a proportional delineation of the beneficiary's duties, USCIS' conclusion that the beneficiary would actually be carrying out the duties is unreasonable." While it is true that the director did not request that the petitioner quantify the amount of time the beneficiary would allocate to each specific duty, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner cannot meet its burden by providing a position description comprised of some qualifying duties, some vague duties that may or may not be qualifying, some non-qualifying duties, and some duties that do not make sense within the context of the petitioner's business. It may be correct that USCIS cannot assume that the beneficiary is primarily performing non-qualifying duties; however, it is equally true that USCIS cannot assume that the beneficiary is primarily performing qualifying managerial or executive duties based on the evidence submitted. Therefore, the petitioner's burden to submit a position description that both clearly describes the beneficiary's duties and establishes that such duties are *primarily* in a managerial or executive capacity, has not been met in this case.

Although counsel appears to recognize the evidentiary value of quantifying the amount of time the beneficiary will spend on various duties, the petitioner has not provided this information on appeal. Therefore, based on the record as it stands, the beneficiary's position description is insufficient to establish that he will be employed in a primarily managerial or executive capacity.

In addition, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract. Rather, 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.

Here, the AAO's analysis of the totality of the evidence in the record remains complicated by the fact that the beneficiary and three of his claimed subordinates are publicly identified as employees of [REDACTED] and [REDACTED]. On appeal, counsel states that such public listing is appropriate pursuant to the terms of the Services

Agreement. Upon review, the petitioner has not adequately explained the duties to performed by the petitioner and its employees under the agreement, nor has it clarified how the employees carry out their seemingly dual roles with the petitioning company and with [REDACTED] and [REDACTED]

The Recitals portion of the Services Agreement indicates that "[REDACTED] wish to have [the petitioner] provide engineering, product development, sales, marketing and support services in accordance with the terms of this Agreement." However, the only specific products/services that are explicitly mentioned in the agreement are the following:

- 2.1 Purchase and Sale. [The petitioner] agrees to sell to [REDACTED] and [REDACTED] and [REDACTED] and [REDACTED] agrees to purchase from [the petitioner], product development or Services, subject to the provisions of this Agreement.

The agreement indicates that all marketing and promotions "shall be carried out exclusively under the [REDACTED] and [REDACTED] brand names." However, the agreement never specifically sets forth the petitioner's responsibility for providing marketing and promotions services on behalf of [REDACTED]. Clause 5 of the services agreement indicates the following as the "Additional Duties and Obligations of [the petitioner]."

- 5.1 Support Materials. From time to time, [the petitioner] shall supply [REDACTED] with samples of advertising and selling literature, drawings, engineering and other non-proprietary Product data as [the petitioner] may have available and which would be helpful in advancing [REDACTED]s and [REDACTED] sale of Products.
- 5.2 Sales Support. Upon [REDACTED] request, [the petitioner] shall provide sales support to [REDACTED]. In addition, [the petitioner] shall provide reasonable assistance with Product demonstrations and trade exhibitions. [The petitioner] reserves the right to render or refuse such support at it's [sic] own discretion on a case-by-case basis.
- 5.3 Training and Support: [The petitioner] shall from time to time, and at it's [sic] own discretion and terms, provide free training to [REDACTED] and [REDACTED]. This training will cover various aspects of the sales, installation, operation, maintenance and repair of the Product. At least one [REDACTED] or [REDACTED] engineer with technical qualifications to be specified by [the petitioner] will be trained.

Clause 11 of the services agreement identifies the relationship between the parties as follows:

Nothing in this Agreement shall be construed as constituting either party as a partner or an employee or an agent of the other party. Neither [the petitioner] nor [REDACTED] shall have the authority to bind or act for the other in any respect. [REDACTED] and [the petitioner] shall each remain an independent contractor responsible only for their own actions.

At the time the agreement was signed in December 2006, [REDACTED], the petitioner's marketing manager, was employed as [REDACTED] Sales & Marketing Vice President, and [REDACTED] the petitioner's technical salesperson, was employed as [REDACTED] Business Development Manager. It is not clear why these employees would have transferred to the petitioner's payroll five months later, assumed different job titles and responsibilities with the petitioning company, while publicly maintaining the same position titles with their former employer.

Counsel's claim that it is "appropriate" under the terms of the agreement for the petitioner's employees to be represented to the public as employees of [REDACTED] is insufficient. The agreement clearly states that the petitioner's employees cannot be construed as the employees or agents of [REDACTED]. Without documentary evidence to support the claim, 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).

There is nothing in the services agreement, for example, which would indicate that the petitioner is responsible for providing accounting or bookkeeping services, yet the petitioner's administrative assistant is listed as [REDACTED] "accounts receivable" employee. Under the terms of the agreement, the petitioner may provide [REDACTED] with sales support, at its discretion, on a case-by-case basis, and only if such support is requested. The petitioner may also be requested to provide existing marketing and promotional materials. These terms suggest that sales and marketing services are ancillary to the petitioner's primary obligation to develop products for [REDACTED]. Such provisions do not appear to mandate the petitioner's employees to provide services as [REDACTED] *de facto* Sales & Marketing Vice President and Business Development Manager. The petitioner's level of involvement in [REDACTED]'s operations appears to go beyond the reach of the Services Agreement. Furthermore, the fact that the beneficiary himself is deeply involved in [REDACTED] to the extent that he is represented to the public as its chief technology officer raises questions as to why the Services Agreement was not disclosed at the time of filing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

It should be noted that, pursuant to Clause 3 of the Services Agreement, the petitioner "agrees not to develop, engineer, assess, support, sell, represent, or promote similar products made by [REDACTED] and [REDACTED] competitors. Competitive products include a broad range of video, voice and data products supplied by companies including, but not limited to Motorola, Scientific Atlanta, Arris, C-Cor and others which sell to Cable and Telco Triple-Play Operators." In light of this provision, the duties of the technical sales person do not appear to be credible. Absent evidence that the petitioner actually has its own customers, [REDACTED] stated responsibilities to contact new and existing customers, make evaluations including specifications, prices and delivery time requirements, determining quantities of products, and quoting prices for products and services do not appear to comport with the terms of the agreement.

Overall, a review of the totality of the evidence does not assist in clarifying the nature of the beneficiary's duties or those of his subordinates. The petitioner has provided position descriptions for its employees which fail to take into account each employee's role under the Services Agreement submitted for the first time on

appeal. At best, the AAO must consider the position descriptions previously submitted incomplete. Absent evidence setting forth with much greater specificity the duties of the beneficiary and his subordinates within the context of their dual roles under the Services Agreement, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

The AAO acknowledges counsel's claim that the director failed to take into account the petitioner's reasonable needs in concluding that the beneficiary would not be employed in a primarily managerial or executive capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, 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.

Furthermore, 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)). In addition 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).

Here, the AAO notes that the primary deficiency with the petitioner's claim is not the number of employees working for the company, but that fact that it has not adequately or consistently explained the "overall purpose and stage of development of the organization." As discussed above, the petitioner has not adequately explained the dual nature of its employees' roles on behalf of the petitioner and on behalf of the petitioner's client, [REDACTED]. The petitioner does not appear to be free to carry out its own product development, marketing and sales functions independent of [REDACTED] therefore, the absence of any mention of [REDACTED] in the original filing, response to the request for evidence, and appeal raises questions regarding the credibility of the evidence submitted in support of the petition. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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

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.