

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave., NW, Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D7



File: WAC 08 061 52097 Office: CALIFORNIA SERVICE CENTER Date: **FEB 03 2009**

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "John J. Grissom".

John J. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 extend the employment of its president 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 Washington corporation, claims to be engaged in the import, export and distribution of seafood products. The petitioner states that it is the subsidiary of TOV [REDACTED], located in Kiev, Ukraine. The beneficiary was initially granted a one-year period of in L-1A classification and the petitioner now seeks to extend the beneficiary's employment for three additional years. The petitioner indicates that the beneficiary will be employed on an intermittent basis.

The director denied the petition on three independent and alternative grounds. Specifically, the director concluded that the petitioner did not establish: (1) that the U.S. entity has been doing business in accordance with the regulations; (2) that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition; or (3) that it has secured sufficient premises for the operation of the business.

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 suggests that the director did not have a clear understanding of the nature of the petitioner's business and the beneficiary's role within it. The petitioner submits voluminous documentary 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.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

The first issue addressed by the director is whether the petitioner established that the U.S. entity is doing business as defined in the regulations.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states:

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.

The petitioner filed the nonimmigrant petition on December 26, 2007. In a letter dated December 19, 2007, the petitioner stated that it was established by the foreign entity for the purpose of increasing the import of seafood products into Ukraine. The petitioner noted that it established its offices in Seattle, Washington because many leading U.S. seafood producers, such as Ocean Beauty Seafoods, Inc., Trident Seafoods, Inc., Norquest Seafoods, Inc. and Great Pacific Seafoods, maintain offices there. The petitioner further explained that the company will continue to locate and purchase seafood and arrange for its export to Ukraine.

In support of the petition, the petitioner submitted a copy of its 2006 IRS Form 1120, U.S. Corporation Income Tax Return, which shows gross receipts of \$15,492,553.

On January 3, 2008, the director issued a request for additional evidence (RFE), in part, instructing the petitioner to submit evidence that it has been doing business in the United States. Specifically, the director requested: (1) copies of the company's bank statements for the previous year; (2) a telephone directory listing; (3) the company's business office hours; and (4) the current operating business phone number located within the petitioner's physical premises.

The petitioner submitted a response to the RFE on March 5, 2008. The petitioner's response included copies of its bank statements for a commercial checking account for the months of January through December 2007. The statements show significant monthly credits and debits. Many of the monthly electronic deposits are attributed to "Inversora Sorfel, S.A." The bank statements show that the company made frequent payments to companies such as Pacific Seafood, Inc., Bornstein Seafoods, Inc., Ocean Beauty Seafoods, Pacific Fish and Impound, Icicle Seafoods, Inc., etc. The petitioner provided a telephone number and evidence that it had submitted the number for listing in the Seattle yellow pages.

The director denied the petition on March 18, 2008, concluding that the petitioner failed to submit evidence to show that the petitioner has been doing business. The director acknowledged that the submitted bank statements show a substantial amount of financial activity, but emphasized that the statements were not accompanied by "documentation that related the financial activity shown in the bank statements to any contracts, invoices or payments for seafood distribution." The director further noted that the petitioner did not seem to have a telephone directory listing at the time of filing or evidence that it leased a warehouse. Therefore, the director concluded that there is a lack of documentation to demonstrate that the company is engaged in seafood commodity trading.

On appeal, counsel for the petitioner explains that the petitioner acts mainly as a buying office for its parent company, and does little selling activity other than to Inversora Sorfel, SA, an affiliate company. Counsel explains that most of the companies it purchases from are located in Seattle, and therefore the products are shipped immediately from the sellers' cold storage facilities. Counsel asserts that the petitioner therefore has no need for leasing cold storage warehouse space. Counsel further explains that the petitioner has a limited number of suppliers in the United States and maintains close relationships with each of them. Counsel notes that the petitioner has little need for a web site or even a public web site listing because it is not engaged in any significant selling activities with third party companies, and because its communications are mostly conducted by email and mobile phone with its established suppliers.

Counsel emphasizes that the bank statements already provided show that the petitioner made regular and substantial payments to various seafood suppliers who were also mentioned in the petitioner's initial supporting letter, including Trident Seafoods, Pacific Seafood and Bornstein Seafoods. Counsel asserts that the bank statements do in fact establish a clear link between the financial activity and seafood trading with the company's previously identified suppliers. On appeal, the petitioner submits voluminous evidence in the form of invoices, shipping documents, packing lists and other documentation demonstrating the petitioner's involvement in seafood trading activities since 2005. The petitioner also submits audited financial statements for 2006. The notes accompanying the financial statements indicate that the petitioner makes its purchases primarily in Washington State and sells substantially all of its goods to an affiliated Uruguay company, which then sells to the Ukrainian company that acts as importer.

Upon review, counsel's assertions are persuasive. The petitioner has established that it is doing business in the United States as a seafood trader. The AAO notes that bank statements submitted in response to the RFE did in fact show payments to the suppliers named in the petitioner's letter dated December 19, 2007, and the additional evidence submitted on appeal corroborates the financial transactions noted in the bank statements. Accordingly, the director's decision with respect to this single issue will be withdrawn.

The second issue addressed by the director is whether the petitioner has established that that the beneficiary will be employed in the United States 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.

In its letter dated December 19, 2007, the petitioner indicated that the beneficiary's duties as president of the U.S. company will be the same as those he holds as commercial director of the foreign entity. The petitioner described his duties as follows:

He is also charged with further establishing and continuing [the petitioner's] business in the United States, including staff hiring and business and financial planning. In addition, [the beneficiary] will be establishing long-term relationships with all the major seafood producers in the Pacific Northwest. He will conduct the major seafood product negotiations, including long term supply arrangements with the producers. He exercises full discretion over all aspects of the company's operations and reports only to the company's Board of Directors. [The beneficiary] directly or indirectly oversees and manages the company's three employees, all of whom report ultimately to him. Currently, [the petitioner] has hired four employees, including a President, Vice President – Sales, a Manager, and a Controller. . . .

As President, [the beneficiary] clearly meets the four criteria of the Service's definition of an "executive." He oversees and directs company employees with regard to the company's fish purchasing and sales operations, which are the main source of the company's revenue. . . . He exercises full discretion in establishing corporate goals and policies and making executive decisions with regard to company direction and business planning. He also reviews the company's financial statements and sales and activity reports to monitor production, efficiency and goal achievement and to make shifts in policies and goals as necessary. . . . He has ultimate executive control over the hiring and firing of staff and he has complete responsibility for major corporate decisions and reports only to the Board of Directors and Shareholders.

The petitioner noted that the beneficiary is in the United States on an intermittent basis and that he continues to hold his position as commercial director for the foreign company. The information provided by the petitioner on the L Classification Supplement to Form I-129 indicates that the beneficiary spent a total of 21 days in the United States since his L-1 visa was issued on December 31, 2006.

The petitioner submitted an organizational chart indicating that the beneficiary supervises a vice president, [REDACTED] a manager, [REDACTED], and a controller, [REDACTED]. The record contains the petitioner's IRS Forms W-2, Wage and Tax Statement for 2007, which indicate that [REDACTED] and Ms. [REDACTED] earned wages of only \$3,000 in 2007.

The director found the initial evidence insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, in the RFE issued on January 3, 2008, the director instructed the petitioner to submit a more detailed description of the beneficiary's duties in the United States and the percentage of time he devotes to each duty. The director also requested an organizational chart and additional information regarding the beneficiary's subordinate employees, including their job duties, levels of education and immigration status.

In a response letter dated February 22, 2008, the petitioner provided the following expanded description of the beneficiary's duties, again noting that the beneficiary divides his time between the foreign and U.S. entities:

- 5% of the total time: Analyzing business development and growth, determining and overseeing implementation of long- and short-term goals, strategies and policies, and making all major corporate decisions with regard to business direction and management.
- 5% of the total time: Establishing long and short-term financial marketing, and operational goals and overseeing implementation of these goals.
- 2% of the total time: Exercising ultimate executive control over all hiring and firing decisions.
- 25% of the total time: Developing and cultivating relationship with the major seafood producers in the Pacific Northwest to ensure that [the petitioner] has access to the best seafood products for exports.
- 15% of the total time: Negotiating with sellers, including negotiating long-term supply arrangements that will grow [the petitioner's] business in the future.
- 20% of the total time: Overseeing and directing company employees with regard to the company's fish purchasing and export operations, including ensuring that customers are fully satisfied with the company's performance and service.
- 10% of the total time: Reviewing the company's financial statements and activity reports to monitor production, efficiency, and goal achievement and to make shifts in policies and goals as necessary.
- 5% of the total time: Ensuring that all financial reporting requirements are met on a timely and regular basis. Ensuring that the day-to-day operations of the organization are effectively and efficiently coordinated and implemented and conducted within the framework agreed to by the Board.
- 5% of the total time: Implementing project management processes to ensure the timely and cost effective development of the key projects.
- 5% of the total time: Building and maintaining a high performance culture through effective performance management, communication and coaching of staff.
- 3% of the total time: Providing clear leadership and promoting a team culture consistent with the organization's values.

The petitioner emphasized that the beneficiary was not responsible for the day-to-day duties involved in generating the petitioner's \$15.5 million in revenues, but instead is responsible for directing the overall management of the company. The petitioner indicated that while the beneficiary is in Ukraine, he delegates the day-to-day duties to the U.S. staff, and provides oversight as needed to ensure that the company's operations are effective.

The petitioner provided an expanded organizational chart which includes position descriptions for the beneficiary's subordinates. The petitioner indicated that the vice president performs the following duties:

Responsible for working with personnel of [the foreign entity] to determine volume needs of fish products seasonally. Works with and maintains business relationships with suppliers in

the United States and Canada to purchase products at competitive pricing to fill needs of [the foreign entity]. Travel to suppliers for relationship maintenance and also for periodic quality inspection of product. Approve and makes payments to suppliers for purchases made and also deals with suppliers for seafood conferences and shows; facilitates negotiations with suppliers. Oversees duties of the office manager making sure daily tasks such as bookkeeping and invoicing are done in a timely manner.

The petitioner stated that its manager, _____, performs the following duties:

Performs general office duties; directs and oversees products shipment overseas; obtains, reviews and forwards to [the foreign entity] product compliance documentation (certificates of origin, health certificates, bills of lading, customs declarations); arranges for proper product packaging and labeling; facilitates communication with [the foreign entity]; communicates with banks and provides requested documentation to secure various credit facilities; assists President, Vice President and Controller if need[ed.]

Finally, the petitioner indicated that its controller, _____, performs the following duties:

Enters in to QuickBooks (“QB”) accounts payable, accounts receivable, general journal entries; prepares checks for vendors; general filing; calculates and enters into QB payroll liabilities; reconciles bank accounts; tax preparation and collaboration with CPA on 941 taxes Labor & Industries taxes, Employment Security Department taxes, estimates tax payments, Business & Occupational taxes, prepares and files tax return extensions, provides necessary documents for federal tax return.

The director denied the petition on March 18, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The director noted that two of the petitioner’s employees earned salaries of only \$3,000 per year in 2007. The director concluded that, given the petitioner’s organizational structure, it is not credible that it requires the beneficiary to perform primarily managerial or executive duties. The director determined that the beneficiary would not be relieved from performing the day-to-day functions of the business.

On appeal, counsel for the petitioner suggests that the director failed to take into account the reasonable needs of the organization in determining that the beneficiary will not be employed in a primarily managerial or executive capacity. Counsel explains as follows:

The majority of the beneficiary’s duties will be primarily directing the management of the organization. The beneficiary makes all decisions regarding what seafood products to purchase, when to purchase them and when to ship them. He does not spend the majority of his time on day-to-day functions. He gives instructions to _____ the Vice President, who executes these decisions and actually goes out into the field to meet with suppliers and to inspect, purchase and arrange for shipment of the product. The other employees support Mr.

██████████'s duties and actually arrange for the payment to suppliers and other paperwork. Often the beneficiary is not even in the US and gives instructions to ██████████ via Blackberry.

Counsel asserts that the petitioner hired a full-time assistant for ██████████ on March 15, 2008. The petitioner submits an updated organizational chart which identifies the new employee as "logistics/purchasing." Counsel emphasizes that the nature of the business, as a buying operation, has an impact on the number of staff needed.

Subsequent to filing the appeal, counsel for the petitioner submitted additional documentation. In a letter dated July 22, 2008, counsel stated that a wholly-owned subsidiary of the petitioning company, PS Acquisition, LLC, recently purchased the assets of Sea Hawk Seafoods, Inc. Counsel indicates that as a result of the purchase, the petitioner, through its subsidiary, will own and operate a seafood processing facility located in Alaska and create 25 permanent full-time positions and 200 temporary peak time positions. The petitioner submits an unexecuted assets purchase agreement dated July 22, 2008; an offer for purchase and sales of assets dated June 4, 2008; and information regarding the facility. The petitioner does not submit evidence of its relationship with PS Acquisition, LLC, nor does it address how the purchase of the facility would impact the beneficiary's duties under the extended petition.

Regardless, the evidence submitted on appeal with respect to the hiring of a new employee three months subsequent to the filing of the petition and the purchase of a processing facility by the petitioner's alleged subsidiary nine months subsequent to the filing of the petition will not be considered. 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). The AAO's analysis of this issue will be based on the evidence submitted prior to the adjudication of the 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.*

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 prove 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). Here while the beneficiary evidently exercises discretion over the U.S. operations as its president, the petitioner has failed to establish that the beneficiary performs primarily managerial or executive duties during his limited periods of stay in the United States.

The petitioner indicates that the beneficiary devotes 25 percent of his time to "developing and cultivating relationships with the major seafood producers in the Pacific Northwest" to ensure that the petitioner has access to the highest quality products for export. The petitioner has not established that the time the beneficiary devotes to supplier relationships falls under the statutory definitions of managerial or executive

capacity. Further, it is unclear how the beneficiary's duties in this regard differ from those performed by the vice president. The petitioner indicates that the beneficiary devotes an additional 15 percent of his time to negotiating supply arrangements with sellers, another duty that appears to overlap with the tasks performed by the vice president, and has not been shown to be managerial or executive in nature.

Based on the petitioner's representations, the remaining job duty requiring a significant portion of the beneficiary's time is "overseeing and directing company employees with regard to the company's fish purchasing and export operations," and "ensuring that customers are fully satisfied with the company's performance and service," duties that purportedly require 20 percent of the beneficiary's time. The petitioner has not indicated what specific tasks the beneficiary performs to ensure customer satisfaction with the petitioner's services, and therefore the AAO cannot determine whether such tasks would be qualifying in nature.

Although the beneficiary is not required to supervise personnel, if it is claimed that his or 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. When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The petitioner indicates that the beneficiary oversees a vice president, an office manager and a controller. The record shows that the office manager and controller both earn an annual salary of \$3,000. This salary equates to a weekly salary of less than \$60 and suggests that these employees work, at most, approximately one day per week. While two of the beneficiary's subordinates have managerial job titles, the petitioner has not shown that they are actually supervising lower-level employees or managing essential functions of the company. Rather, the vice president, as the sole full-time employee of the company, is performing almost every operational task associated with the petitioner's purchasing and export business, with only limited assistance from the two part-time employees.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of

endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 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 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. Therefore, while the petitioner indicates that its vice president has a bachelor's degree in English, the petitioner has not established that the duties of the position, which include purchasing, inspecting and arranging for the export of fish, actually require a bachelor's degree in English.

Based on the foregoing, the petitioner has not established that the beneficiary will supervise a staff of managerial, professional or supervisory employees, and therefore his responsibility for overseeing lower-level staff, which accounts for 20 percent of his time, will not be deemed to be managerial in nature.

Overall, the petitioner indicates that the beneficiary devotes a total of 60 percent of his time to negotiating purchase agreements, maintaining supplier relationships and overseeing non-professional employees, none of which have been shown to be qualifying managerial or executive duties. 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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel asserts that the director failed to understand the nature of the petitioner's business, and therefore did not take into account the reasonable needs of the organization when analyzing its staffing levels. 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). 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)).

Although the petitioner stresses that, due to the nature of its business, it does not require a large staff, the evidence of record shows that the petitioning company is essentially a one-person fish purchasing operation

that has not yet grown to the point where it requires the services of a primarily managerial or executive employee. Based on the evidence of record, the company is run almost single-handedly by the vice president, with minimal administrative support from the manager and controller, and also little actual supervision from the beneficiary, who spent a mere three weeks in the United States during the year preceding the filing of the petition. While counsel stresses that the beneficiary “makes all decisions regarding what seafood products to purchase, when to purchase them and when to ship them,” the petitioner has not established that this level of decision-making authority rises to the level of a managerial or executive employee as those terms are defined in the statute.

Furthermore, in the present matter, regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS 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 support the beneficiary in a primarily managerial or executive position, the petitioner is ineligible by regulation for an extension.

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

The third and final issue addressed by the director is whether the petitioner has sufficient physical premises to house its business. At the time the petitioner filed a “new office” petition, it was required to affirmatively demonstrate that it had acquired sufficient physical premises suited to the type of business it intended to operate. 8 C.F.R. § 214.2(l)(3)(v)(A).

On the Form I-129, the petitioner indicated that its business is located at [REDACTED], in Seattle, Washington, and that the beneficiary would work at this location while in the United States. The petitioner submitted an apartment rental agreement made between the petitioning company and “Commercial Group,” for this location in the building known as “[REDACTED]” According to the terms of the rental agreement, the premises “shall not be used for any purpose other than as a residence for one person.” Additional terms of the agreement indicate that there are to be no pets and no waterbeds in the premises. The lease was dated December 29, 2004, and was intended for a period of one year, commencing on January 1, 2005, with a month-to-month term commencing thereafter.

In the RFE issued on January 3, 2008, the director requested that the petitioner provide an office lease and business license for the U.S. entity’s office. The director noted that the lease suggested that the business is located in a residential apartment. The director therefore instructed the petitioner to provide evidence that the site is zoned for commercial use.

In response, the petitioner submitted a letter dated January 15, 2008 from R [REDACTED] of Commercial Group, LLC, who stated that the petitioner has rented the premises in question since December 29, 2004. Mr. Grant indicates that the petitioner is permitted to use, and has used this space for commercial purposes since they signed the lease. The petitioner submitted county records showing that Commercial Group owns the property,

known as [REDACTED]. The "present use" of the property is described as "Apartment (Mixed Use)." The petitioner also submitted a copy of its City of Seattle business license for the address, with an expiration date of December 31, 2008.

In denying the petition, the director emphasized that, notwithstanding the petitioner's response to the RFE, the lease agreement states that the lease was intended to be used only as a residence for one person. The director noted that the lease did not indicate the total square footage of living, office and/or warehouse space. The director also found it significant that the petitioner never entered into a new lease agreement or purchased property for the purpose of conducting its business. The director acknowledged the letter from [REDACTED] stating that the petitioner has been using the premises for commercial purposes, but emphasized that the terms of the lease expressly forbid it.

On appeal, counsel states that the petitioner sought to locate an office close to major suppliers, and that the Ballard neighborhood in Seattle, Washington is ideal for such purposes. Counsel states that the leased space is approximately 800 square feet in size and that the petitioner disclosed to the lessor from the beginning that a business would be operated from the premises. Counsel contends that the lease that was signed as a "standard boilerplate lease agreement," that was amended by the oral agreement of the lessor. Counsel further states that the size of the space leased is sufficient because the petitioner rarely has all of its employees at the office location at any one time. The petitioner submits copies of three photographs that are purportedly of the leased premises, including an external shot of a building with no discernible address and two interior shots showing two employees at separate desks in a small office.

Upon review, the petitioner has not overcome the grounds for denial. Although the petitioner submitted a letter from its landlord acknowledging that the petitioner utilizes the leased premises for commercial purposes, the issue of the underlying residential lease agreement has not been adequately resolved, and the photographs submitted on appeal are inconclusive in establishing that the petitioner is actually occupying the leased premises for commercial purposes. If the initial petition was approved based upon the written lease agreement that was submitted in support of this petition, the approval would have constituted gross error on the part of the director.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.