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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



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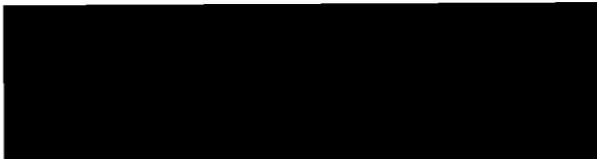
NOV 23 2009

File: WAC 09 013 51541 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



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).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. 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, an Illinois corporation, states that it is a global supplier of metallic components and automotive parts. It claims to be a subsidiary of [REDACTED] located in Daegu, South Korea. The petitioner seeks to employ the beneficiary in the position of president for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States 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 for review. On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the petitioning company in determining whether the beneficiary would be employed in a primarily managerial or executive capacity, and imposed requirements on the petitioner and beneficiary that are not found in the statute or regulations. Counsel submits a detailed brief 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 sole issue addressed by the director is whether the petitioner established 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant worker, on October 20, 2008. The petitioner indicated on the petition that the U.S. company has three employees. In a letter dated October 6, 2008, the

petitioner indicated that the U.S. office was established in 2004 to serve as the foreign entity's sales office, and is primarily engaged in importing automotive parts and reselling them to its North American customers. The petitioner described the beneficiary's proposed duties as president as follows:

[The beneficiary] will oversee the operations of [the petitioning company]. He will manage all aspects of [the company], including operation account management, human resourcing management, and core customer management. A primary function will also be to find and develop a new field of non-automotive business, such as aerospace and non-manufacturing lines. In the capacity of President, [the beneficiary] has the ultimate authority to approve all legal and management decisions pertinent to securing new contracts and is the go-through executive for all matters related to financing, customer relations and manufacturing services. He has ultimate authority in all financial matters and negotiates all financial aspects with customers and financial institutions.

[The beneficiary] will have the ultimate budgetary control over every aspect of [the petitioner's] operations and will direct [the petitioner] as the go-through executive for all critical decisions on the realization of the North American Business expansion. At [the petitioning company], three employees will report directly to [the beneficiary]: an engineering specialist, a logistical & sales assistant and a sales/marketing specialist. All of these employees hold at least a Bachelor's degree.

The petitioner also submitted a separate job description, in which it further stated that the beneficiary will also "direct and coordinate the day to day technical support operations of the company," and "have full authority and discretion in assembling, retaining and optimal utilization of his subordinate managerial staff."

The petitioner submitted an organizational chart for the U.S. company which indicates that the beneficiary supervises a "sales resident" employee, a logistics and account assistant, and "Techman Sales Sales Representative."

The director issued a request for additional evidence (RFE) on October 27, 2008, in which she requested, *inter alia*, additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary will devote to each specific duty; (2) the total number of employees at the U.S. location where the beneficiary will be employed; (3) an organizational chart for the U.S. company which identifies all employees under the beneficiary's supervision by name and job title; (4) brief job descriptions, educational level and annual salaries/wages for all of the beneficiary's subordinates; (5) copies of the petitioner's state quarterly wage reports for the last two quarters; and (6) copies of the petitioner's payroll summary and IRS Forms W-2 and W-3 evidencing wages paid to employees.

In response to the RFE, the petitioner submitted an organizational chart indicating that the beneficiary will supervise a resident sales representative. The chart indicates that the U.S. company is "currently hiring" a sales manager and a finance and logistics assistant. The petitioner described the beneficiary's position as follows:

- Discovering new automotive project
- Getting new RFQ Project (Request for Quote) from customer
- Submitting the quote for customer RFQ to customer
- Following up project quote submitted to be awarded
- Awarding new project from customer
- Managing new project development with time line
- Managing launched projects
- Managing finance management
- Managing sub supplier Warehousing company

The petitioner indicated that the resident sales representative serves as a "window person to customer for any issues (Logistic, Quality) from customer," and is responsible for periodically contacting customers to maintain customer relationships. The petitioner indicated that the individual who holds this position has a "university" education.

The petitioner indicated that the currently-vacant sales manager position is responsible for developing and controlling sales and service programs, overseeing regional and local sales managers and their staff, consulting with department heads to plan advertising services and to secure information on equipment and customer specifications, preparing budgets and approving budget expenditures, and determining price schedules and discount rates. Finally, the petitioner indicated that the finance and logistics assistant position would be responsible for monitoring open orders, managing the supply chain, creating purchase orders and accounting for purchased product, and analyzing trend reports, among other duties.

In addition, the petitioner submitted a separate job description for the position of president, in which it stated that the beneficiary would perform the following duties:

- Direct and coordinate project leader in the development of new automotive projects. (60%)
- Manage sub supplier warehousing company. (10%)
- Approval all legal and management decisions pertinent to securing new contracts and go through executive for all matters related to financing, customer relations and manufacturing services. (10%)
- Direct all financial activities and negotiates all financial aspects with customers and financial institutions. (10%)
- Oversee budgetary control over every aspect of [the petitioning company]. (5%)
- Coordinate sales representatives in getting new RFG (Request for Quote) Project from customer. (5%)

The petitioner submitted copies of its Illinois Employer's Contribution and Wage Report for the second and third quarters of 2008. The petitioner paid the beneficiary and two other employees during the second quarter of 2008 and in July 2008. In August and September 2008, the months immediately preceding the filing of the petition, the petitioner paid wages to the beneficiary and to the individual identified as resident sales representative.

The director denied the petition on December 18, 2008, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director noted that the petitioner submitted two different position descriptions for the beneficiary in response to the RFE and that the claimed duties were too broad and nonspecific to convey any understanding of the beneficiary's actual day-to-day duties. The director further observed that, with only one subordinate employee, it was more likely than not that the beneficiary would be engaged in performing the day-to-day operational tasks of the company. The director further found that the petitioner had not established that the beneficiary supervises a subordinate staff of managerial, professional or supervisory personnel, or that he would otherwise be relieved from having to perform non-qualifying duties. Finally, the director acknowledged the petitioner's claim that it is currently hiring two additional employees, but emphasized that the petitioner must establish eligibility as of the date of filing.

On appeal, counsel for the petitioner asserts that the director "denied the L-1A petition in a one-page decision that was long on form, and short on substance," despite the petitioner's submission of a voluminous response to the Request for Evidence.<sup>1</sup> Counsel alleges that the director "was fixated with the fact that there were 'only two employees,' despite the fact that the petitioner indicated at the time of filing and in response to the RFE that the beneficiary supervises three employees, including an engineering specialist, a logistical and sales assistant and a sales/marketing specialist, all of whom hold at least a Bachelor's degree."

Counsel asserts that "USCIS ignores both the Statute and commercial and economic realities when it fixates on the (incorrect) number of employees that [the beneficiary] supervises." Counsel contends that "given the reasonable needs of the organization in light of the overall purpose and stage of development of the organization, [the petitioner's] staffing levels were appropriate and reasonable."

Counsel further alleges that the director failed to review the position descriptions provided by the petitioner, noting that the petitioner has included "over a dozen pages of employer letters, statements and a comprehensive and detailed description spelling out [the beneficiary's] duties." Counsel summarizes all descriptions provided in the record and asserts that the petitioner has "unequivocally met its burden of demonstrating that [the beneficiary's] duties are 'primarily' managerial because it documented in depth the proportion of duties that would be managerial and the proportion that would be non-managerial."

Counsel asserts that the beneficiary qualifies as an executive or a manager, and that the director incorrectly determined that the petitioner used these terms interchangeably. Counsel discusses at length an unpublished AAO decision in which it was determined that a technical support manager with only one subordinate employee qualified as a function manager, and asserts that following the same reasoning, the beneficiary would also qualify as a function manager, as he exercises discretion over the day-to-day operations of an essential function and functions at a senior level within the petitioner's organizational hierarchy. Specifically, counsel states that the beneficiary would "direct and control the petitioner's activities related to the development of new automobile projects" and would supervise three employees who would perform the support tasks necessary for the petitioner to provide its manufacturing services.

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<sup>1</sup> The AAO notes that the director's decision dated December 18, 2008 was nine pages long, and not a one-page decision as alleged by counsel.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 214.2(i)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. The AAO will then consider this information in light of 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.

In addition, 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). Here, while the beneficiary appears to exercise authority over the U.S. operation with respect to financial and other matters, the petitioner has not established that the beneficiary is relieved from performing the day-to-day non-managerial functions inherent to the business.

The AAO acknowledges that the petitioner has submitted a number of descriptions of the beneficiary's duties and indicated how the beneficiary's time would be allocated on a weekly basis. However, the AAO concurs with the director's findings that the descriptions provided do not clearly establish what specific tasks the beneficiary would be required to perform on a day-to-day basis. The petitioner has resubmitted variations of the same vague job description without explaining in any detail what the beneficiary actually does as the company's president. The lack of detail is dubious given that, according to the beneficiary's resume, he has served in the position of president in E-1 status since April 2008 and his duties should be clearly defined.

The petitioner's initial description of the beneficiary's duties was general and paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. For example, the petitioner stated that the beneficiary "must direct the management of the company day-to-day activities," be responsible for "the genesis and implementation of strategic planning, developing and establishing policies and objectives," "direct and coordinate the managerial activities" of the company, and "have full authority and discretion in assembling, retaining and optimal utilization of subordinate managerial staff." 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The petitioner further indicated that the beneficiary would manage "operation account management, human resources management, and core customer management," "direct and coordinate the development of a new

field of non-automotive business," and "direct and coordinate the day to day technical support operations of the company." The petitioner did not, however, identify the day-to-day tasks the beneficiary would perform with respect to account management, customer management, new business development or technical support operations, such that his duties could be classified as managerial or executive. 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 his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Although counsel objects to the director's issuance of an RFE in this matter, the AAO concurs with the director that the petitioner's initial evidence did not demonstrate by a preponderance of the evidence that the beneficiary would be employed in a primarily managerial or executive capacity. While the petitioner responded to the director's requests for additional evidence regarding the beneficiary's proposed duties and the staffing of the U.S. company, the additional evidence contained unexplained inconsistencies. First, the petitioner submitted two different position descriptions for the beneficiary. In the statement of duties accompanying the organizational chart, the petitioner stated that the beneficiary is personally responsible for "discovering new automotive projects," "getting new RFQ Project (Request for Quote) from customer," "submitted the quote for customer RFQ to customer," and following up project quotes. These duties suggest that the beneficiary is directly involved in all aspects of the petitioner's marketing and sales activities, including non-managerial activities. At the same time, the petitioner indicated in a separate job description that the beneficiary will allocate 60 percent of his time to "direct and coordinate project leader in the development of new automotive projects," and 5 percent of his time coordinating sales representatives in getting new requests for quotes projects from customers. The petitioner does not otherwise claim to employ a "project leader," so it is not clear how the beneficiary would spend the majority of his time coordinating the activities of such an employee. The job duties of the sales representative, as described by the petitioner, do not include obtaining requests for quotes from customers. Furthermore, the duties described above suggest that the beneficiary himself is primarily responsible for developing automotive projects, including obtaining requests for quotes. 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).

Overall, the petitioner's descriptions of the beneficiary's duties are both inconsistent and overly generalized and therefore, insufficient to establish that the beneficiary would be performing primarily managerial or executive duties. As noted above, when examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature and scope of the petitioner's business, and any other factors contributing to a complete understanding of a beneficiary's actual role in a business.

Here, the petitioner's claim that the beneficiary is employed in a primarily managerial or executive capacity is predicated on the petitioner's and counsel's assertions that the beneficiary will supervise three employees who would perform the support tasks necessary for the petitioner to provide its services. The petitioner initially claimed that these employees include an engineering specialist, a logistics and sales assistant, and a

sales/marketing specialist. The AAO notes that the position of "engineering specialist" does not appear on either of the organizational charts for the U.S. company. The petitioner has not identified who holds this position, identified the duties associated with the position, or provided evidence of wages or other payments to a person holding the position. Therefore, it is reasonable to conclude that the petitioner did not employ an engineering specialist at the time of filing, and the petitioner does not indicate that it intends to fill this position.

The petitioner's initial organizational chart submitted at the time of filing indicated that the position of "logistics and account assistant" was held by [REDACTED]. The petitioner's quarterly wage report for the third quarter of 2008 shows, however, that this individual last received wages in July 2008, three months prior to the filing of the petition. Absent additional evidence showing subsequent payments to [REDACTED] it must be concluded that this position was also vacant at the time of filing. There is also no evidence that the petitioner ever employed a "sales manager," or a "sales/marketing specialist." As noted by the director, based on the evidence presented, the only persons employed at the time of filing were the beneficiary and the resident sales representative. Contrary to counsel's assertions, USCIS is not required to accept the petitioner's unsupported assertions regarding its staffing levels when the petitioner's own tax records fail to corroborate the petitioner's claims. Again, 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. at 591-92.

On appeal, counsel characterizes the petitioner's personnel structure as a temporary decrease in staffing level and indicates that the petitioner is actively seeking to fill the positions of sales manager and logistics and sales assistant. However, the AAO cannot find that the petitioner normally employs more than two to three workers. The evidence of record shows that the petitioner paid one employee in 2006 and two employees in 2007, so it appears that its current staff of two appears to be the norm rather than a temporary situation that happened to coincide with the filing of the instant petition. Regardless, as noted by the director, 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 director's determination that the petitioner had two employees at the time the petition was filed is corroborated by the evidence of record.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner has claimed that the beneficiary supervises three employees who "hold at least a Bachelor's degree," and indicates that the beneficiary manages a "subordinate managerial staff." As discussed above, the beneficiary's sole documented subordinate is a "resident sales representative." The petitioner claims that this employee's level of education is "university," and that he serves as a "window person to customer for any issues (logistic, quality.)" 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 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. In the instant case, the petitioner has not, in fact, established that the beneficiary's sole subordinate, whose education is described merely as "university," actually completed a bachelor's degree or that such degree is actually necessary to perform the vaguely described customer liaison activities attributed to him.<sup>2</sup>

Nor has the petitioner shown that the beneficiary's sole subordinate supervises subordinate staff members or manage a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisors, professionals, or managers, and he cannot qualify for this classification as a "personnel manager" pursuant to section 101(a)(44)(A)(ii) of the Act.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an

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<sup>2</sup> The AAO notes that the petitioner has made inconsistent statements regarding the beneficiary's own educational level. While there is no requirement that the beneficiary possess a bachelor's degree in order to qualify for this classification, the inconsistencies in the record raise questions regarding the credibility of the evidence in general. The petitioner has repeatedly indicated that the beneficiary completed a bachelor's degree in engineering in metallic engineering from Younghan University in 2000 before joining the foreign entity in May of that year. However, the AAO notes that the petitioner indicated in response to the RFE that the beneficiary's educational level is "high school." The beneficiary was 18 years old in May 2000, so it is reasonable to question whether he had attained a bachelor's degree as of that date. 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).

essential function, the petitioner must clearly describe the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel claims that the beneficiary will manage an essential function of the U.S. company as he will "direct and control the petitioner's activities related to the development of new automobile projects." As noted above, the petitioner indicated in response to the RFE that the beneficiary will devote 60 percent of his time to "direct and coordinate project leader in the development of new automotive projects." However, there is no "project leader" and no one to perform the non-qualifying duties associated with the essential function the beneficiary is claimed to manage. Rather the petitioner indicated that the beneficiary himself will be "discovering new automobile projects," and getting new requests for quotes from customers. Such duties may be essential to the petitioning company's success, but they have not been shown to be primarily managerial in nature. In the case of a function manager, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. The petitioner has not established that the beneficiary qualifies as a function manager.

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 senior 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.* Here, the petitioner's claim that the beneficiary manages a subordinate managerial staff and devotes the majority of his time to the broad goals and policies of the corporation are not supported by the evidence of record. As discussed further below, the petitioner has not established that the beneficiary is relieved from focusing on the day-to-day operations of the U.S. company.

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, 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 (9<sup>th</sup> 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)). Furthermore, 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 size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The petitioner in this matter is a four-year old company engaged in the import, sales and marketing of its parent company's products in the United States. The petitioner has claimed that its personnel needs are met by a president, an engineering specialist, a logistics and accounts assistant, and a sales/marketing specialist, and it has also referred to a "project leader" and proposed sales manager position. In reality, the petitioner employs the beneficiary and a resident sales representative whose duties, as described by the petitioner, are limited to responding to customer inquiries. Thus, while the beneficiary is claimed to direct, coordinate or manage activities such as customer management, account management, technical support, financial matters, business development, and project development, among other activities, the petitioner has not demonstrated how the beneficiary would be relieved from performing the majority of the day-to-day operational tasks of the company. Collectively, the evidence brings into question how much of the beneficiary's time can actually be devoted to 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 petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of any meaningful percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Finally, the AAO acknowledges counsel's reference to an unpublished decision in which the AAO determined that a beneficiary with only one subordinate employee met the requirements of serving in a managerial and executive capacity for L-1 classification as a function manager. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization in a managerial or executive capacity within the three years preceding the filing of the petition. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A), periods spent in the United States in a lawful status for a branch of the same employer or a

parent, affiliate or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad, but such periods shall not be counted toward fulfillment of that requirement.

The beneficiary in this matter was issued a five-year E-1 visa authorizing employment with the petitioner in September 2004. The foreign entity indicates that the beneficiary's employment history with the U.S. and foreign entities is as follows:

- [REDACTED] – 05/2000 to 09/2001
- [REDACTED] – 12/2003 to 08/2004
- [REDACTED] – 09/2004 to 12/2006
- [REDACTED] – 3/2005 to 12/2006
- [REDACTED] 01/2007 to 03/2008
- [REDACTED] – 01/2007 to Present
- [REDACTED] ] – 04/2008 to Present

The beneficiary served in the Republican Army of Korea between September 2001 and November 2003.

Based on the information provided, the beneficiary did not have one year of continuous employment with the foreign entity at the time his E-1 visa was issued in September 2004. While the petitioner claims that the beneficiary has held concurrent positions in both the U.S. and foreign entities since that time, the record does not clearly establish how much time the beneficiary has spent working in Korea since obtaining his E-1 visa. The AAO cannot find that the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) contemplates a situation whereby a beneficiary could acquire one year of continuous qualifying employment abroad by aggregating periods of employment with a foreign entity while concurrently employed by a United States entity. Rather, the regulatory definition of "intracompany transferee" only allows USCIS to expand the "one year of continuous employment abroad" requirement established by statute beyond the three years immediately preceding the filing of the petition.

Furthermore, the only detailed position description submitted is for the most recent "business development manager" position; however, the AAO cannot conclude that he held such position for a continuous year, given that he was employed in the United States during the same period. Therefore, the evidence is insufficient to establish that the beneficiary's period of qualifying employment with the foreign entity was in a primarily managerial or executive capacity. 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). 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).

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.