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



D7

File: EAC 08 153 54571 Office: VERMONT SERVICE CENTER Date:

SEP 02 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:

SELF-REPRESENTED

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 and 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/chief executive officer 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 corporation, states that it operates a pet shop and pet services business. It claims to be a subsidiary of Perdyl E.I.R.L., located in Lima, Peru. The beneficiary was previously granted L-1A classification for a one-year period in order to open a new office in the United States, and the petitioner now seeks to extend her 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 in the United States under the extended petition.

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, the petitioner asserts that the beneficiary performs both managerial and executive duties, supervises managerial and professional personnel, and is not engaged in the day-to-day work of the business. The petitioner submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (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), 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 nonimmigrant visa petition on April 30, 2008. The petitioner stated on Form I-129 that the company operates a pet shop and services business with nine employees. In a letter dated April 15, 2008, the petitioner stated that the beneficiary's duties as chief executive officer of the U.S. company include the following:

- Planning, developing, and establishing long-range goals and objectives of business organization in accordance with board directives and corporation charter.
- Conferring with advisors to plan business objectives, to develop organizational policies to coordinate functions and operations, and to establish responsibilities and procedures for attaining objectives, and also in then implementing goals through subordinate administrative personnel and sub-contractors.
- All aspects of the Company's finance (budget and accounts receivable), administration, and marketing.
- Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and planning in accordance with current conditions.
- Directing and coordinating formulation of financial program to prove funding for new or continuing operations to maximize returns on investments, and to increase productivity.
- Promoting the Company by representing it before organizations and participating at various seminars, conventions, and trade shows.

- Liaison activities with the accountants and lawyers who contract with the Company.
- Hiring staff and other personnel actions, including promotions, transfers, discharges, or disciplinary measures.
- Administrative control and conformance with legal requirements of the firm.

The petitioner's letter also included an organizational chart for the U.S. entity. The chart indicates that the beneficiary reports to the president of the U.S. company and supervises the following staff: two customer service employees; a marketing manager, who in turn supervises two sales associates; and an administration department comprised of an accountant and a business consultant.

The petitioner submitted copies of invoices to establish that it had been doing business for the previous year. The AAO notes that the invoices submitted indicate that the petitioner has provided pet sitting and dog walking services, marketing and sales representative services, moving and transportation services, painting and floor polishing services, and "information services." The petitioner also operates a pet grooming shop.

The director issued a request for additional evidence (RFE) on June 3, 2008, in which he requested additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity. Specifically, the director requested: (1) a comprehensive description of the beneficiary's duties, explaining how such duties are managerial or executive in nature; (2) names, position titles, educational credentials, and complete position descriptions for all employees of the U.S. company, including a breakdown of the number of hours each employee devotes to each job duty on a weekly basis; (3) copies of the U.S. company's IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2007 and the first quarter of 2008; and (4) copies of all IRS Forms W-2 and 1099 issued by the U.S. company in 2007.

In a response dated July 15, 2008, the petitioner stated that the beneficiary's responsibilities, "will include everything," including "operations, marketing, strategy, financing, creation of company culture, human resources, hiring, firing, compliance with safety regulations, sales, PR, etc." The petitioner stated that her specific duties will be divided into the following areas of responsibility:

1. Setting strategy and vision – 20%
2. Building culture – 5%
3. Personnel Building – 10%
4. Capital allocation – 10%
5. Entering and negotiating contracts on behalf of the company – 15%
6. Conferring with advisors to plan business objectives, develop policies and coordinate functions – 5%
7. All aspects of the company's finance (budget and accounts receivable), administration, and marketing. – 10%

8. Directing and coordinating formulation of financial program to prove funding for new or continuing operations to maximize returns on investments, and to increase productivity. – 10%
9. Liaison activities with the accountants and consultants who contract with the company – 10%
10. Administration, control and conformance with legal requirements of the firm. – 5%

The petitioner briefly discussed each area of responsibility. The AAO notes that the duties listed were substantially similar to those included in the petitioner's initial description of the beneficiary's duties. The petitioner emphasized that the beneficiary's primary duties are in a managerial or executive capacity because she oversees all aspects of the operation, develops and maintains the company's vision, approves financial obligations, and has the authority to seek business opportunities and strategic alliances with other organizations. The petitioner emphasized that the beneficiary oversees managers, consultants and lawyers, and is not involved in the day-to-day operations of the company. The petitioner stated that the beneficiary will devote 100 percent of her time to managerial and executive duties.

The petitioner stated that the beneficiary supervises a marketing manager, two customer service representatives, an accountant, a business consultant, and independent contractors including sales associates.

The petitioner described the duties of the subordinates as follows:

Business Consultant

Duties: A Bachelor's Degree is the academic level for this position. Provides management, financial and general counseling and training programs to the "Company." Presentation of financial material and evaluation of current financial condition, and marketing products/services. 2. Plans, coordinates and evaluates success of training programs designed to assist the "Company" and clients with problems or to inform the "Company" and clients about changes or current developments in regulations/laws or conditions that may affect their business. 3. performs necessary administrative duties such as correspondence and reports 4. Maintains close contact with business community and governmental agencies/legislators to assess the "Company" and clients needs and to keep informed of general business conditions and changes in regulations/laws affecting small business. 5. Assists with promotional activities such as advertising, brochures, mailings designed to publicize programs/services of the "Company."

Administration and Human Resources (Accountant)

Duties: CPA Certification + Associate Degree. Bachelor's in Information Systems. Manage of Accounting software. Software and Hardware troubleshooting. General Accounting duties, budgeting advise, financial statements generation (Profit & Loss, Balance Sheet and statement of results), Corporate Taxes, payroll register and maintenance, etc. This position reports to the CEO. Financial projections, budgeting, review of bids, quotations, Supervision of Bank Accounts. Recommends measures to improve quality of service and suggest changes in working conditions and use of materials to increase efficiency of work crew. Reviews

order of service/purchase and contracts to ensure conformance to company policy, budgeting, financial reports, minor accounting and all financial and administrative matters of the company.

Marketing Manager

Duties: Bachelor's degree in Business Administration + 2 yrs experience in retail business. Prepares purchase orders as required and get them approved by the CEO, obtains bids and estimates and arranges for purchase according to established procedures. Completes service orders by detailing time spent, material used, work location, type of work performed. Promotion of the Company, in charge of developing web site, contact person between the Company and Advertising Companies, as printing, brochures, and advertising material to promote business. Supervision of Sales Associates. Quality control duties. Purchase sales control and supervision. Market research for new business and locations. This position reports to the CEO.

Customer Service (2)

Duties: General clerk duties, filing, customer service, correspondence, take phone calls and messages, help customers at the pet shop, in charge of keeping records of customers (Dogs), Point of Sale management, cashier duties. Dog walking, pet grooming, pet full service, as well as pet sitting services.

Sales Associates (2)

Duties: General sales person duties as customer service of clients that come to our shop to buy pet accessories. 2 yrs. exp. In sales and experience in working selling pet supplies. Familiarized with our products. Sales follow up. Check inventory and stock. Order purchase of inventory shortage. Verify orders of purchase and contact with providers.

The petitioner submitted copies of its IRS Forms W-2, Wage and Tax Statement, for 2007. The records show that the petitioner paid wages of \$22,000 to its president, \$18,461 to the beneficiary; \$15,000 to the marketing manager; and \$5,269 to each of the customer service representatives. The petitioner also submitted the requested IRS Forms 941 for 2007 and the first quarter of 2008. The petitioner reported that it paid wages of \$25,200 to five employees in the quarter preceding the filing of the petition. The petitioner provided copies of three IRS Forms 1099-MISC, issued to the individuals identified as sales associates in 2007. Each employee was paid \$15,000. The petitioner did not submit copies of Forms 1099 issued to the business consultant or accountant.

In addition, the petitioner submitted a copy of its independent contractor agreements with its accountant, [REDACTED] and three sales associates, and a copy of its business consulting agreement with [REDACTED]. The petitioner submitted invoices from [REDACTED] company, Centro Latino, Inc., indicating that it has been paying him \$100.00 per month for "payroll, bookkeeping," rather than the \$1,040 per month stated in the agreement.

The director denied the petition on September 8, 2008, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that, while the petitioner claims to have nine employees, its IRS Form 941 for the first quarter of 2008 indicates that the company has five employees, some of who may work on a part-time basis. The director further noted that the petitioner's statements regarding the beneficiary's duties were general, and did not specify exactly what the beneficiary would be doing within the context of the petitioner's current staffing arrangement.

The director also determined that the petitioner did not establish that it is paying the beneficiary her proffered annual salary of \$51,000, and that her actual salary "does not appear to be commensurate with a bona fide manager or executive position in a major metropolitan business market." The director acknowledged the petitioner's statement that some of the positions subordinate to the beneficiary require a bachelor's degree, but noted that the petitioner did not provide copies of the employees' educational credentials as requested. The director also questioned whether the employees of a pet grooming shop would occupy professional positions.

The director concluded that the petitioner had failed to establish that the subordinate staff is able to relieve the beneficiary from involvement in providing the sales and services of the company, such that she can engage in primarily managerial or executive duties.

On appeal, the petitioner asserts that the beneficiary performs both managerial and executive duties and is not engaged in the day-to-day work of the business. The petitioner states that there are no inconsistencies in the record with respect to the number of employees working for the company. The petitioner emphasizes that its "W-2 employees" include the company president, the beneficiary, the marketing manager, and two sales associates [REDACTED] and [REDACTED], while the independent contractors include the accountant, the business consultant, the two customer service representatives, and a third sales associate [REDACTED].

The petitioner asserts that all of its employees work full-time, and that the staff of the company is sufficient to relieve the beneficiary from providing the sales or services of the company to its 250 clients. The petitioner emphasizes that it intends to open a second pet grooming shop and hire four more workers by 2009, and will eventually open a veterinary clinic. The petitioner notes that the petitioner's president is a licensed veterinarian, while the beneficiary and the marketing manager are qualified veterinarians in Peru and are both preparing to take the necessary examinations to allow them to become licensed in the United States.

The petitioner re-iterates the position descriptions it provided in response to the RFE, and emphasizes that the beneficiary does not involve herself in the day-to-day operations of the company. In this regard, the petitioner asserts that the director placed undue emphasis on the size of the U.S. company, noting that "even though our organization does not have a large number of employees, its staff is concentrated in such a labor that has oriented the Company to a great success and expansion."

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. While the AAO finds that the director's adverse determinations were warranted based on the evidence of record, it is noted that the director's underlying analysis, in part, was flawed, as the director issued an adverse finding based in part on the beneficiary's salary. The AAO notes, however, that a beneficiary's salary is an

admissibility factor and not a criterion to be used in determining his or her prospective employment capacity. The director's finding with regard to the latter is not supported by any statute, regulations or precedent decision.

Notwithstanding the director's reasoning the director properly found insufficient evidence to establish that the beneficiary would be engaged in primarily managerial or executive tasks. 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 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(l)(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 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.

As noted by the director, the petitioner has failed to provide a sufficiently detailed description of the beneficiary's day-to-day duties. The initial position description, despite being quite lengthy, failed to specify any specific tasks the beneficiary performs on a daily basis as the chief executive officer of a pet grooming business. For example, the petitioner stated that the beneficiary is responsible for "planning, developing and establishing long-range goals and objectives," "conferring with advisors to plan business objectives" and "develop organizational policies," and generally overseeing "all aspects of the operation." Such duties provide little insight into the nature of the beneficiary's day-to-day duties. 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 director therefore requested a comprehensive description of the beneficiary's' duties. As noted above, the RFE also included a request for a complete description of all employees' duties, and a breakdown of the number of hours devoted to each employee's duties on a weekly basis. While the petitioner submitted a slightly lengthier description of the beneficiary's duties in response to the RFE, it largely restated the initial job description and provided little additional explanation as to what the beneficiary primarily does on a day-to-day basis. For example, the petitioner added that the beneficiary will be responsible for "building culture" and "strategic vision." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to her position merely on the basis of the beneficiary's job title, placement on a general organizational chart or broadly-cast business responsibilities. Furthermore, while the petitioner's descriptions of the beneficiary's duties suggests that she holds the highest level of authority within the company, the AAO cannot overlook the fact that the petitioner also employs a president, whose position is senior to the beneficiary's. Although the petitioner was instructed to submit position descriptions for all employees in the U.S. company, it has opted not to provide a description of the president's duties. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Such evidence would potentially confirm that there is no substantial overlap of duties among the petitioner's two "chief executives," and lend support to the claim that the beneficiary is responsible for "all aspects of the operation" and "the vision of the company" despite the fact that she is not the senior employee within the petitioning company.

The petitioner's description of the beneficiary's duties is 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, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of 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.

Here, there are several unexplained discrepancies in the record regarding the nature of the petitioner's business, the number of workers it employs, and their job duties. While it has been established that the petitioner, at the time of filing, was operating a pet grooming shop that also sells pet food and supplies, there is evidence in the record indicating that the petitioner is also engaged in providing moving and transportation services, marketing and sales services, dog walking and pet sitting services, and home improvement services such as painting and floor polishing. The petitioning company was issued a Form 1099 in 2007 from "Conrob, Inc.," a company located in Palm City, Florida. The petitioner has issued invoices to Conrob for "marketing services, sales representative." The petitioner also submitted a letter dated March 2008 from [REDACTED] of Conrob, who states that the petitioner's employees "rarely require supervision, they are punctual, typically exceed expectation." Based on this evidence, it is reasonable to believe that the petitioner, while providing some type of services to Conrob, is not merely grooming or sitting pets.

The petitioner has also submitted position descriptions for some employees which are inconsistent with the claimed nature of the business. For example, the job descriptions for the beneficiary's subordinates contain references to "the work crew," "obtaining bids and estimates," and completing service orders "by detailing time spent, material used, work location, type of work performed." These types of duties are not consistent with a business that grooms dogs in its pet shop. Moreover, the fact that the petitioner claims to have a total of four employees, three sales associates and a marketing manager, whose primary duties are to purchase inventory for a single small pet shop is not entirely credible. The petitioner did not report any purchases on its corporate income tax return in 2007 or claim to have any inventory. Rather, the total "cost of goods sold"

reported on Form 1120 (\$45,000) is equivalent to the amount paid to the Form 1099 employees as "cost of labor."

There are also inconsistencies in the record as to which employees are direct employees and which employees are employed on a contract basis. In response to the RFE, the petitioner submitted independent contractor agreements for the three sales associates, the accountant and the business consultant. The petitioner now claims on appeal that two of the sales associates are payroll employees. Similarly, the petitioner previously stated that the two customer service representatives are payroll employees and submitted copies of their Forms W-2 and Form I-9, Employment Eligibility Verification. On appeal, the petitioner claims that these employees are independent contractors, but provides no explanation for the change in their employee status. There is no credible evidence to establish who was actually being paid by the petitioning company as of the date of filing.

Furthermore, although the petitioner submitted a copy of its consulting agreement with the business consultant, there is no evidence that the petitioner has made any payments to her, much less paid her the minimum of \$1,500 per month stated in the terms of the agreement signed in January 2007. Similarly, the petitioner's agreement with the accountant indicates that he would be paid \$1,040 per month for a wide variety of financial and administrative services; however, the evidence submitted indicates that the petitioner has been paying him \$100 per month for bookkeeping and payroll services only.

Finally, the AAO notes that the petitioner claims to employ only two customer service representatives who perform any pet services, despite the fact that this is the stated purpose of the petitioner's business. As stated above, the petitioner has provided inconsistent information regarding the status of these employees, and it cannot be confirmed that they were working for the petitioner as of the date of filing. The petitioner issued both employees Forms W-2 in 2007, but states that they were not among the payroll employees during the first quarter of 2008. The petitioner has not submitted evidence that it signed a consulting agreement with the customer service representatives or other evidence to confirm that they were still employed by the company as of the date the petition was filed.

The discrepancies discussed above raise questions regarding the reliability of the petitioner's claims regarding its staffing levels, the nature of the petitioner's business, and the ability of the subordinate employees to relieve the beneficiary from involvement in the day-to-day operations of the business. 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). 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).

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).

Here, the petitioner claims to employ a total of seven to eight employees who work subordinate to the beneficiary, including the marketing manager, business consultant and accountant. As discussed above, the record does not contain evidence of payments to the business consultant, and the record suggests that the accountant's actual duties are much more limited than those stated in the various job descriptions provided. While the marketing manager is claimed to supervise the sales associates, the employment status of the sales associates is uncertain for the reasons discussed above. Furthermore, the beneficiary is also directly responsible for supervising the customer service representatives who provide services to the customers, and whose employment status is also uncertain. Moreover, the petitioner states that the customer service representatives are also responsible for pet transportation services, dog walking and pet sitting services, which could reasonably take them away from the shop during business hours. It is reasonable to believe that the beneficiary or the marketing manager, who have the requisite background to perform pet grooming and hygiene services, may be required to perform such services. The totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of providing pet services and retail sale of pet supplies, in addition to whatever other services the petitioner may provide, and that their duties do not extend beyond providing such services. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, and she cannot qualify 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 essential function, the petitioner must furnish a position description that clearly describes 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. Here, the petitioner has not clearly articulated a claim that the beneficiary manages an essential function of the petitioning company. On appeal, counsel states that the beneficiary "manages a major function of the Organization," and goes on to state that she was the person that signed Forms I-9, the lease agreement and payroll checks. The fact that the beneficiary has been granted signatory authority as the second-most senior employee in the company is not sufficient to establish that she manages an essential function of the company. As discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that she performs primarily managerial duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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 the present matter, 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.

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)). 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).

As discussed above, the petitioner has not documented payments to all of its claimed employees, and has not consistently indicated which employees are direct employees and which are contracted staff. In light of these discrepancies, the AAO is not persuaded that the petitioner was paying nine full-time employees at the time of filing as claimed. The record also contains conflicting information regarding the scope and nature of the services the U.S. company provides, factors which would reasonably influence the company's staffing requirements. Considering these issues along with the vague description submitted for the beneficiary, the AAO cannot conclude that the beneficiary is relieved from involvement in the day-to-day operations of the company.

The AAO acknowledges the petitioner's claim that it intends to open a second pet grooming shop and, eventually, a veterinary clinic. However, as noted above, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not demonstrated that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Accordingly, the appeal will be dismissed. 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).

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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.