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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



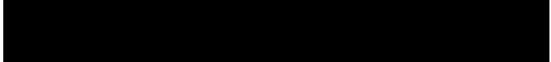
**U.S. Citizenship  
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Services**

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FILE: EAC 08 115 50527 OFFICE: VERMONT SERVICE CENTER Date: **JAN 14 2010**

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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation, states that it is engaged in the real estate and construction business. It claims to be an affiliate of [REDACTED] located in Israel. The beneficiary was initially granted a one-year period in L-1A status in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for three additional years.

The director denied the petition based on three independent and alternative grounds. Specifically, the director determined that the petitioner failed to establish: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; (2) that the U.S. and foreign entities maintain a qualifying relationship; and (3) that the beneficiary was employed by the foreign entity for one year within the three years preceding his transfer to the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the beneficiary is managing and directing the construction function of the organization by directly supervising and coordinating the work of subcontracted managers and professional employees. Counsel further asserts that the petitioner's stock certificate submitted in support of the appeal establishes the U.S. company's affiliate relationship with the beneficiary's former employer. Counsel submits a brief and additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

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

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

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

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

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant visa petition on March 14, 2008. In a letter dated March 11, 2008, the petitioner stated that the beneficiary "is in charge of acquisitions, and supervises all phases of construction," and "is responsible for hiring contractors, and signing contracts with clients and workers." The petitioner stated that the company employs three in-house employees and approximately ten outside contractors, including architects, engineers, plumbers, electricians, cement workers, carpenters, painters."

On March 21, 2008, the director issued a request for additional evidence (RFE), in which he instructed the petitioner to submit an organizational chart for the U.S. company, and a list of United States employees that identifies each employee by name and position title. The director also requested a complete position description for each U.S. employee, including the beneficiary, and a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis.

In a response dated April 15, 2008, the petitioner stated that the beneficiary "consults with clients and with subcontractors," "is overseeing the work that's being done on the houses," and "is going to the bank when needed." The petitioner stated that it employs [REDACTED] on a full-time basis, and that [REDACTED] "consults with subcontractors and suppliers, " and "shops around for better prices on supplies." Finally, the petitioner stated that it employs an office secretary who works 30 hours per week and is responsible for answering phone calls, making phone calls, filing paperwork, and depositing money in the bank when needed.

On June 19, 2008, the director issued a second RFE, in which he addressed, among other issues, the beneficiary's proposed employment capacity in the United States. The director instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's proposed duties; (2) information regarding the

number of subordinate supervisors working under the beneficiary's management, including their job titles and job duties; (3) information regarding the amount of time the beneficiary will allot to managerial/executive duties; (4) an organizational chart for the United States entity and complete position descriptions for all employees; and (5) a copy of the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2008.

In a response dated July 28, 2008, the petitioner provided the following breakdown of the beneficiary's proposed duties, noting that the beneficiary's duties vary according to the different phases of given projects:

- Managing Contractors – 30 hours
- Managing Office Administrator – 3 hours
- Consulting with Banks – 3 hours
- Consulting with Current and Prospective Clients – 10 hours
- Consulting with Architects and Engineers – 4 hours

The petitioner stated that the beneficiary "operates with complete autonomy," and "manages a staff of managerial and supervisory personnel" including 2 company supervisors and minimum of 42 contractors, professionals and suppliers, devoting 100 percent of his time to managerial/executive duties.

The petitioner's letter included an organizational chart, on which the beneficiary is identified as "directing manager," supervising an office administrator and an assistant. The petitioner further described the beneficiary's duties as the following:

- Consults with clients regarding desired construction; decides which architects, engineers, suppliers and contractors to hire for each job; negotiates with banks for financing; ensures compliance with all building codes; authorizes payments for work that is satisfactorily completed.

The petitioner stated that the office administrator "handles all accounts payable, receivables, payroll, administrative tasks, answers all phone calls, makes bank deposits." The petitioner indicated that the beneficiary's assistant "oversees work of contractors on a daily basis, shops for best prices on supplies, and reports to [the beneficiary] re: progress and problems where his expertise is required."

The petitioner noted that the company uses contractors to perform most functions, and that the beneficiary "decides which contracting companies and suppliers shall be hired and then manages their respective supervisors." The petitioner noted that the contractors' own foremen supervise the various workmen. The petitioner provided a list of more than 40 contractors and suppliers and evidence including agreements and invoices to document the petitioner's use of contract employees.

Finally, the petitioner submitted a copy of its IRS Form 941 for the first quarter of 2008, which confirms the petitioner's payments to three employees, including the beneficiary, the office administrator and the beneficiary's "assistant," who received the same wages as the beneficiary during the quarter.

The director denied the petition on August 8, 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 concluded that the petitioner failed to establish that the U.S. company has grown to the point where it has sufficient staff to relieve the beneficiary from performing non-qualifying duties.

On appeal, the petitioner explains that the U.S. company acts as the general contractor in the construction of homes and remodeling projects and hires subcontracting specialists to perform all functions associated with the construction projects. The petitioner notes that the company is currently under contract on seven job sites in Long Island, New York. The petitioner provides additional position descriptions for the beneficiary and his subordinates, noting that the beneficiary performs the following duties as general manager:

In charge of acquisitions, all phases of construction, responsible for hiring, contracting and overseeing of subcontractors, i.e., overseeing the daily construction performance, such as electrical, plumbing, masonry, woodworking, tiles, carpeting, etc. on all job sites of the company to direct above stated contractors which includes the physical visiting of the construction sites on a daily basis to oversee the performance of the subcontractors, foremen and their workers to make sure that all necessary steps of the job descriptions meet with the customer's specifications, meets with architects and engineers to discuss work in progress and future projects; and finalize contracts with new customers for construction.

The petitioner indicates that [REDACTED] serves in the position of Assistant Manager and is responsible for the following duties:

Assist the General Manager handles all accounts payable, accounts receivable, payroll, initial meetings with customers, handles the ordering and facilitating of building supplies needed for works in progress and all follow up to make sure they are delivered timely to conform with contract deadlines and work schedules; sets up subcontractors schedules on each job site and daily meeting with the beneficiary to discuss projects and/or any problems.

The petitioner states that [REDACTED] is the petitioner's secretary and is daily office operations such as phone calls, answering the telephone, arranging appointments, making bank deposits, ordering office supplies, placing advertisements, and filing duties.

The petitioner further describes the beneficiary's responsibilities as follows:

The beneficiary is required to visit each of the job sites, daily to oversee and direct the individual subcontracting managers with regard to the specific task such subcontractor was hired to perform. For example, the subcontracting plumbing company has a manager, foreman and crew at a specific jobsite at which the beneficiary must physically visit daily to inspect and meet with and direct the manager as to the quality and efficiency of the work being performed. In essence, the beneficiary is managing and direct[ing] the actual construction function of our corporation by directly supervising and controlling the work of the subcontracted managers and professional employees. It is customary in our industry for the General Contracting Corporation not to employ each of these professional crews but rather to hire subcontracting firms which it directs in the actual performance of these professional arrangements. . . . The beneficiary is a Professional with the required expertise in construction with which he directs this main function of our company. He most definitely is

not engaged in the non managerial, day to day operations of our corporation, but in fact is an Executive within the meaning of the regulations.

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

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations, the petitioner has failed to show that his duties will be primarily in a managerial or executive capacity.

Despite having multiple opportunities to provide a comprehensive description of the actual duties the beneficiary performs on a day-to-day basis and the amount of time the beneficiary devotes to specific duties, the petitioner has failed to describe the beneficiary's position as general manager with any specificity. For example, in response to the director's first request for a breakdown of the number of hours the beneficiary devotes to specific duties on a weekly basis, the petitioner stated that the beneficiary works 40 hours per week, during which he "consults with clients and with subcontractors," "is overseeing the work that's being done on the houses," and "is going to the bank when needed." In response to the director's subsequent request for a complete job description and the percentage of time the beneficiary devotes to specific job duties, the petitioner stated that the beneficiary spends 30 hours per week "managing contractors," 10 hours per week "consulting with current and prospective clients," and the remaining ten hours of his time, managing the office administrator, and consulting with banks, architects and engineers. These responses were only marginally responsive to the requests for additional evidence and provided little insight into the nature of the beneficiary's daily duties. 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 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On appeal, the petitioner provides a job description which consists of little more than an amalgamation of the three vague descriptions that preceded it, noting that the beneficiary is "in charge of acquisitions," "all phases of construction," visiting multiple job sites to oversee the daily activities of contractors, meeting with architects and engineers and finalizing contracts with customers. Again, the majority of these duties have not been described in sufficient detail, and as such cannot be classified as managerial or executive in nature. The

petitioner's business is based on designing customized homes and remodeling projects based on its customers' specifications, hiring workers, and coordinating the completion of the project. The beneficiary appears to be involved in consulting with prospective clients, acquiring the contracts, assisting in the design of the projects and coordinating the delivery of the projects. Therefore, the beneficiary is directly involved in providing the services of the business. 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).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner claims to employ a secretary or office administrator and an assistant manager. The petitioner has not provided consistent job descriptions for either of these employees. The petitioner initially indicated that the secretary performs solely administrative duties, then later added that she is responsible for accounts payable and receivable, and, on appeal, indicates that her duties are primarily clerical and administrative, while the assistant manager is responsible for accounts payable and receivable. The petitioner initially stated that the assistant manager "consults with subcontractors and suppliers," and "shops around for better prices on supplies," and later added that this employee oversees work of contractors on a daily basis, and reports any problems to the beneficiary. On appeal, the petitioner indicates that the beneficiary oversees the contractors on a daily basis, and no longer attributes this responsibility to his claimed subordinate; however, the petitioner also indicates for the first time that the beneficiary's subordinate is responsible for initial client meetings. Given that the petitioner has only two subordinate employees, it is essential that the petitioner provide a clear and credible description of their actual duties so that USCIS can determine whether the subordinate employees could reasonably relieve the beneficiary from performing the non-managerial functions of the company on a day-to-day basis. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The 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 claims that the beneficiary supervises a secretary/office administrator and an assistant manager. The petitioner has not established that either of these employees actually supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Furthermore, the petitioner has not established that either of these positions require, or that the position-holders possess, a bachelor's degree, and thus the petitioner has not established that the beneficiary's subordinates could be classified as professionals.<sup>1</sup>

The petitioner also claims that the beneficiary directs managerial, supervisory and professional personnel employed by organizations that are subcontracted to perform work for the petitioner. While the petitioner has documented its use of contractors, including professionals such as architects, the petitioner has not established the beneficiary's supervisory authority over individual workers employed by the companies. In order to be a supervisor, an employee must be shown to possess some significant degree of control or authority over the employment of a subordinate. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Leroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)). The "contracts" between the petitioning company and the contractors are simply written proposals for work to be performed, submitted by the contractors, which have been accepted by the petitioner. There are no written terms that would give the petitioning company's employees any significant degree of supervisory control over the contractors' employees.

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 detailed description of 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.

On appeal, the petitioner asserts that the beneficiary manages and directs the construction function of the company by supervising and controlling the subcontracted employees. However, as discussed above, the beneficiary's duties have not been described in sufficient detail and therefore it cannot be affirmatively determined that his duties are primarily managerial in nature. Furthermore, as noted above, the beneficiary is also responsible for operational tasks, such as client consultations, marketing the petitioner's business and

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<sup>1</sup> 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.

selling its services, and project design activities, which have not been shown to be managerial or executive in nature. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO notes 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)). 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).

Moreover, 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 CIS 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.

At the time of filing, the petitioner was a one-year-old construction company which employed the beneficiary as general manager, an assistant manager, and a secretary/office administrator. As discussed above, there are inconsistencies in the record as to how the company's essential functions are allocated among the three-person staff. At most, it appears that the beneficiary's subordinates are responsible for administrative tasks, accounts payable and receivable, scheduling contractors, and purchasing and receiving supplies and materials. Most marketing, sales and client service-oriented functions appear to be performed by the beneficiary himself, as the petitioner has not identified who is responsible for marketing the business, meeting with current and prospective client meetings to negotiate sales of the petitioner's services, obtaining customer specifications, drawing up proposals and contracts, estimating project costs, designing remodeling and construction projects, formulating service orders, and other related operational tasks. The record does not demonstrate that these duties would be incidental to the beneficiary's claimed managerial or executive responsibilities.

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

The second issue addressed by the director is whether the petitioner established that the petitioner and the foreign entity have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner claims that both the foreign entity and the U.S. entity are wholly-owned by the same individual, [REDACTED], but it did not provide documentary evidence of the ownership of either company with the initial evidence. In the request for evidence issued on June 19, 2008, the director requested copies of the petitioner's articles of incorporation and bylaws, including all amendments made to the original documents.

In response to the RFE, the petitioner submitted a copy of its articles of incorporation, which indicate that the U.S. company is authorized to issue 200 shares of stock with no par value. The petitioner also provided a copy of the foreign entity's certificate of incorporation, and a letter from its accountant, who indicates that the foreign entity has 100 issued capital shares. Finally, the petitioner submitted a "full company report" obtained from the Israeli Ministry of Justice, Corporation's Registrar, which indicates that [REDACTED] owns all 100 shares issued by the foreign entity.

The petitioner's response to the request for evidence also included a copy of the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2007. At Schedule K, the petitioner indicated "no" where asked if one foreign person owned at least 25% of the company's stock, and where asked whether one individual or corporation owned at least 50% of the company's voting stock.

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. The director noted that the record did not contain evidence of who owns the petitioner's issued shares, and therefore did not support the petitioner's claim that both companies are wholly owned by [REDACTED].

On appeal, the petitioner submits a copy of its stock certificate number 1, which indicates that 200 shares were issued to [REDACTED] on January 10, 2007.

Upon review, the petitioner has not established that the U.S. and foreign entities have a qualifying relationship.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant

annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The AAO notes that the record before the director was devoid of any evidence of the ownership of the petitioning organization and therefore the petition was properly denied on this basis. The applicable regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) specifically requires the petitioner to submit evidence that the United States and foreign entities are still qualifying organizations.

Although the petitioner has submitted a copy of its stock certificate #1 on appeal, the AAO finds the stock certificate alone insufficient to establish the current ownership of the U.S. company. As noted above, information provided in the petitioner's IRS Form 1120 for 2007 does not corroborate the petitioner's claim that [REDACTED] is the petitioner's sole owner. 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).

Therefore, the petitioner has not submitted sufficient evidence on appeal to overcome the director's determination, and for this additional reason the appeal will be dismissed.

The third and final issue addressed by the director is whether the petitioner established that the beneficiary had at least one continuous year of full-time employment abroad with the foreign entity prior to his transfer to the United States in March 2007. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The petitioner indicates that the beneficiary was employed by the foreign entity from June 2001 until March 2007. In the RFE issued on June 19, 2008, the director requested evidence to establish that the beneficiary was employed by the foreign entity during the requisite time period, noting that documentation provided should include, but is not limited to: (a) the beneficiary's last annual tax return and tax withholding statement reflecting the employer; (b) copies of payroll documents reflecting the beneficiary's period of employment; or (c) other unequivocal evidence establishing the beneficiary's employment by the foreign entity.

In response to the RFE, the petitioner submitted a pay stub issued to the beneficiary by the foreign entity on September 11, 2006 for the month of August 2006. The document indicates that the beneficiary worked for the company from January through August.

The petitioner also submitted the foreign entity's employment reports for the years 2003 through 2006, which bear the stamp of the Ministry of Industry, Trade and Labor. The beneficiary's name does not appear on any of the reports. Finally, the petitioner submitted the beneficiary's membership certification in the Association of Construction and Builders in Israel, for the 2005-2006 year. The foreign entity's company name appears on the certification.

The director denied the petition, noting that the evidence submitted was not persuasive in establishing that the beneficiary was employed by the foreign entity for one full year in the three-year period preceding the filing of the first L-1A classification petition.

On appeal, the petitioner states that it is submitting the beneficiary's Israeli "protocol income tax form," which is comparable to a U.S. IRS Form W-2, for the years 2005 and 2006.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed for this additional reason.

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.