

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 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, a Florida corporation, states that it is engaged in the purchase, sale and distribution of books, music and videos. It claims to be a subsidiary of [REDACTED], located in Venezuela. The petitioner seeks to employ the beneficiary in the position of sales manager 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 denial is "completely unfair," and suggests that the director misplaced all the evidence submitted or otherwise failed to review such evidence. Counsel submits a brief statement and copies of previously submitted 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 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 November 10, 2008. The petitioner stated on Form I-129 that the U.S. company has six employees. In a letter dated November 2, 2008, counsel for the petitioner described the beneficiary's proposed duties as follows:

Her services are required to continue the operations and business plan and institute the start-up expansion operations of the business through the exportation to Latin America. It is critical to the success of the business plan that [the beneficiary] has the opportunity to establish the goals and standards of the U.S. subsidiary corporation. . . . (This company will begin the exportation business of books, Bibles, music, videos and other related products to Latin America and whose primary client will be Venezuela). [The beneficiary] will coordinate and direct the overall U.S. sales and marketing operations of the products, managing the planning and implementation of the overall sales strategies and overseeing the marketing and promotional activities nationwide. Also, the company will expand the sales operation by providing consulting in this field between Venezuela and the United States. . . .

* * *

[The beneficiary] will be responsible in terms of strategic associations to create internal procedures and select qualified managerial and non-managerial personnel to coordinate the day-to-day operations of the business. She will be responsible for hiring and firing personnel, directing and conducting management studies, directing the management and growth of the company, developing new customer bases in the United States and Venezuela, developing financial programs to raise capital, reviewing activity reports and financial statements to determine progress and status in attaining and revising objectives and planning in accordance with current conditions, and performance standards to create new systems or revise established procedures such as: Sale of the products offered, setting marketing guidelines, developing new external markets for the sale of products and evaluating the performance of employees. She will be performing a managerial function within the organization. She will devote 100% of her time to managerial duties.

The petitioner submitted an organizational chart for the U.S. company which depicts the beneficiary's proposed position as "Sales & Export Manager." The chart shows that the beneficiary would report to the general manager, and directly supervise an operations manager, assistant manager, and freelance sales representative. The chart shows that the operations manager supervises a store manager, who, in turn, supervises two customer service employees.

The petitioner submitted evidence of wages paid to employees, including copies of its IRS Forms W-2 for 2007, and copies of its state quarterly wage reports and federal quarterly tax returns for 2007 and the first two quarters of 2008. The most recent documentation submitted was the petitioner's Florida Form UCT-6, Employer's Quarterly Report, for the second quarter of 2008. The Form UCT-6 indicates that the petitioner had five employees during the months of April and May 2008 and four employees as of June 2008. A total of six employees are named on the Form UCT-6, including the petitioner's general manager, operations manager, store manager, assistant manager, and two customer service employees.

The director issued a request for additional evidence (RFE) on November 20, 2008, in which he requested, *inter alia*: (1) a comprehensive description of the beneficiary's proposed duties; (2) a list of all U.S. employees by name and position title; (3) complete position descriptions for all U.S. employees including a breakdown of the

number of hours devoted to each of the employee's job duties on a weekly basis; and (4) evidence of wages paid to employees.

In a response dated December 17, 2008, the petitioner further described the beneficiary's proposed duties as the following:

As a Sales and Export Manager, her services are required to institute the start-up expansion operations and business plan of our established U.S. subsidiary through the exportation to Latin America. She will be responsible for establishing and promoting the standardization of development operations in the company, in terms of strategic associations to create internal procedures and select qualified managerial and non-managerial personnel to coordinate the day-to-day operations of the business.

[The beneficiary] will be responsible for the overall U.S. sales and marketing operations of the products, managing the planning and implementation of the overall sales strategies nationwide, overseeing the marketing and promotional activities nationwide. She will perform a managerial function within the organization; she will also establish the goals, strategies, policies and procedures of the company in the sales areas and exercise wide latitude with regard to discretionary decisions.

Our company will begin the exportation business of books, Bibles, music, videos and other related products. Her duties including overseeing the establishment of the U.S. company, planning and developing the U.S. investment. (Expand the operations by giving consulting in this field between Venezuela and the United States).

As a Sales & Export Manager she will have authority to make independent decisions and exercise discretionary authority over daily operations and control financial assets and personnel management operations in the company.

The petitioner stated that the beneficiary will manage and supervise the following employees: operations manager; assistant manager (sales department); store department manager; and store representative department supervisor. The petitioner indicated that the beneficiary will devote 100 percent of her time to managerial duties and will not perform any first-line supervision of employees or "hands-on productive labor." Rather, the petitioner stated that she will "develop objectives for modification of existing programs or the design of new system capabilities, based on her analysis and evaluation, assign resources to develop or modify [the petitioner's] systems programs to meet the clients' needs." Finally, the petitioner indicated that the beneficiary will "monitor the progress of the program development to ensure that the company provides appropriate solutions that meet the clients' needs," as well as manage managerial personnel, hire training staff, and supervise "the sales, marketing and supplies operations."

In addition, the petitioner indicated that the beneficiary would allocate her time as follows:

Oversee the establishment of training programs and materials for [the petitioner's] personnel and clients, and will conduct presentations and customized training sessions when needed for current and prospective clients. (6 hours).

Do business plan/analysis for all sales projects of the company. (6 hours)

Hire and Fire employees (2 hours)

Review market analysis to determine volume potential, price schedules, and discount rates and develops sales campaigns to accommodate company's goals. (10 hours)

Coordinate and prepares blanks of the company for sales and distribution clients both in the United States and abroad. (3 hours)

Coordinate liaison between sales department company and other sales related unit (Marketing & Publisher). (3 hours)

Manage functions in supervising, motivate and offer incentives to subordinate personnel and create plans for such purpose. (4 hours)

Review report for subordinate's managerial employees. (3 hours)

Reports sales on a daily basis to the General Manager. (3 hours)

The petitioner also provided the requested position descriptions for other company employees. The petitioner stated that the operations manager: is in charge of operations, production and inventory control of costs (12 hours); directs and coordinates activities of the operations department of the company (8 hours); confers with management personnel in formulating administrative and operational policies and procedures (6 hours); coordinates with the sales manager the activities necessary to achieve technical and commercial success (8 hours); and submits required reports to the sales and export manager (6 hours).

The petitioner indicated that the manager assistant (sales department): conducts negotiations/public relations with company customers (10 hours); prepares daily reports for the sales manager (5 hours); executes and coordinates quotes to national and international clients and suppliers (6 hours); controls daily sales according to inventory (6 hours); coordinates business travel for the sales & export manager developing the logistic plan in order to accomplish the client's need (3 hours); prepares the appropriate documentation for the sales and exportation business (6 hours); and controls the administration office services related to the sales and export function (4 hours).

The petitioner indicated that the store manager is: in charge of maintaining the business goods to be ready for sale (10 hours); inspects defective equipment in the field (5 hours); supervises and coordinates activities of workers engaged in attending clients (10 hours); conducts negotiations/public relationship with company customers (10 hours); and submits reports required to the sales manager and operations manager.

Finally, the petitioner indicated that the supervisor (sales representative department) is responsible for: visiting and following up with clients with Representative Sales (8 hours); prepare daily report of the clients visited (5 hours); processes orders received from customers (5 hours); accomplishes the business sales strategies developed by the sales & export manager (5 hours); functions in supervising, motivating, offering incentives and training to subordinate personnel and creating plans for such purpose (12 hours); and reports sales on a daily basis to the sales and export manager (5 hours).¹

The director denied the petition on January 6, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director noted that the majority of the employees working for the petitioner have been assigned managerial job titles, and questioned whether the beneficiary would be supervising a staff of bona fide managers and supervisors, or whether the beneficiary's subordinates would be performing the day-to-day tasks necessary for the successful operation of the business. The director determined that the petitioner had not shown that the beneficiary would function at a senior level in the petitioner's organizational hierarchy, other than in position title.

On appeal, counsel for the petitioner asserts that the petitioner did establish that the beneficiary will be involved in the supervision and control of the work of other supervisory personnel, and that the U.S. organization has a reasonable need for a manager for its sales and export component. Counsel suggests that the director may have misplaced the petitioner's response to the RFE or otherwise failed to review the evidence. Counsel re-submits her letter dated November 2, 2008 and highlights her statement that the beneficiary's "services are required to continue the operations and business plan and institute start-up expansion operations of the business through the exportation to Latin America."

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

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.

Upon review, the petitioner has failed to provide a clear and consistent description of the beneficiary's proposed duties. At the time of filing, counsel stated that the beneficiary will institute the petitioner's start-up

¹ The AAO notes that the individual identified as "Supervisor (Sales Representative Dept.)" in response to the RFE was identified as a freelance sales representative on the organizational chart submitted at the time of filing.

export operations, coordinate and direct the overall U.S. sales and marketing operations, manage the planning and implementation of overall sales strategies, oversee nationwide marketing and promotional activities, select personnel to coordinate the day-to-day operations of the business, direct and conduct management studies, direct the management and growth of the company, develop new customer bases, and develop financial programs to raise capital. While such statements describe general managerial tasks associated with sales, marketing and export functions, the director reasonably requested additional evidence regarding the specific tasks the beneficiary will perform within the context of the petitioner's operations. The petitioner did not describe with specificity what managerial duties the beneficiary would undertake to oversee the company's domestic and international expansion activities, or who would carry out non-managerial tasks associated with these functions. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner's response to the director's request for a "comprehensive description" of the beneficiary's duties failed to elaborate upon the duties listed above, but rather introduced new duties. For example, the petitioner stated that the beneficiary will devote 10 hours per week to reviewing market analysis and developing sales campaigns and another six (6) hours to "do business plan/analysis for all sales projects of the company." The petitioner did not provide sufficient explanation as to how the beneficiary's responsibility for reviewing and "doing" business and market analysis would rise to the level of managerial or executive capacity. The beneficiary's proposed responsibility for establishing training programs and conducting presentations and training sessions for prospective clients, which the petitioner stated would require another six hours of her time, is inconsistent with the nature of the petitioner's business, which is limited to sales of books, music and videos, the use of which requires no training. Finally, it is unclear what duties the beneficiary would perform to "coordinate and prepare blanks of the company for sales and distribution clients" or to "coordinate liaison between sales department company and other sales related unit." These duties are not clearly written and do not clearly define the beneficiary's proposed managerial or executive tasks.

Overall, the petitioner failed to clearly explain and document the purpose for the beneficiary's newly created position of "sales manager" or "sales and export manager," the specific duties to be performed, or how the position would be incorporated into the petitioner's existing organizational structure. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the AAO will not consider the beneficiary's proposed duties in the abstract. The evidence of record shows that the petitioner operates one retail bookstore in Florida and reported four employees on its most recent quarterly wage report. It is the petitioner's burden to establish that it has a reasonable need for a sales and export manager to perform the stated duties, and to demonstrate how it proposes to expand from a single retail location to a business with a nationwide and international sales, marketing, export and distribution operation. The petitioner did not submit a business plan or other evidence relating to its planned

expansion activities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner's description of the beneficiary's duties was insufficient to establish that the beneficiary would be performing primarily managerial or executive duties upon her transfer to the United States.

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 petitioner's staffing levels and the job titles and duties of the company's employees. The petitioner stated on Form I-129 that it has six employees. The most recent Florida Form UCT-6, Quarterly Wage Report, provided by the petitioner listed a total of six individuals, but indicated that only four employees worked for the company as of June 2008. Nevertheless, the six employees listed on the Form UCT-6 for the second quarter of 2008 were all listed as current employees on the petitioner's organizational chart submitted at the time of filing. The petitioner has not provided any more recent evidence of wages paid to employees to corroborate the employment of the individuals named on its organizational chart. The petitioner inexplicably changed the job title of Moises Gil from "sales representative" to "sales representative supervisor," when responding to the request for evidence. Nevertheless, the record does not contain any evidence of wages paid to this individual. The petitioner indicates that Perla Calix holds the position of assistant manager, however, the petitioner has submitted "shift reports" generated by its cash registers which indicate that Ms. Calix works as a cashier. This inconsistency is critical, given that the petitioner indicates that this individual would be assisting the beneficiary by performing administrative functions in conjunction with the export function. The two individuals identified as "customer service" staff, presumably as cashiers, do not appear on the more recent cash register shift reports and it is unclear whether they are still employed by the company. Furthermore, the AAO notes that some of the duties attributed to the petitioner's employees appear to be inconsistent with the nature of the petitioner's business. For example, the petitioner stated that the sales representative supervisor visits clients on a daily basis, and the store manager "inspects defective equipment in the field."

In light of these discrepancies, the petitioner has not clearly established or documented the number and types of workers employed by the company as of the date the petition was filed. 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).

Here, the petitioner claims that the beneficiary will directly supervise an operations manager, an assistant manager, a store manager and a sales department supervisor. As noted above, the evidence of record does not corroborate the employment of the supervisor or any subordinate sales representatives, nor has it been established that the petitioner actually employs a total of six employees as claimed on Form I-129. Moreover, as noted by the director, nearly all of the petitioner's employees have been given supervisory or managerial job titles. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)).

The petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. The petitioner operates a retail store with no more than six employees, and has submitted an organizational chart depicting four tiers of supervisory and managerial personnel. In the present matter, the totality of the record does not support a conclusion that the beneficiary's proposed subordinates would be bona fide supervisors and managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the petitioner's retail bookstore store. The petitioner has not established that the beneficiary qualifies 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 will manage an essential function of the petitioning company, nor has it provided a detailed description of the beneficiary's duties sufficient to establish that she will perform 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.

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 (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).

The evidence shows that the petitioner operates a medium-sized retail bookstore that is open for business for 52 hours per week. The petitioner described the business on Form I-129 as a "bookstore and cafeteria," so it appears that it may also engage in food preparation and sales. The petitioner claims to employ a general manager, operations manager, store manager, assistant manager and sales supervisor, and only two staff to perform the day-to-day customer service functions of the business. Furthermore, as discussed above, there are discrepancies in the record regarding the number of staff, their job titles and their job duties. In light of such discrepancies, it is not been established that the petitioner has a reasonable need for the beneficiary's services in a primarily managerial or executive capacity.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary would not be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.