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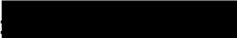
**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

D7



FILE  Office: VERMONT SERVICE CENTER Date: FEB 17 2011

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker under 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
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 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 limited liability company, states that it operates an information technology company. It claims to a subsidiary of [REDACTED] located in Brazil. The beneficiary was previously granted L-1A classification in order to open a new office in the United States. The petitioner now seeks to extend the beneficiary's employment in the position of Chief Executive Manager/Information Technology Director for two additional 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 director observed that the petitioner had not grown to the extent that it has support personnel to relieve the beneficiary from participating in the non-managerial, day-to-day operations of the company at the end of its first year of operations.

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 director failed to take into account the petitioner's use of independent contractors, dedicated employees provided by its parent company, as well as its hiring plans, in concluding that the beneficiary would not have sufficient subordinate staff. The petitioner submits, among other items, a revised organizational chart and employee list in support of the appeal.

#### **I. The Law**

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.

## **II. Discussion**

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), 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 Form I-129, Petition for a Nonimmigrant Worker, on December 3, 2008. In a letter dated November 26, 2008, the petitioner provided the following description of the beneficiary's duties:

[The beneficiary] will be responsible for the supervision of the entire office, setting the work standards and general guidelines for each assignment, also planning effective schedules, that will meet our client's objectives and deadlines, ensuring repeat and long-term business relationships, setting new guidelines which will lead the company to new fields, and being alert to new developments in the marketplace, based on all the international marketing experience he carries. Furthermore, he will continue [to] identify new markets for penetration and act as liaison for collaborators assuring that these markets are accessed. He will have full authority to implement marketing directions for the subsidiary company. . . .

[The beneficiary] will continue to have the unfettered discretionary authority to structure the company, to fit in homogeneity with the main operations in Brazil and will have full authority over the daily operations of the business. The proposed percentage of time spent on management level duties for the next twenty-four months will be:

- Directing the ongoing development of new projects for the U.S. subsidiary, 40%;
- Establishing appropriate contract and business relationships with clients, manufactures [sic], and others, reviewing terms and negotiating most favorable deals for the U.S. subsidiary, 40%;
- Managing and directing marketing efforts in emerging markets, 20%;

According to the petitioner's business plan, the U.S. company is "a service provider company specialized in the sales, consulting, maintenance, repair and installation of information technology and telecom devices, equipment and services" for commercial and residential customers. The business plan identifies the beneficiary as the company's "general director" and describes his duties as the following:

- Manage and coordinate financial and budget activities: 15% of his time;
- Establish administrative rules and policies, company culture and mission; oversee business development, systems and methods to optimize performance, team motivation and results: 15% of his time;
- Hire, supervise, evaluate and, if necessary dismiss staff members: 5% of his time;
- Review corporate actions; Review reports, financial statements and sale activity reports submitted by staff: 20% of his time;
- Establish and approve corporate financial objectives: 15% of his time;
- Oversee the maintenance of personnel and other administrative records: 20% of his time;
- Conduct weekly staff meetings to ensure the company objectives are being met: 10% of his time.

With respect to the staffing of the U.S. company, the petitioner stated on the Form I-129 that it has six employees; however, the petitioner's business plan identifies only four staffed positions, including the beneficiary's position.

The petitioner indicates that it employs a Field Supervisor Technician and describes the duties of this position as follows:

- Monitoring and managing services, including contractors, and performing technical tasks according to the demand: 20% of his time;
- Deliver and install desktops and laptops computers, monitors, printers, keyboards, modems and other related peripherals: 20% of his time;
- Clean, adjust, lubricate and perform routine servicing of computers, monitors, printers, keyboards, modems and other related peripherals: 10% of his time;
- Assist with diagnosing malfunctions and repairing desktop and laptop computers, monitors, printers, keyboards and other related peripherals, by disassembling and inspecting for defects: 10% of his time;
- Assist with repairs by replacing defective electronic or mechanical components, reassembling and checking equipment for correct operation: 15% of his time;
- Assist in the installation of common software packages: 5% of the time;
- Instruct operators on the basic care and operation of desktop and laptop computers, monitors, printers, keyboard, modem and other related peripherals: 5% of his time;
- Provide technical assistance to clients, over the phone regarding hardware and software problems: 5% of his time;
- Keep projects and services on schedule: 10% of his time.

The petitioner indicated that it employs [REDACTED], who has a high school diploma and 20 years of experience in customer service and sales. The petitioner stated that she performs the following duties:

- Maintain and develop a computerized customer and prospect database: 10% of her time;
- Perform general office duties such as ordering supplies, maintaining records and performing basic bookkeeping work: 25% of her time;
- Respond to and follow up on sales inquiries by post, telephone, schedule technical visits: 10% of her time;
- Maintain and develop existing and new customers: 5% of her time;
- Make travel arrangements for all employees: 5% of her time;
- Participation in staff meetings: 5% of her time;
- Receive and place telephone calls: 25% of her time;
- Update mail, email, phone directories: 10% of her time;
- Perform data entry and use day-to-day software programs: 5% of her time.

Finally, the petitioner indicates that it employs an assistant technician who holds a Bachelor's degree in computer science and performs the following duties:

- Perform basic clerical tasks, invoices and other indexed documents: 5% of her time;

- Help the Field Supervisor Technician with less complex tasks: 15% of her time;
- Assist with remote support calls, troubleshooting as needed: 5% of her time;
- Assist with scanning of computers for viruses and spyware: 15% of her time;
- Assist with diagnosis and repair desktop and laptop computers, monitors, printers, keyboards and other related peripherals: 25% of her time;
- Clean adjust, lubricate and perform routine servicing of computers, monitors, printers, keyboards, modems and other related peripherals: 10% of her time;
- Assist in the installation of common software packages: 5% of her time;
- Assist with basic repairs by replacing defective electronic or mechanical components, reassembling and checking equipment for correct operation: 10% of her time;
- Instruct operators in the basic care and operation of desktop and laptop computers, monitors, printers, keyboards, modems and other related peripherals: 10% of her time.

The business plan states the petitioner's intent to hire a systems analyst and a network analyst "by early 2009." The petitioner also submitted an organizational chart which indicates that the beneficiary directly supervises the "executive assistant/customer service" employee and the field supervisor technician, who in turn supervises the assistant technician and independent contractors. The chart also identifies the proposed systems and network analyst positions.

The petitioner's income statement as of October 31, 2008 indicates that the company achieved gross sales of approximately \$180,000. As evidence of wages paid to employees, the petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return for the first three quarters of 2008. The petitioner reported three employees in the third quarter of the year.

The director issued a request for additional evidence on December 31, 2008, in which he advised the petitioner that additional evidence would be needed to demonstrate that the U.S. company has grown to a sufficient size to support the beneficiary's claimed managerial or executive position. Specifically, the director noted that the petitioner should submit additional evidence to demonstrate that the beneficiary has been relieved from performing the non-managerial, day-to-day operations involved in providing the company's services.

In a response dated February 4, 2009, the petitioner provided a new, itemized description of the beneficiary's duties as "general manager," in which it listed his tasks as follows:

1. He directs, plans and implements policies and objectives of [the petitioner] in accordance with resolutions taken by the board of directors of [the petitioner's parent company] . . .;
2. He directs organizational activities to plan procedures, establish responsibilities, and coordinate functions. The Business Plan for [the petitioner], for instance, was created and has been updated by him;
3. He confers with board members, organization officials and staff members to establish policies and formulate plans;

4. He analyzes operations to evaluate performance of the company and its staff and to determine areas of cost reduction and program improvement;
5. He reviews financial statements and sales and activity reports to ensure that the organization's objectives are achieved compared to the Business Plan and board of directors expectations;
6. He directs and coordinates the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency;
7. He assigns or delegates responsibilities to subordinates;
8. He directs and coordinates activities concerned with production, pricing, sales and/or distribution of products.
9. He screens, selects, hires, transfers and discharges employees;
10. He directs non-merchandising segments of business, such as advertising, purchasing, credit and accounting;
11. He establishes internal control procedures;
12. He prepares executive reports and sets budgets;
13. He negotiates and/or approves material contracts with suppliers and distributors;
14. He promotes objectives of institution or business before associations, public, government agencies, or community groups.

The petitioner emphasized that the beneficiary "delegates all non-managerial duties to his staff" and indicated that he holds a weekly Friday afternoon staff meeting at which the employees report results, problems and suggestions. The petitioner stated that "technical matters are handled by the Field Supervisor Technician assisted by subcontractors and an Assistant Technician," while the daily administrative and secretarial tasks are handled by the administrative support/customer service employee. The petitioner submitted supporting documentation including the minutes of monthly staff meetings and financial statements.

The director denied the petition on March 10, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that, given the staffing structure described, the petitioner had not shown that the beneficiary will be relieved from performing the non-managerial, day-to-day functions of the business.

On appeal, the petitioner asserts that the beneficiary is employed in a managerial capacity and is ideally suited to continue establishing and growing the U.S. company based on his experience. With respect to the staffing of the company, the petitioner restates its plans to hire a network analyst and a system analyst in the near future. The petitioner further states:

We would like to stress that the Brazilian company supports two employees operating full time to [the petitioner] in the following functions: a System Analyst I and a System Analyst II, increasing our team of employees.

It's important to emphasize that the company has also a full team of independent contractors, such as an Electrician [*sic*], a Web Designer, a Computer Programmer, and a Data Cabling, which may be hired on a job to job basis depending on the size, complexity, circumstances and delivered time of each of our projects.

The petitioner submits a revised organizational chart which identifies the beneficiary's direct subordinates as the field supervisor technician, a marketing employee, and the executive assistant/customer service employee. The petitioner added the two Brazilian-based system analysts as subordinates of the field supervisor technician. The petitioner indicates that the executive assistant supervises an accounting employee as well as an administration and maintenance employee and two receptionists, who are identified as employees of [REDACTED] the petitioner's landlord.

The petitioner submits a lengthier job description for the beneficiary in support of the appeal, which describes his duties as follows:

a) Management and Administration

- i) Develop and facilitate an active planning process.
- ii) Develop organizational goals and objectives consistent with the mission and vision of [the company].
- iii) Develop and administer operational policies.
- iv) Oversee all programs, services and activities to ensure that program objectives are met.
- v) Oversee business development.
- vi) Ensure compliance with funding sources and regulatory requirements.
- vii) Provide information for evaluation of the organization's activities.
- viii) Service as liaison between all of the participating organizations/stakeholders.
- ix) Negotiate with vendors, contractors, and others.

b) Fiscal

- i) Prepare and submit grant applications and funding proposals, as appropriate
- ii) Develop, recommend and monitor annual and other budgets.
- iii) Ensure effective audit trails.
- iv) Approve expenditures.
- v) Provide for proper fiscal record-keeping and reporting.
- vi) Submit monthly financial statements to the board of directors.

c) Human Resources

- i) Administer board-approved personnel policies
- ii) Ensure proper (legal) hiring and termination procedures.
- iii) Oversee any and all disciplinary actions.
- iv) Provide for adequate supervision and evaluation of all staff and volunteers.

d) Board Relations

- i) Assist the board chair in planning the agenda and materials for board meetings.
- ii) Initiate and assist in developing policy recommendations and in setting priorities.
- iii) Facilitate the orientation of new board members.
- iv) Work with the board to raise funds from the community.
- v) Staff board committees as appropriate.

e) Community/Stakeholder Relations

- i) Serve as chief liaison with specific community groups and stakeholders.
- ii) Ensure appropriate representation of [the company] by all employees.
- iii) Coordinate representation of [the company] to legislative bodies and other groups.
- iv) Coordinate and schedule visits to [the company] project.

f) Information Technology

- i) Work closely with the Field Supervisor Technician to develop the technology vision and leadership and lead [the company] in planning and implementing enterprise information systems and achieve more effective and cost beneficial enterprise-wide IT operations.
- ii) Work with the Field Supervisor Technician to ensure sufficient and appropriate resources for:
- iii) Facilitating communication between staff, management, vendors and other technology resources within the organization.
- iv) Overseeing the back office computer operations of the affiliate management information system, including local area networks and wide-area networks.
- v) Management of multiple information and communications systems and projects, including voice, data, imaging and office automation.
- vi) Design, implementation, and evaluation of the systems that support end users in the productive use of computer hardware and software.
- vii) Development and implementation of user-training programs.
- viii) Overseeing and evaluating system security and back up procedures.

The petitioner submits additional documentary evidence in support of the appeal, including invoices, bills, receipts and other documents evidencing the company's business activities. The petitioner also submits monthly pay stubs issued by its Brazilian parent company to the above-referenced System Analysts, who are now claimed to be providing services to the U.S. company.

Upon review, and for the reasons stated herein, the AAO concurs with the director's determination that the petitioner failed to establish 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.*

Here, the petitioner has assigned the beneficiary at least four different managerial job titles ("chief executive manager," "information technology director," "general director," "general manager"), and provided four largely dissimilar descriptions of the beneficiary's duties. The petitioner has failed to provide any consistent, detailed and credible explanation of what the beneficiary actually does on a day-to-day basis within the context of managing a small information technology consulting business.

For example, the petitioner stated at the time of filing that the beneficiary devotes 40 percent of his time to "directing the ongoing development of new projects"; 40 percent of his time establishing contacts and business relationships and negotiating favorable deals; and 20 percent of his time managing and directing marketing efforts. This description, though quite vague, suggests that the beneficiary devotes a considerable portion of his time to marketing, sales and business development tasks which may or may not be managerial in nature.

At the same time, the petitioner's initial evidence included a business plan with a completely different position description indicating that the beneficiary devotes 30 percent of his time to establishing financial objectives and coordinating financial and budget activities; 20 percent of his time reviewing "corporate actions" and reports; 15 percent of his time establishing company rules, policies, systems and methods; 20 percent of his time overseeing maintenance of personnel and administrative records; and 15 percent of his time on personnel matters such as hiring, supervising, evaluating employees and holding staff meetings. Position descriptions that include a percentage of time devoted to specific tasks can greatly assist USCIS' understanding of what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See e.g. Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). However, where, as here, the petitioner depicts the beneficiary's position in such an inconsistent manner, the AAO is unable to discern which, if any, of the petitioner's descriptions accurately reflects the beneficiary's actual duties.

The petitioner was given the opportunity to provide additional evidence to further clarify the nature of the beneficiary's position and how the position qualifies as either managerial or executive in nature. Rather than clarifying the disparate job descriptions submitted at the time of filing or attempting to add further detail to the information already on record, the petitioner introduced a new position description that appears to have been largely derived from the job description for "Chief Executives" found on the U.S. Department of Labor's Occupational Information Network (O\*NET Online) website.<sup>1</sup> Generic job descriptions compiled by the U.S. Department of Labor have no bearing on an assessment of this beneficiary's duties within the context of the petitioning company's business, and the petitioner cannot satisfy its burden of proof by paraphrasing or wholly repeating such descriptions; the regulations require the petitioner to submit a detailed description of

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<sup>1</sup> See "Details Report for 11-1100.00 – Chief Executives," <http://www.onetonline.org/link/details/11-1011.00> (accessed on February 15, 2011).

the beneficiary's actual duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Furthermore, the petitioner made no attempt to reconcile this description with either of the position descriptions submitted at the time of filing. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to an already inconsistent job description.

The job description submitted on appeal, quoted in its entirety above, bears almost no resemblance to either position description provided at the time of filing, and introduces new areas of responsibility not previously mentioned. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The AAO does not doubt that the beneficiary exercises an appropriate level of authority over the U.S. company as its manager or director. However, for the reasons discussed above, the record contains no reliable evidence of what constitutes his day-to-day duties, such that they could be classified as primarily managerial or executive in nature. The AAO cannot accept four different position descriptions and speculate as to which one might most accurately convey the beneficiary's actual duties. 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 petitioner has not provided a description of the beneficiary's duties sufficient to establish that such duties are primarily managerial or executive in nature.

Beyond the required description of the job duties, 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. Here, without a detailed description of the beneficiary's duties, the director reasonably looked to the petitioner's staffing levels and use of independent contractors to determine whether the company employs sufficient staff to relieve the beneficiary from primarily participating in non-qualifying duties.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) specifically requires the petitioner to submit 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. As noted by the director, the evidence of record does not corroborate the petitioner's claimed staffing levels. The petitioner indicated on Form I-129 that it has six employees. The petitioner's organizational chart at the time of filing identifies a total of four employees, including the beneficiary, while the company's quarterly federal tax return for the third quarter of 2008 indicates that the company had three employees. Although the record contains multiple references to the petitioner's use of independent contractors, the petitioner has neither documented wages paid to such contractors, nor described with any specificity exactly what services they provide. 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Upon review of the totality of the evidence submitted, it appears that the petitioner's staff as of the date of filing included the beneficiary, the field supervisor technician and the administrative support/customer service associate. Although the petitioner indicates that it employs an assistant technician, we note that this employee is not mentioned in any of the staff meeting minutes submitted by the petitioner, and, as noted above, the petitioner has not submitted any payroll records or quarterly tax returns reflecting wages paid to a fourth employee.

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).

As discussed above, the petitioner has demonstrated that the beneficiary would be supervising two employees, the field supervisor technician and the administrative support/customer service associate. Neither of these individuals holds a bachelor's degree and the AAO cannot find that either occupies a professional position.<sup>2</sup>

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<sup>2</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).

One of the beneficiary's subordinates has a supervisory job title, and is depicted as overseeing an assistant technician and independent contractors. However, 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)). As discussed above, the petitioner has not submitted evidence of any wages paid to the assistant technician or to the independent contractors who are claimed to report to the field supervisor technician. Based on the position description the petitioner provided for the field supervisor technician, he is primarily engaged in directly providing the services of the petitioning organization. Therefore, the petitioner has not established that the beneficiary will be primarily supervising a subordinate staff comprised of managerial, supervisor or professional personnel.

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 position description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary.

While the petitioner indicates on appeal that the beneficiary will be employed in a primarily managerial capacity, the petitioner has not articulated a claim that the beneficiary manages an essential function of the U.S. company. Merely stating that he will manage all functions of the company is insufficient. Again, the AAO cannot accept vague assertions regarding the beneficiary's employment capacity and speculate as to what qualifying duties he may perform. As discussed, *infra*, the petitioner has not provided a consistent, detailed description of the beneficiary's job duties, nor has it provided a credible claim regarding the amount of time the beneficiary will devote to managerial versus non-managerial duties. 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 section 101(a)(15)(L) of the Act. *See* 52 Fed.

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Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

Reg. 5738, 5739 (Feb. 26, 1987). The petitioner has neither adequately articulated nor substantiated a claim that the beneficiary qualifies as a function manager.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the beneficiary will exercise discretion over the petitioning company, the petitioner has neither claimed nor presented evidence to establish that the beneficiary will devote the majority of his time to focusing on the goals and policies of the organization. The petitioner cannot establish that the beneficiary is employed in an executive capacity merely by paraphrasing the statutory definition. 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. at 1103.

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)).

Moreover, 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.

At the time of filing, the petitioner was a one-year-old information consulting business that claimed to have a gross annual income of \$330,000. The petitioner has established that the company employed the beneficiary, a field supervisor technician and an administrative assistant/customer support employee, but failed to

document its employment of any other claimed employees or contractors. Based on a review of the totality of the evidence, it does not appear that two employees would relieve the beneficiary from performing non-managerial duties associated with operating a service-oriented business that claims to be available 24 hours per day, seven days per week. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

While the petitioner has submitted an updated organizational chart on appeal and claims to have immediate openings for additional positions, 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will 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.