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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

**PUBLIC COPY**

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DATE: MAY 10 2011

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

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:

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a 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 Texas limited liability company, operates a travel agency and claims to be a subsidiary of Aeromundo of Chihuahua, S.A. de C.V., located in Mexico. The beneficiary was previously granted L-1A classification for a period of one year in order to open a new office in the United States. The petitioner now seeks to extend the beneficiary's status for two additional years so that she may continue to serve in the position of Executive Director.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will 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. On appeal, counsel for the petitioner asserts that the director erred by assuming that the petitioner seeks to classify the beneficiary as a manager, noting that the petitioner clearly stated that she will be employed in an executive capacity. Counsel contends that the beneficiary's duties as described in the record fall squarely within the definition of "executive capacity," and emphasizes that there is no statutory requirement that an executive supervise a certain number or type of subordinate employees, particularly when the business itself does not require a multi-layered management structure. Finally, counsel notes that the petitioner experienced various unforeseen difficulties during the first year of operations which limited its normal growth. Counsel requests that the AAO consider the instant petition as a "*de facto* 'new office' petition" in light of these limiting factors.

## **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(1)(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 (1)(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. The Issue on Appeal**

The sole 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. Counsel and the petitioner assert that the beneficiary will be employed in an executive capacity, and contends that the director erred by applying the statutory criteria applicable to managerial employees. Accordingly, the AAO will limit its discussion to whether the petitioner established that the beneficiary will be employed in the United States in a primarily executive capacity.

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 February 13, 2009. The petitioner indicated that it operates a travel agency with "approximately 5" employees. In support of the petition, the petitioner submitted the following statement of duties for the beneficiary:

The Executive Director will direct and manage all components and functions of the United States' subsidiary of [the foreign entity]. The Executive Director will be responsible for providing the overall direction of the operation of the United States subsidiary of [the foreign entity]. Either personally or through subordinates, the Executive Director will be performing the following duties.

1. 5% Developing an overall strategy for starting and growing the United States' subsidiary of [the foreign entity].
2. 10% Establishing operational targets, setting up guidelines for dealing with providers and customers, and creating operating procedures for the United States subsidiary.
3. 5% Reviewing financial data, reports, statements and sales data to establish whether the organization meets its operational targets.
4. 5% Establishing and maintaining an operating budget for the United States' subsidiary of [the foreign entity].
5. 15% Managing relationships with [the company's] United States providers, which include air lines, cruise lines, hotels, rent a car agencies and tour operators.
6. 10% Developing and overseeing commercial agreements with [the company's] providers located in the United States.
7. 10% Generating and sustaining clientele for the United States subsidiary.
8. 25% Directing the operations of the United States subsidiary.
9. 10% Training and supervising employees of the United States subsidiary.
10. 5% Installing, operating and training employees of [the company] on technical software, which will include, but is not limited to the reservation system software Worldspan.

In a letter dated February 6, 2009, an officer of the foreign entity stated that the beneficiary performs the following duties:

- Directs and coordinates [the petitioner's] financial and budget activities in order to fund operation and increase efficiency.
- Develop and oversee commercial agreements with [the petitioner] and service providers such as airlines, travel agencies, hotels, rental car companies and other organizations.
- Negotiate and approve contracts between [the petitioner] and service providers and government agencies.
- Prepare budgets for programmed trips to further reduce the costs to large organizations and increase quality of service.
- Coordinate functions among departments and delegate responsibilities amongst different departments.
- Determine and guide course of action in operations with airlines, hotels, travel operators, and service providers.
- Establish policy on use of Worldspan Manual to increase productivity and quality of services within different segments of the agency. . . .
- Formulate policy as it pertains to employees, such as employee dress, pay rates, hours of operation, training, and customer service.
- Make recommendations to the Board of Directors regarding evaluations of the travel market.
- Establish operational targets for commissions with airlines, hotels, and bookings on Worldspan.
- Establish sales goals and policy of [the petitioner] in terms of sales, marketing, future markets, and the agency's position in the current market.
- Establish policy on development of promotional material such as travel programs, flyers, and other marketing material.
- Responsible for overall administration of [the company] including: reviewing and evaluating the results of the agency's activities, ensuring continuing contractual compliance and allocating resources for greater effectiveness and efficiency.
- Remain knowledgeable of laws, regulations and policies of airlines, hotels, tour operators, trains, cruises, and other service providers in the travel industry.
- Maintain full compliance with IATA: International Air Transport Association.
- Develop and maintain contractual obligations with banks, guarantee companies, insurance and other third party agencies . . . .
- Establish core procedure guidelines for Sales, Corporate, Group, and Shuttle Departments.
- Establish core requirements for Tourismap [sic].
- Keep employee records and hire and discharge employees as necessary.
- Develop skill and knowledge requirements for department heads.
- Negotiate employee contracts.
- Attend meetings with airlines, associations of travel agencies, hotels and other government agencies.
- Implement corrective action plans to solve corporate and departmental problems in the agency.

With respect to the staffing of the U.S. entity, the foreign entity's officer stated:

Currently, [the petitioner] is minimally staffed with three employees. This staff is currently paid on a commission basis. This is currently necessary to promote the sales essential to continue growing in this difficult economy. The staff, as it exists, is responsible for attending walk in clients and to support all telephone and email inquiries for all departments and Turismap. The staff must converse with customers to determine destination, mode of transportation, travel dates, financial considerations, and accommodations required. Staff must handle all client reservations including flight, hotel and rental car requirements. Staff must also collect payment for transportation and accommodations from clients. The staff must also coordinate all group and corporate travel.

Although the letter from the foreign entity indicated that the petitioner has three employees, the petitioner submitted copies of only two "contracts of employment." The petitioner submitted a contract made in June 2008 with [REDACTED] for the position of "Outside sales Department Turismap." According to the terms of the contract, [REDACTED] agreed to work ten hours per week in exchange for sales commissions and monthly expense reimbursement.

The second contract was between the petitioner and Jose Fernandez and was signed on January 5, 2009. [REDACTED] agreed to work in the position of "Travel Sales" for wages of \$7.00 per office hour plus sales commissions. The petitioner did not provide a complete copy of the contract and the portion submitted does not indicate how many hours per week he is expected to work.

The petitioner did not identify the third employee or submit evidence of wages or commissions paid to any employees. The petitioner provided evidence that it utilizes the services of a bookkeeping service for monthly financial reports. The AAO notes that the beneficiary's first name appears as "Sales Rep" on many of the invoices submitted as evidence of the petitioner's business activities during the first year of operations.

The director issued a request for additional evidence (RFE) on February 19, 2009, in which he advised the petitioner that the initial evidence was insufficient to establish that the U.S. office has grown to the extent that it currently supports a managerial or executive position. The director requested that the petitioner submit the following additional evidence: (1) a comprehensive description of the beneficiary's duties and an explanation as to how such duties qualify as either managerial or executive in nature; (2) the job titles and job duties of all subordinate employees managed by the beneficiary; and (3) the amount of time the beneficiary allocates to managerial versus non-managerial duties.

In response to the request for evidence, the petitioner submitted three additional descriptions of the beneficiary's duties. In a letter dated April 1, 2009, counsel for the petitioner stated that the beneficiary is responsible for the following "executive capacity" duties:

- Developing the overall business strategy
- Establishing the company's operational targets

- The review of financial data [sic], reports, statements, and sales to determine whether the organization meets its operational targets.
- The maintaining of an operational budget.
- The business relationship management with [the petitioner's] United States suppliers.
- The negotiation, execution and fulfillment of commercial agreements.
- Other executive capacity duties listed in the employment letter.

Counsel noted that such duties "are analogous to the U.S. Department of Labor's (DOL) O\*Net duty description under 11-1011.00 – Chief Executive, which includes the reported title of Executive Director."

The petitioner submitted an additional list of 24 duties, which is similar to the lengthy list of duties provided by the foreign entity the time of filing and will not be repeated here. Finally, the petitioner submitted a chart labeled "Time Used in Executive Functions," accompanied by a brief description of how much time the beneficiary devotes to specific tasks on a weekly basis. The information provided is as follows:

- 2 hours – Collect financial data [sic]
- 6 hours – Prepare budgets for programed [sic] trips
- 3 hours – Coordinate functions among departments
- 5 hours – Establish [sic] operational target
- 3 hours – Attend meeting with staffs [sic]
- 4 hours – Negotiate [sic] or approve contracts
- 3 hours – Evaluate staff progress
- 3 hours – Write business correspondence
- 6 hours - Direct and coordinate activities of Travel Agency
- 5 hours – Work with Travel Providers or commercial vendors
- 3 hours – Non-executive functions [sic].

Counsel stated that the beneficiary's duties are "primarily related to policy and corporate procedures" while her "day-to-day duties are limited to management and training of staff."

In response to the director's request for information pertaining to the beneficiary's subordinate staff, counsel emphasized that the statutory definition of "executive capacity" at section 101(a)(44)(B) of the Act does not require an executive to supervise the work of supervisory, professional or managerial personnel. Counsel emphasized that, despite delays and difficulties limiting the petitioner's start-up operations, the beneficiary "has managed to hire [redacted] and [redacted], Outside Sales and Turismap."

The petitioner submitted an organizational chart depicting the U.S. company's anticipated "peak season" staffing levels. The chart lists the beneficiary as executive director, supervising an office manager who is "to be hired." The chart indicates that the office manager will supervise the group department, the sales department, the corporate department, and the Turismap Development department. The chart identifies [redacted] in the Sales Department and [redacted] in the Turismap department. The other departments are unstaffed. According to the chart, the petitioner also intends to hire a shuttle driver and temporary/seasonal sales representatives.

The petitioner submitted a list of sales conducted in 2009 through March 10, along with copies of invoices for these transactions. Out of 18 sales transactions, the beneficiary's name is listed as "sales rep" on 12 invoices. Some invoices identify [REDACTED] as the sales representative, some identify "[REDACTED]," and one identifies [REDACTED]. [REDACTED] name does not appear on any of the invoices submitted. Most of the Turismap sales appear to have been transacted by the beneficiary.

The petitioner's IRS Form 1065, U.S. Return of Partnership Income, for 2008 indicates that the company paid salaries and wages of \$28,666, but the record does not contain copies of IRS Forms W-2 or other evidence of wages paid to employees, and it is not clear who received this money, particularly in light of claims that the petitioner's employees currently work on commission.

The director denied the petition on April 14, 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 determined that the position descriptions provided demonstrate that the beneficiary "functions and performs virtually all the required duties and functions to run a travel agency." The director found that the job description, considered with the small number of employees suggests that the beneficiary would not be relieved from performing the non-managerial or non-executive operations involved in producing a product or providing a service. The director further noted that the petitioner failed to explain the discrepancy between the number of employees claimed on the petition and the current number of employees. Finally, the director acknowledged the petitioner's proposed organizational chart, but emphasized that the petitioner is no longer a "new office" and, as such, future hiring plans could not be considered.

On appeal, counsel asserts that the director assumed in error that the petitioner seeks to classify the beneficiary as a manager, rather than as an executive. Counsel emphasizes that the plain reading of the statutory definition of "executive capacity" reveals that executives are not required to supervise subordinate supervisory, professional or managerial employees, and that USCIS cannot require an executive to supervise such staff. Counsel reiterates the job description included in his letter dated April 1, 2009, and states that, based on such duties, the beneficiary "is not merely clothed with an executive title" but is "actually charged primarily with executive capacity responsibilities and authority in the United States entity." Counsel relies on unpublished AAO decisions in support of the proposition that a beneficiary may serve in an executive capacity even when the petitioning enterprise has few or no employees.

Counsel further emphasizes that the petitioner's business is "very specialized" and requires the beneficiary to perform "sophisticated economic analyses, determine which opportunities to pursue and then negotiate the deals." Counsel asserts that "the day-to-day functions of ticket sales, reservations and group travel planning are designated for the employees in those specific positions." Counsel states that the beneficiary is responsible for "directing the management of the organization, establishing long range goals, to exercise wide latitude in discretionary decision-making by planning, developing and establishing policies and objectives while receiving only general supervision or direction from the board of directors."

In addition, counsel asserts that "it is clearly error on the part of the Service to require all start-up and small businesses to have multi-layered organizational structures." Counsel contends that the organizational chart

establishes that the beneficiary holds a position in "the senior executive ranks," and stresses that the petitioner cannot be expected to have the type of hierarchy one would find in a large multinational corporation.

Counsel requests, in the alternative, that the AAO consider the instant petition as a "*de facto* new office," citing various "factors limiting the normal growth of [the petitioner] during its first year in operation." Counsel explains that such factors include a delay in the issuance of the beneficiary's L-1 visa, which caused the U.S. entity to miss the primary season for travel sales in 2008. Counsel further states that other extenuating factors include record violence in Ciudad Juarez and the Mexican State of Chihuahua and reduction in travel to the region, as well as the weak economy in the United States. Counsel asserts that, in light of such factors, the petitioner could not be reasonably expected to have a "fully realized business."

**B. Discussion**

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary will be employed in primarily executive capacity under the extended petition.

As a preliminary matter, the AAO notes that the petitioner is not eligible for a second "new office" L-1A visa approval with an additional one-year validity period. The L-1A nonimmigrant visa classification is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. The only provision that would allow for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

In general, the statute allows nonimmigrant L-1A classification for an alien that is being transferred from an overseas employer temporarily to the United States to work for a related company in a managerial or executive capacity. Section 101(a)(15)(L) of the Act. By statute, eligibility for the classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Pursuant to the statutory definitions of the terms, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. *See* section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. 5738, 5740 (February 26, 1987) (available at 1987 WL 127799).

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient approach to petitions filed on behalf of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the start up of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(I)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(I)(14)(ii)(B).

USCIS will not grant a second petition under the more lenient "new office" provisions because it would undermine the established regulatory scheme for L-1 nonimmigrants and create an incentive for foreign companies to delay or under-fund the implementation of their U.S. business plans. By allowing multiple petitions under the more lenient standard, USCIS would in effect encourage foreign entities to create inactive, under-funded or under-staffed companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties.

Upon review of the current petition, it is apparent that the petitioner was unable to start operations and grow as quickly as anticipated. This failure on the petitioner's part is not a result of some impossibility created by the law or regulations. The one-year period was not included in the regulations as a hindrance to new offices. On the contrary, the new office provisions were added to the regulations in 1987 specifically in recognition that it would be impossible for some new offices to immediately employ someone in an executive or managerial capacity as defined in the regulations. *See* 52 Fed. Reg. at 5739-5740. At the same time, the legacy INS stated that it "must concern itself with abuse or the potential for abuse of any visa category" and further noted that "one year is sufficient for any legitimate business to reach the 'doing business' standard." *Id.*

In conclusion, the petitioner may not be granted a second petition under the more lenient "new office" provision. The regulation at 8 C.F.R. § 214.2(I)(3)(v)(C) allows the intended United States operation one year within the date of approval of a new office petition to support an executive or managerial position. There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new

office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

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 AAO acknowledges that the petitioner has consistently claimed that the beneficiary performs primarily executive duties under section 101(a)(44)(B) of the Act. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The fact that the beneficiary manages or directs 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. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. *See* section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the petitioner has failed to show that the beneficiary's duties as of the date of filing are primarily executive in nature.

The petitioner has provided at least five different descriptions of the beneficiary's duties, including two different breakdowns describing how the beneficiary allocates her time among 10 or 11 different tasks, as well as lists of 23 to 24 tasks with no assigned percentages, and a list of duties from counsel that largely paraphrases the statutory definition of executive capacity. The AAO is not in a position to determine which of the submitted job descriptions most accurately describes the beneficiary's actual duties, but will give more weight to those descriptions that include information regarding how much time the beneficiary devotes to specific tasks and responsibilities. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner's job description should be sufficiently detailed to establish what portion of the beneficiary's job duties is primarily executive in nature and what proportion is actually non-executive. *See generally, Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

At the time of filing, the petitioner indicated that the beneficiary devotes the largest portion of her time, 25 percent of her weekly hours, to "directing the operations of the United States subsidiary," but included no

further information regarding what this responsibility entails. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

While the position description includes some qualifying duties, such as developing the company's overall strategies, budget policies and objectives, the petitioner did not indicate that the beneficiary would be devoting more than 25 percent of her time to such tasks. The petitioner has not explained how the beneficiary's duties related to generating and sustaining clientele, developing and overseeing commercial agreements with travel service providers and "managing relationships," which account for 35% of her time, rise to the level of "executive capacity," as such duties are inherently related to the sales, marketing and provision of the petitioning agency's services. The non-executive operations activities of a travel agency are not limited solely to the sale of travel services to individuals and groups. The petitioner generates commission income by partnering with specific hotels, car rental companies, airlines and other travel service providers. Based on the information in the record, these entities offer participating travel agencies a standard commission as part of an affiliate program, and have a fairly straightforward process that involves submitting an affiliate application with a signed affiliate agreement. It is not clear what executive duties are involved in "managing" or "negotiating" these types of affiliate relationships or agreements.

The petitioner stated that the beneficiary would spend the remaining 15% of her time training and supervising the petitioner's employees, and installing, operating and training employees to use travel industry software. The petitioner's employees are claimed to include two sales representatives whose employment has not been well documented in the record. While it is undoubtedly critical that the petitioner's employees receive proper training, the petitioner has not established that training personnel is a task that traditionally falls under executive capacity.

In response to the director's request for a more detailed description of the beneficiary's specific duties and a breakdown of the time she devotes to specific tasks, the petitioner submitted a new list of nine duties which are stated to account for the beneficiary's 40-hour workweek. This description of the beneficiary's duties bears little resemblance to those discussed above, and the petitioner provided no explanation for providing two conflicting explanations regarding how the beneficiary spends her time. 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 the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The duties described in the revised job description include collecting financial data, working with travel providers or commercial vendors, writing business correspondence, and performing non-executive functions. None of these duties appear to be executive in nature. The beneficiary's remaining duties include vaguely described responsibilities such as "direct and coordinate activities of travel agency," "coordinate functions among departments," and "prepare budgets for programmed trips." The petitioner failed to specify exactly what activities the beneficiary directs and coordinates, and the record fails to support a finding that the petitioning agency consisting of the beneficiary and two claimed commissioned sales people is organized by

"department." The petitioner did not explain why establishing budgets for programmed trips, which appears to be a component in offering travel packages to clients, is considered to be an executive function. The petitioner emphasizes that such tasks require analytical skills, but the complexity of the duties do not automatically raise them to those included in the statutory definition of "executive capacity."

Finally, the AAO notes that the submitted job descriptions do not indicate that the beneficiary is directly involved in the company's sales, while many invoices issued by the petitioner, including those issued subsequent to the hiring of the claimed subordinate personnel, identify the beneficiary as the "sales rep" who handled the transaction. Therefore, the job descriptions submitted, in addition to being inconsistent, appear to be incomplete and cannot be considered to provide an accurate account of the beneficiary's actual duties at the end of the first year of operations. As discussed above, while the beneficiary appears to be the individual responsible for the U.S. company and possesses the authority to establish goals and policies, the record does not support a finding that the majority of her duties rise to the level of "executive capacity" as defined in the statute.

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 indicates that non-executive tasks, such as dealing with telephone and in-person inquiries from customers and handling sales transactions, are performed by subordinate personnel.

However, the petitioner has not clearly explained or documented the number or types of workers it employed at the time of filing, or the nature or scope of the services they provide. The petitioner indicated on the Form I-129 that it employed "approximately 5" workers at the time of filing. In a letter accompanying the petition, the petitioner indicated that the company is "minimally staffed" with three employees who are paid on a commission basis. The petitioner submitted employment contracts for only two employees. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) plainly 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 when the beneficiary will be employed in a managerial or executive capacity. The petitioner has not submitted consistent information regarding the number of employees, nor has it provided evidence of any payments to direct or commissioned employees or contractors other than evidence that it pays approximately \$135 monthly for the services of a bookkeeping service. As noted above, the record contains evidence that Jose Fernandez the "travel sales" employee does perform sales duties for the company, however, the petitioner has not provided a position description or indicated whether he is a full-time or part-time employee. The record contains no corroborating evidence establishing that the other claimed employee, Alejandro Carrillo, was working for the petitioner at the time of

filing the petition. Rather the evidence suggests that the beneficiary is directly performing the sales related to the petitioners' "Turismap" travel directory. While we note that the names of at least two other individuals appear as "sales rep" on the petitioner's invoices, the petitioner has not claimed to employ anyone other than the two individuals referenced above. 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 statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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 the organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or 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 counsel correctly asserts that the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, while the beneficiary is responsible for the goals and policies of the company as its executive director, the evidence of record fails to demonstrate that these are her primary duties, nor has it explained who performs the majority of the non-qualifying tasks associated with operating a travel agency.

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).

Furthermore, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If

the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

We acknowledge counsel's arguments that the petitioner does not require a multi-tiered organizational structure due to the nature of the business. Based on the petitioner's proposed organizational chart, however, the petitioner does in fact anticipate the need for an office manager and several department supervisors. It simply has not grown to a point where it can employ any regular, full-time staff, much less hire a manager. Counsel further refers to unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner, as a service-oriented business, clearly cannot support an executive position if it has no full-time employees or contractors to engage in duties related to providing the services. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his or her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Although the petitioner indicates that it intends to hire several employees in the future, it is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing the petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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.