

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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

[Redacted]

D7

DATE: **AUG 09 2012** Office: VERMONT SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

[Redacted]

**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

6

**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 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, [REDACTED] a New Jersey corporation established on June 1, 2007, states that it provides travel, computer and technical consulting services. It claims to be a subsidiary of [REDACTED] located in Brasov, Romania. The beneficiary was previously granted L-1A status for a one-year period in order to open a new office in the United States and the petitioner now seeks to extend his status in the position of President for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity, or that the U.S. entity requires a bona fide manager or executive on a full-time basis.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary is primarily engaged in executive and managerial duties. Counsel submits a brief and additional evidence 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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

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

directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

## **II. Procedural History**

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 2, 2009. The petitioner indicated its intent to employ the beneficiary as the president of the U.S. company with the proposed duties of overseeing establishment of its U.S. operations, developing business plans, contracting marketing services, and hiring support and IT personnel.

In a letter accompanying the petition, the petitioner described the nature of the U.S. company's business as providing travel services, including "subcontract[ing] many tours with professionals and highly knowledgeable tour guides who are fluent in a variety of languages." The petitioner also described the U.S. company's business as providing IT consulting services, including the development of proprietary software, software consulting, and maintenance.

With respect to the beneficiary's role as president in the U.S. company, the petitioner stated:

[The beneficiary] has been responsible for the initial establishment of our U.S. operations, developing a business plan in collaboration with the parent company and strategies for making our services known in the marketplace, including the establishment of an interactive website, and contracting of marketing professionals to assist with publicity.

Since the commencement of operations [the beneficiary] has taken our company into exciting new directions: In the area of IT consulting services, [the beneficiary] is working closely with consultants [REDACTED] and [REDACTED] in order to establish a team which will be in charge of developing diversified iPhone applications. [REDACTED] has already registered in the iPhone Developers Program and has registered a d/b/a with the State of New Jersey for this specific purpose (Please see Exhibit A). [REDACTED] will be the supervisor/project manager of the team. [REDACTED] will be the point person for specific software solutions (SAP) which is his specialty. Raluca Apostolescu will be the Marketing Manager in charge of recruiting and hiring the members of the team. Two team members are already in place. This presents a great opportunity for growth for the company, since there are not many programmers who are familiar with the iPhone platform, and we plan to train new programmers to work on a variety of projects related to this issue.

The director issued a request for additional evidence ("RFE") on November 30, 2009, in which he requested, *inter alia*, the following: (1) an organizational chart for the U.S. entity, listing the beneficiary and all employees; (2) a breakdown of the number of hours that the beneficiary devotes to each of these employees' job duties on a weekly basis; (3) 2008 Forms W-2, Wage and Tax Statements, for all the employees of the U.S. entity; (4) Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2008 and the first three quarters of 2009; (5) evidence that the petitioner has employees who are qualified to perform and are actually providing the services of providing tour guides and IT consulting services; (6) evidence that the U.S. entity is actually providing the claimed services; (7) evidence that the U.S. entity has grown sufficiently to support an employee in an executive/managerial capacity; and (8) a copy of the business plan for the U.S. entity.

In a response dated January 13, 2010, counsel for the petitioner submitted a statement asserting that the beneficiary is providing services in a managerial or executive capacity for the U.S. company. Counsel also asserted that although the petitioner is continuing with its business plan to provide both travel services and IT consulting services, it has experienced financial difficulties due to the hardships the business and airline community worldwide has experienced. Counsel asserted: "Given the financial hardship faced by the [U.S.] company, it has not expanded as much as was originally planned, but they are now in a position to begin hiring additional personnel." Counsel stated that the petitioner has also expanded into providing insurance packages.

The petitioner provided a statement from the beneficiary describing his duties and main accomplishments at the U.S. company for the past year. First, the beneficiary noted that he secured and is maintaining a business relationship with [REDACTED] for which he has "acted as a business consultant, managing and directing [REDACTED] employees." Second, the beneficiary noted he has started a separate project, in collaboration with Dan Anghel, to develop a new software platform to be sold to insurance industries. Third, the beneficiary noted that he has secured "a new headquarters for the U.S. entity, consisting of larger office areas and equipment."

Fourth, the beneficiary noted he has been developing [REDACTED] an iPhone Applications Development Studio, in collaboration with [REDACTED]. The beneficiary claimed that he has been actively looking for developers for both projects. The beneficiary stated he is “acting as a manager of [REDACTED] has “an executive position in respects to the above referenced projects,” and that he does “not have any clerical duties and will not program for the above software projects.”

Lastly, the beneficiary claimed he spends approximately 70+ hours per week “to oversee all my company’s activities” and provided the following breakdown of his duties:

- 1) Approximately 25 hours a week “spent under the current contract with [REDACTED]”;
- 2) Approximately 25 hours a week “spent on the software platform project, overseeing and conceptualizing the different stages of development together with [REDACTED]”;
- 3) 15-20 hours a week “dedicated to Essentialbit.com”; and
- 4) “The remaining time is put into [REDACTED]”

The petitioner submitted a company description and a proposed organizational chart, which indicates that the beneficiary, as President, will oversee an Administrative Services Manager, IT Manager and Marketing Manager. In turn, the Administrative Services Manager will oversee financial/accounting personnel and an administrative assistant; the IT Manager will oversee programmers/IT consultants; and the Marketing Manager will oversee marketing/advertising personnel and sales/travel consultants. The petitioner provided position descriptions for each of the proposed positions. *See Exhibit B.*

The petitioner submitted copies of its 2009 Forms W2 issued to [REDACTED] in the amount of \$25,000 and [REDACTED] in the amount of \$20,000. The petitioner also submitted a copy of its 2009 Form 1099-MISC issued to [REDACTED] in the amount of \$9,900. *See Exhibit C.*

The petitioner submitted a letter from [REDACTED] of Pinnacle Risk Solutions (Insurance Specialists), in which he stated that [REDACTED] has been working with the beneficiary “on developing a new software platform.” The petitioner submitted a “License Agreement” dated January 1, 2010 indicating that [REDACTED], owned by [REDACTED] granted a license to [REDACTED] to use and occupy three of its offices for \$1,000/month. The petitioner also submitted an “Agreement” dated December 23, 2009 between [REDACTED] in which [REDACTED] agreed to provide [REDACTED] with “IT support and Marketing services.” The terms of the above “Agreement” are valid for three years, for a fee of \$80,000 per year. *See Exhibit D.*

The petitioner submitted a letter from [REDACTED], dated December 24, 2009, in which he stated that he has been “providing consulting services to [the beneficiary’s] company” and is “in the planning stages of various projects which will involve me as a project manager [for [REDACTED]” [REDACTED] further stated: “My position in [REDACTED] will consist in overseeing a team of highly qualified professionals in software development.” The petitioner included a copy of [REDACTED] resume,

which indicates he is presently employed as a [REDACTED], and resides in Sarasota, Florida. *See* Exhibit E.

The petitioner submitted an undated letter from [REDACTED] in which he stated that during his past year of “cooperation” with the beneficiary, they have made “many potential client connections” and “are now working on a training curriculum to help us recruit and train potential new developers.” The petitioner included a copy of [REDACTED] resume, which indicates he is presently employed as a “Senior Software Engineer” by [REDACTED] in New York. *See* Exhibit F.

As evidence of its “2009 Financials,” the petitioner submitted copies of numerous deposited checks written by [REDACTED] from January 2009 through December 2009. The petitioner submitted its accompanying invoices to [REDACTED].” The petitioner also submitted copies of its business checking statements from PNC Bank during the time period of January 1, 2009 through November 30, 2009. *See* Exhibit G.

As evidence of its “2008 Financials,” the petitioner submitted a copy of a 2008 IRS Form 1099-MISC it received from [REDACTED] indicating it received nonemployee compensation of \$63,931.00. The petitioner submitted a copy of its 2008 profit and loss statement indicating the company made a gross income of \$63,931 and incurred total expenses of \$13,825, resulting in a net income of \$49,958. The petitioner submitted a list of all incurred expenses in 2008. The petitioner submitted copies of its business checking statements from PNC Bank from August 1, 2008 through December 31, 2008. The petitioner also submitted copies of numerous deposited checks written by [REDACTED] from January 2008 through December 2008. The petitioner submitted its accompanying invoices to [REDACTED].” *See* Exhibit H.

The petitioner submitted photographs of its premises. *See* Exhibit I.

The director denied the petition on March 5, 2010, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner had not hired any employees to work for [REDACTED] other than the beneficiary; because the beneficiary was the sole employee, the petitioner failed to demonstrate that it had other employees to perform the day-to-day operations of its establishment. The director also concluded that the petitioner had not established that it requires a bona fide manager or executive position on a full-time basis, as it appeared the beneficiary would be engaged in the non-managerial, day-to-day operations of the U.S. company.

The petitioner filed an appeal on May 7, 2010. On appeal, counsel for the petitioner asserts: “We believe the documentation we have submitted clearly establishes that the Beneficiary is primarily functioning as an executive/manager at [REDACTED].” Counsel contends:

The description of the Beneficiary's duties clearly show he is authorized to make high level decisions for the company: he directs the management of the organization, establishes its goals and policies, exercises wide latitude in discretionary decision making and receives only general supervision or direction from the Board of Directors. INA § 101(a)(44)(B), § 1101(a)(44)(B), 8 CFR §214.2(l)(1)(ii)(C). Thus, he is clearly performing duties which are executive in nature.

We also submit that as part of his work week the Beneficiary, for the time being, engages in the management of the IT department, where he supervises the work of professionals." Counsel further reaffirmed the beneficiary's statement that he does not have any clerical duties and will not program for the above software projects. (Resumes and [sic] of those supervised have been previously submitted to USCIS.)

To support the appeal, the petitioner resubmitted copies of: the director's decision; the December 24, 2009 letter from [REDACTED]; [REDACTED] resume; and the U.S. company's Position Description and Responsibilities for an IT Manager.

### III. Analysis

The issues addressed by the director are whether the petitioner established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity, and whether the company can support a bona fide manager or executive position on a full-time basis.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The petitioner also has not established that its U.S. company can support a bona fide managerial or executive position. Therefore, the director properly denied the petition and upheld the denial on motion.

As a threshold matter, the AAO agrees with the director that the beneficiary is, and has been, the petitioner's sole employee. Although the petitioner suggested that it employs [REDACTED], [REDACTED], and [REDACTED] (either directly or as independent contractors) through its submission of its Forms W-2 or Form 1099-MISC on their behalves, the AAO is not persuaded that the petitioner has ever employed these individuals. The petitioner has repeatedly given vague or contradictory statements regarding its staff size; for example, in counsel's letter dated October 15, 2009, counsel claimed that the petitioner already has "[t]wo team members in place," but in response to the director's RFE, counsel claimed that the petitioner is "now in a position to begin hiring additional personnel." The director specifically noted in the denial notice that the beneficiary is the petitioner's sole employee, and on appeal the petitioner does not refute this conclusion.

Moreover, the documents in the record support the director's conclusion that the beneficiary is the petitioner's sole employee. The beneficiary's 2008 federal tax return reflects that the beneficiary filed IRS Form 1040 and Schedule C, Profit or Loss from Business (Sole Proprietor), listing himself

as the sole proprietor of [REDACTED]. On his Schedule C, the beneficiary did not report any expenses paid for wages (Line 26) or contract labor (Line 11). The petitioner's 2008 "Profit & Loss Standard" shows no expenses paid for wages or contract labor; in fact, the only income the petitioner received was \$63,931, the exact amount [REDACTED] paid to the petitioner for its contracted work. A review of the petitioner's bank statements revealed no evidence of regular deductions representative of the payment of employee wages or salaries. A review of [REDACTED] resume indicates he is presently solely employed as a "[REDACTED]" by [REDACTED]. [REDACTED] resume indicates he is presently solely employed as a "Senior Software Engineer" by [REDACTED] in New York— neither resumes listed any work with or for the petitioner in New Jersey.

In the RFE, the director requested that the petitioner submit IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2008 and the first three quarters of 2009. The petitioner failed to submit these documents in response to the RFE. This evidence is critical as it would have established that the petitioner is actually employing or contracting other employees. 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 failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

For the reasons discussed below, the petitioner has failed to establish that the beneficiary is primarily employed in an executive or managerial capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(iii). The petitioner's description of the jobs duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* 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 proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 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). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections

101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm’r 1988).

While the AAO does not doubt that the beneficiary performs *some* executive or managerial duties for the petitioner, the petitioner has failed to demonstrate that the beneficiary *primarily* performs in a executive or managerial capacity and does not spend a majority of his time on the U.S. company’s day-to-day functions.

#### A. Executive Capacity

Counsel for the petitioner repeatedly describes the beneficiary’s executive duties in very broad terms, noting he “is authorized to make high level decisions for the company,” “directs the management of the organization, establishes its goals and policies, exercises wide latitude in discretionary decision making and receives only general supervision or direction from the Board of Directors.” These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *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.).

In the beneficiary’s statement submitted in response to the RFE, the beneficiary likewise provided vague descriptions of his current duties. Specifically, the beneficiary stated he works approximately 70 hours a week “to oversee all my company’s activities,” including 25 hours a week “spent under the current contract with [REDACTED]” 25 hours a week “spent on the software platform project, overseeing and conceptualizing the different stages of development together with [REDACTED]” 15-20 hours a week “dedicated to [REDACTED]” and “[t]he remaining time [of 0-5 hours per week] is put into [REDACTED]”

The vague descriptions the beneficiary provided, such as “oversee all my company’s activities,” “overseeing and conceptualizing the different stages of development,” “dedicated to Essentialbit.com” and “put into [REDACTED]” fail to provide any meaningful insight into what the beneficiary primarily does on a day-to-day basis. Reciting vague job responsibilities is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. V. Sava*, 724 F.Supp. 1103 (E.D.N.Y 1989).

In addition to being vague, the job duties appear to be non-executive and non-managerial in nature. The beneficiary stated that he works approximately 25 hours a week under the current contract with [REDACTED]. According to the work contract between the petitioner and [REDACTED] Solutions, the petitioner will provide [REDACTED] with “IT support and Marketing services” including the following services:

- 1) Design and develop various product modules;
- 2) Provide technical design support and testing;
- 3) Maintain existing systems, application software and hardware;
- 4) Make presentations and offer technical input in closing proposals;
- 5) Assist staff in resolving technical issues. Train and coach staff on customer and Company requirements;
- 6) Ensure timely delivery of software, and insure high quality of products and services;
- 7) Research market conditions;
- 8) Gather and analyze data on competitors;
- 9) Oversee design, maintenance and upgrading of company's website,
- 10) Work closely with sales staff and solicit their input regarding ways to make optimum use of website;
- 11) Work closely with management and sales staff to coordinate year-round print marketing campaign; and
- 12) Oversee the designing and development of print materials.

The duties listed in the petitioner's work contract with [REDACTED], such as providing technical design support, maintaining computer systems, and assisting staff in resolving technical issues, clearly describe non-executive and non-managerial services and products. The petitioner failed to provide any evidence establishing that the petitioner employs any other employees, and if so, that these employees are and have been performing the services required under the Pinnacle Risk Solutions contract.<sup>1</sup> Since the petitioner has not established that it employs anyone other than the beneficiary, the AAO must conclude that the beneficiary is the only one who is performing the tasks necessary to provide the services and products to [REDACTED]. According to the beneficiary's statement, he spends approximately 25 hours out of 70 total hours per week—almost one third of his time—on these duties alone. The petitioner has failed to establish that the beneficiary can be considered to be primarily employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel for the petitioner has also indicated that the petitioner "has expanded into providing some insurance packages." To support this assertion, counsel submitted a copy of the beneficiary's Insurance Producer License issued by the State of New Jersey on March 26, 2009. The fact that the beneficiary is personally licensed as an insurance producer further suggests that the beneficiary is

---

<sup>1</sup> Based on the beneficiary's own statement, his collaboration with [REDACTED] is limited to the development of a new software platform to be sold to insurance industries, and his collaboration with [REDACTED] is limited to the development of [REDACTED]. His statement rules out the possibility that the petitioner has any contract employees to provide the services and products required by the work contract with [REDACTED].

primarily performing the day-to-day operations of the U.S. company, and therefore, is not considered to be employed in an executive capacity.

*B. Managerial capacity*

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. The term “function manager” applies generally when the 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).

On appeal, the petitioner asserts the beneficiary is acting as a personnel manager. Counsel asserts the beneficiary is “managing and directing [redacted] employees.” The petitioner has also claimed the beneficiary supervises independent consultants [redacted].

The petitioner failed to submit supporting evidence of its claim that the beneficiary supervises [redacted] employees, [redacted], [redacted], or any other employees. As noted above, the beneficiary is the petitioner’s sole employee. Furthermore, the work contract between the petitioner and [redacted] states only that the petitioner is to provide “IT and Marketing services”; the contract makes no mention of the petitioner providing managerial or supervisory services for [redacted] employees. Simply 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. 1988) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, without any additional and credible explanation of the exact duties and time spent by the beneficiary providing these services to Pinnacle Risk Solutions, the AAO cannot determine whether the beneficiary is primarily performing the claimed managerial or executive duties. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

*C. Supporting a bona fide executive or managerial position*

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. The petitioner must establish that the beneficiary would be engaged in primarily managerial duties upon commencement of employment with the U.S. company, and not at some future date once the expansion efforts are underway. 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. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner has not established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Currently, the beneficiary is the petitioner's sole employee, and the one who is performing the day-to-day operations of the business. Counsel for the petitioner expressed: "Given the financial hardship faced by the company, it has not expanded as much as was originally planned, but they are now in a position to begin hiring personnel." The petitioner claimed it plans to hire three additional managers and five additional employees to be subordinate to the beneficiary in the future. However, the petitioner has not credibly demonstrated that it will and can afford to hire these proposed eight employees, including three managers, considering its 2008 net income of \$49,958. Even the petitioner's new "larger" office space consists of only three offices, which is insufficient to support the proposed additional eight employees.

Even assuming *arguendo* that the petitioner will hire additional personnel in the future to be subordinate to the beneficiary, the future plans of the petitioner are not enough to establish eligibility for the benefit sought. 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). Here, the petitioner has not met its burden of establishing that its U.S. operations are now at a level sufficient to support and require the beneficiary's full-time employment in an executive or managerial capacity.

#### IV. Qualifying relationship

Beyond the decision of the director, the record does not establish that the petitioner, Travserv LLC, has a qualifying relationship with the beneficiary's foreign employer, Travserv SRL. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

According to the Form I-129 Supplement L, the petitioner claimed it is a subsidiary of the beneficiary's foreign employer based upon common ownership and control.<sup>2</sup> Specifically, the petitioner claimed that [REDACTED] owns 90% of both [REDACTED] and the beneficiary owns 10% of both companies.

---

<sup>2</sup> Assuming all facts are true, it appears the petitioner is better defined as an affiliate, rather than a subsidiary, of [REDACTED]

In contrast, the beneficiary's 2008 IRS Form 1040 and Schedule C list himself as the sole proprietor of [REDACTED] directly contradicting the petitioner's claims that the beneficiary is the 10% owner. An LLC may elect to be treated as a sole proprietorship only if it has a single member or owner. *See* Treas. Reg. § 301.7701. 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).

Furthermore, the petitioner failed to submit primary evidence of both companies' ownership, such as operating agreements and stock/membership certificates. The only documents submitted to this extent were [REDACTED] "Abridged Balance Sheets" listing [REDACTED] as the Manager, which are insufficient to prove the claimed ownership and control by [REDACTED] and the beneficiary.

Finally, the AAO notes discrepancies regarding the beneficiary's claimed work experience. According to Form I-129 Supplement L, the petitioner claimed the beneficiary was continuously employed abroad by [REDACTED] from March 2004 to November 2008 as its Vice President in charge of operations. However, the record reflects that the beneficiary last entered the United States on September 23, 2006 on a B-2 tourist visa; therefore, the beneficiary could not have been employed by the foreign company until 2008 as claimed. In addition, the petitioner's initial letter submitted in support of Form I-129 indicated the beneficiary worked for the foreign company "[f]rom 2005 until 2008." The discrepancies as to when the beneficiary's employment at [REDACTED] began and ended gives reason to doubt the beneficiary's claimed qualifications and undermines the petitioner's credibility. 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.

## V. Conclusion

The petitioner has not established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity, that the company requires a bona fide manager or executive position, and that there is a qualifying relationship between the petitioner and the beneficiary's foreign employer. 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.