



U.S. Citizenship
and Immigration
Services



D7

DATE: **DEC 08 2012**

Office: VERMONT SERVICE CENTER

FILE:

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Ron Rosenberg
Acting 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 to classify the beneficiary as an intracompany transferee in a managerial or executive capacity 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 Pennsylvania limited liability company, states that it provides export management and business development services to United States and offshore manufacturers in the fields of educational and scientific equipment and instruments. It claims to be a branch office of ██████████ located in Pakistan. The petitioner seeks to employ the beneficiary in the position of Director of Sales and Marketing and requested that the beneficiary be granted a change of nonimmigrant status from H-1B to L-1A.

The director denied the petition concluding that the petitioner failed to establish: (1) that the foreign entity employed the beneficiary for one continuous year within the three years preceding the filing of the petition; (2) that the petitioner and the foreign entity have a qualifying relationship; and (3) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director further found that the petitioner failed to establish that the beneficiary was maintaining H-1B or any other valid nonimmigrant status at the time the petition was filed and therefore would be ineligible for a change of status even if the petition could be approved.

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, the petitioner asserts that the director's decision contained several factual errors. The petitioner asserts: (1) that the beneficiary has been employed by the foreign entity as a consultant since 2007; (2) that the evidence shows that all of the petitioner's exports are shipped to the foreign entity or its customers, thus establishing the qualifying relationship; and (3) that the beneficiary will be employed in an "executive managerial" capacity. The petitioner further emphasizes that the service center accepted its late-filed request for a change of status based on the beneficiary's claim of extreme hardship and thereby already determined that he was in status. The petitioner 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.

II. THE ISSUES ON APPEAL

A. One Year of Continuous Employment Abroad

The first issue to be addressed is whether the petitioner established that the beneficiary 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. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 19, 2010. In a letter dated July 15, 2009, [REDACTED] indicated that it had last employed the beneficiary in Pakistan from January 1999 until September 2002.

The petitioner stated on the Form I-129 that the beneficiary was last admitted to the United States on July 1, 2004 in H-1B nonimmigrant status, and that this status had expired on July 29, 2009. The petitioner provided a copy of an approval notice for an H-1B petition and change of status request filed by [REDACTED] on July 25, 2003, which granted the beneficiary H-1B status from November 12, 2003 until July 29, 2006. In addition, the petitioner provided an approval notice for an H-1B petition filed by [REDACTED] which granted the beneficiary H-1B status from August 31, 2006 until July 29, 2009. The beneficiary explained in an accompanying affidavit that his second H-1B employer engaged in unlawful employment practices which led the beneficiary to establish the petitioning company in February 2007. The beneficiary's 2008 IRS Form 1040, Individual Income Tax Return, for 2008 indicates that he has derived his income from the profits of the petitioning company and a second company called [REDACTED].

The director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed for one continuous year abroad within the three years preceding the filing of the petition. The director noted that the beneficiary appears to have entered the United States for extended stays in B-1/B-2 status in 2001 and 2002, was granted H-1B status in 2003, and has been physically present in the United States continuously since 2004, thus making it impossible for the petitioner to establish the requisite one year of employment abroad within the three years preceding the filing of the petition.

On appeal, the petitioner states:

[T]he beneficiary had been employed by Afro Asian International, Lahore, Pakistan from [sic] 1990 through 2002. Thereafter, working as a liaison officer and consultant from 2007-

2010 between the company and its U.S. vendors in order to streamline their imports and respond to international bid projects.

The petitioner submits a letter dated June 6, 2011 from [REDACTED] stating that the foreign company has utilized the beneficiary's services as an International Sales Consultant from 2007 to 2010, in addition to his prior assignment as director of sales and marketing based in Pakistan from 1992 to 2002.

Upon review, the petitioner has not established that the beneficiary 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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. *Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.*

(Emphasis added).

The record shows that the beneficiary has been physically present in the United States almost continuously since September 2002, initially in B1/B2 status, then in H-1B status for unrelated employers, and, as of the date of filing, with no valid nonimmigrant status. The beneficiary has not spent any portion of this period in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary of the petitioner or foreign entity. While the beneficiary indicates that he founded the petitioning company as a branch of the foreign entity in February 2007 and that he has also worked for the foreign entity in the United States since 2007, there is no evidence that he has worked for either company in a lawful status. The beneficiary indicates that his employment with his H-1B employer was terminated as of September 2007, and the record reflects that no petitions have been filed on his behalf since that time until the current one.

This lengthy stay in the United States and subsequent employment with unrelated companies must be considered interruptive of the qualifying period of employment the beneficiary accrued with the foreign entity between 1990 and 2002. As such, it is factually impossible for the petitioner to establish that the beneficiary was employed abroad by the foreign entity for one continuous year during the three years preceding the filing of this petition in April 2010.

The petitioner claims that the foreign entity has employed the beneficiary as a consultant since 2007. However, the plain language of the regulation at 8 C.F.R. § 214.2(l)(3)(iii) requires the petitioner to submit "evidence that the alien has at least one continuous year of full-time employment *abroad* . . ." The beneficiary cannot gain this one year of continuous employment with the foreign entity while residing in the

United States, even if it were established that he has been performing services on a full-time basis for the foreign employer. The petitioner concedes that the beneficiary was last employed abroad in September 2002, nearly eight years prior to the filing of the petition, and, as discussed above, the beneficiary's qualifying period of employment abroad was interrupted by the beneficiary's subsequent employment by two unrelated companies in the United States from 2003 until 2007.

The petitioner has not submitted evidence on appeal to overcome the grounds for denial. Accordingly, the appeal will be dismissed.

B. Qualifying Relationship

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

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

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

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

* * *

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

(J) *Branch* means an operating division or office of the same organization housed in a different location.

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

(L) *Affiliate* means

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

The petitioner stated on the Form I-129 that the U.S. company is a branch office of [REDACTED]. The petitioner did not complete the section of the petition where it was asked to describe the stock ownership and managerial control of each company.

The petitioner's initial evidence included the foreign entity's Pakistan Form IT-1, Return of Total Income/Statement of Final Taxation for the year ended December 31, 2008. According to the shareholder information contained therein, the ownership of the foreign entity was as follows: [REDACTED] (25%); [REDACTED] (12.5%); [REDACTED] (12.5%); [REDACTED] (6.25%); [REDACTED] (12.5%) and [REDACTED] (31.25%).

The petitioner indicated that the beneficiary "founded" the U.S. company, a limited liability established in Pennsylvania in 2007. The beneficiary reported his income received from the petitioner on his Form 1040, Schedule C, Profit or Loss from Business, thus suggesting that he is in fact the only member of the petitioning limited liability company.

In a request for evidence (RFE) issued on June 8, 2010, the director requested additional evidence establishing the ownership and control of the U.S. and foreign entities. Specifically, the director requested that the petitioner "list the number of shares of stock that have been issued for the U.S. and foreign entity, the names of the individuals to whom they have been issued, and copies of all stock certificates issued."

In response, the petitioner submitted a copy of the foreign entity's Pakistan Form 29, Particulars of Directors and Officers, and Form A- Annual Return of Company Having Share Capital, dated October 31, 2009. According to these documents, the foreign entity is owned by the following individuals: [REDACTED] (20%); [REDACTED] (10%); [REDACTED] (5%); Shehzad [REDACTED] (10%); [REDACTED] Rana (20%); [REDACTED] (25%) and [REDACTED] (10%).

The petitioner also provided a copy of the U.S. company's Pennsylvania Certificate of Organization. The record also includes a Pennsylvania Enterprise Registration Form which appears to identify the beneficiary as the sole member of the company.

The director denied the petition concluding that record lacks sufficient documentation to establish a relationship between the U.S. and foreign entities.

On appeal, the petitioner emphasizes that "[a]ll of [the petitioner's] exports are sent to Afro Asian International or its clients in Pakistan. Copies of shipping documents submitted already demonstrate the sole purpose of [the petitioning company] is an export entity for its overseas office."

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

The petitioner stated on the Form I-129 that the U.S. company is a branch of the Pakistani entity. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(I)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(I)(1)(ii)(J). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, *supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). If the claimed branch is incorporated in the United States, USCIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

Here, the evidence of record indicates that the petitioner is a Pennsylvania limited liability company and therefore it cannot qualify as a branch office of the Pakistani company. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and

any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Based on the limited evidence submitted, the record indicates that the U.S. company is wholly owned by the beneficiary, while the foreign entity is owned by seven individuals, with the beneficiary owning only a 10 percent interest. While the beneficiary exercises control over the U.S. company by virtue of being its sole owner, the record contains no evidence that he controls the foreign entity. Therefore, the two companies do not share the requisite ownership and control needed to meet the definition of qualifying organizations for the purpose of this classification.

The petitioner's assertion that "the sole purpose of [the petitioning company] is an export entity for its overseas office" is irrelevant, as the petitioner must establish that the two companies share common ownership and control, rather than simply establishing that they have a close business relationship.

Finally, the AAO notes that while it appears that both companies are owned by members of the same family, this familial relationship does not constitute a qualifying relationship under the regulations. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family").

Based on the foregoing, the petitioner has not established that the U.S. and foreign entities have a qualifying relationship. Accordingly, the appeal will be dismissed.

Although the petitioner has not established the requisite common ownership and control, the AAO will withdraw the director's statements regarding the financial viability of the U.S. company and the company's maintenance of physical premises for the operation of the business. The evidence of record establishes that the company is doing business and the petitioner has adequately explained and documented its leasing arrangements on appeal. Therefore, the AAO's finding that the U.S. and foreign entities do not have a qualifying relationship is based solely on the petitioner's failure to corroborate its claims that the company is a branch, affiliate or subsidiary of the foreign entity, and not on a finding that the U.S. company is not doing business as a qualifying organization in the United States.

C. Employment Capacity in the United States

The third issue addressed by the director is whether the petitioner will employ the beneficiary in a primarily managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

The petitioner stated that the beneficiary will serve in the position of director sales and marketing. In a letter submitted in support of the petition, the petitioner described the beneficiary's duties as follows:

1. Establish, develop and maintain high level, professional relationships with U.S. vendors and international customers.
2. Identify and understand customer needs and objectives and prepare bid proposals accordingly.
3. Develop and manage international distributor/agent activities.
4. Develop and achieve sales forecast on timely basis.
5. Negotiate most competitive pricing and terms with vendors.
6. Settle technical details and negotiate commercial contracts with customers.
7. Promote the sale of products (see products line card).
8. Coordinates with vendors and agents to fully satisfy customers regarding their purchase orders etc.
9. Monitor the status of the accounts any conflicts/concerns customers might have.
10. Analyzes and improves the delivery time frame and after sales support terms.
11. Travel to vendors when necessary for product training, contract negotiations and trade shows within the U.S.

12. Handle export process from adhering to EAR (Export Administration Regulations) through to selection of freight forwarding companies
13. Deal with domestic & international banks and also process letters of credits.
14. Prepare and execute agency/distribution rights agreements.
15. Deliver presentations to U.S. vendors and visiting customers
16. Excellent negotiation skills
17. Prepare competitor analysis for products as requested by customers.

The petitioner indicated that the beneficiary's "daily assignments" are the following:

- Check emails and prepare appropriate responses
- Phone calls to customers internationally
- Phone calls to vendors
- Prepare bids
- Prepare purchase orders
- Make purchase decisions and thoroughly investigate market for competitive product offerings
- Research vendors for projects
- Work with letters of credit and liaise with foreign banks, U.S. banks and prepare documentation for letter of credits payment draft upon shipment
- Continuously look for new products and business opportunities along our line of business.

The petitioner stated on the Form I-129 that it has three employees. The petitioner provided an organizational chart depicting the position of president overseeing the positions of "office administration/accounts" and "sales & marketing." The chart did not identify any employees by name.

In the request for evidence issued on June 8, 2010, the director advised the petitioner that the duties described above do not appear to be primarily managerial or executive in nature. The director requested that the petitioner submit a letter from the U.S. company further describing the managerial decisions made by the beneficiary and delineating his typical managerial responsibilities. The director requested that the petitioner provide the number of subordinate supervisors the beneficiary manages, their job duties, and information regarding the amount of time the beneficiary will allocate to managerial/executive duties. Finally, the director requested an organizational chart for the U.S. company.

In a letter dated August 31, 2010, the petitioner stated that the beneficiary "has many major duties and responsibilities that are both Managerial and Non-managerial," and reiterated that he supervises a project manager and an office administrator. The petitioner described the beneficiary's "key managerial" duties as the following:

- To oversee the development, and maintaining professional relationships between US vendors and international customers.
- Feed sales leads from vendors
- Respond to bids from in-term bids
- Prepare bid proposal
- Post bid response and after sales support
- Manage international agent activities
- Address technical issues
- Secure marketing and distribution rights

- Prepare 'lock out' bid specifications
- Develop vendors and product portfolio for exclusive representation
- Authorize purchase orders and negotiate most competitive pricing
- Use proper techniques for organization, staffing and direction of the company's operations
- Look to the future and make assumptions regarding variables or situations that may affect the company's budget plan
- Set goals such as rate of return from sales
- Document the progress of the budget
- Prepare and plan company's budget
- Attend key industry trade shows to meet existing vendors. . . .
- Negotiate letters of credit with domestic banks and terms with foreign customers
- Monitor export procedures and strictly ensure export compliance
- Manage company's budget effectively

The petitioner stated that the beneficiary's "key non-managerial responsibilities" include: developing and achieving the sales forecast; planning and implementing marketing strategy; planning and managing marketing resources according to budget; recruiting, managing training and motivating staff; planning and managing internal communications; managing awareness of company's direction and mission; evaluating employees' performance; and initiating strategies to streamline employees' duties.

The petitioner stated that two employees will "assist with day-to-day operations, administration and special turn-key projects." The petitioner indicated that the office administrator: collects, compiles, evaluates and reports administrative information; oversees quality control of database or spreadsheet information; plans and organizes clerical support activities; prepares budgeting, purchase and expense-related statements; and performs clerical duties. The project manager's duties as described in the record include: "managing day to day operational aspects of a project"; tracking and reporting project budgets and expenses; leading proposal efforts; possessing "understanding in the areas of application programming, database and system design"; and maintaining "awareness of new and emerging technologies and the potential application on client engagements." The petitioner submitted an organizational chart which indicates that the sales and marketing director (the beneficiary's position) oversees the office administrator, project manager, and a consultant. The petitioner has not identified the subordinate employees by name or provided any evidence of salaries, wages or other payments to them.

The director denied the petition finding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner claims to have only two employees in addition to the beneficiary, and failed to establish that he would function at a senior level within an organizational hierarchy, or that he would be engaged in the supervision of subordinate managers, supervisors or professionals.

On appeal, as evidence of the beneficiary's "executive managerial duties," the petitioner states: "The nature of products we deal in is very sophisticated and require a solid technical understanding along with business skills and years of sales experience in the technical education market." The petitioner provides a detailed list of products the petitioner sells in the fields of technical education products, electrical/electronic/telecom testing and measuring instruments, scientific and laboratory equipment and special education equipment for the handicapped. The petitioner emphasizes that the portfolio "requires technical expertise and market knowledge of a highly qualified and experience professional," such as the beneficiary. The petitioner places

particular emphasis on the beneficiary's responsibility for negotiating and securing marketing distribution rights for entire countries and regions. The petitioner states that "preparing bids on international projects small or large requires a qualified experienced manager to review the complex terms and conditions of bid project." Finally, the petitioner states that the project manager, with the beneficiary's guidance, seeks quotations from U.S. vendors and prepares bids according to the beneficiary's guidelines on a case-by-case basis.

Upon review, and for the reasons discussed herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

Here, while the petitioner has provided a detailed description of the beneficiary's duties as director of sales and marketing, the AAO does not agree with the petitioner's characterization of these duties as primarily managerial in nature. Some of the beneficiary's duties, such as his responsibility for negotiation of international distributorship agreements, may require a level of authority commensurate with managerial or executive capacity. However, the petitioner has not established how the majority of the beneficiary's key responsibilities fall within the statutory definitions of managerial or executive capacity. For example, the beneficiary's duties include: "negotiate most competitive pricing and terms with vendors"; "promote the sale of products"; "coordinates with vendors and agents and agents to fully satisfy customers regarding their purchase orders"; "attend product & sales overview training sessions"; monitor the status of the accounts and resolves any conflict/concerns customer might have"; "traveling to vendors when necessary for product training"; "handle export process"; "deal with domestic & international banks and also process letters of credit"; and "deliver presentation to U.S. vendors and visiting customers." The petitioner further stated that the beneficiary's daily assignments including placing phone calls to customers and vendors, preparing bids, preparing purchase orders, making purchase decisions, investigating the market for competitive product offering, researching vendors for projects, preparing documentation for letters of credit, and looking for new products.

Based on the duties described, the beneficiary is directly involved in all operational aspects of the U.S. company and directly performs most of the day-to-day tasks required for it to operate, rather than delegating such non-managerial tasks to his claimed subordinates. The AAO acknowledges the petitioner's assertion that the petitioner's products are technically sophisticated and that the knowledge required to operate in the industry is complex. However, the petitioner has not explained how the technical sophistication of the

products elevates the beneficiary's sales, market research, product sourcing and export-related duties to the level of a manager or executive. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because many, or even the majority, of the beneficiary's daily tasks, as outlined above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO notes that when the director advised the petitioner that the initial description of the beneficiary's major duties and responsibilities and "daily assignments" did not appear to be primarily managerial or executive in nature, the petitioner responded by simply altering the position description with providing any explanation for the alterations. For example, in responding to the RFE, the petitioner de-emphasized the beneficiary's actual daily involvement in preparing bids and purchase orders, making phone calls to customers and vendors, making purchase decisions, researching vendors and products, preparing letters of credit and promoting the sale of products, and suggested that he has oversight authority in these areas. 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). When responding to a request for evidence, 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 its 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'r 1978). Based on the petitioner's unexplained changes to the initial detailed list of duties submitted, the AAO finds the initial position description most credible. As discussed above, that description falls significantly short of establishing that the beneficiary would be employed in a qualifying managerial or executive capacity.

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 stated on the Form I-129 that it has three employees. At the time of filing, the petitioner submitted an organizational chart depicting a president, a sales and marketing position and an office administrator/accounts employee. In response to the RFE, the petitioner indicated that the organization is headed by the director of sales and marketing (the beneficiary's position), who supervises an office administrator and a project manager. The petitioner also submitted an organizational chart which included a "consultant" position, but it has offered no additional explanation or evidence regarding this position. The petitioner has not identified any subordinate by name or provided evidence of wages or other payments to any employees other than the beneficiary. 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)).

Even if the petitioner had submitted corroborating evidence of its employment of a project manager and office administrator, the evidence of record would be insufficient to establish that such employees relieve the beneficiary from performing primarily non-qualifying duties. The office administrator is described as performing clerical, administrative and some routine financial tasks. However, the job description provided for the project manager is not credible in light of the nature of the petitioner's business as described in the record. The duties attributed to the project manager appear to be those performed by a project manager in an IT services company. The petitioner did not indicate how this employee would relieve the beneficiary from performing market research, product sourcing, purchase and export-related activities related to the petitioner's core business of distributing technical and scientific educational products.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a nonimmigrant visa to an multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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).

Here, the petitioner indicates that the beneficiary, as director of sales and marketing, has two direct subordinates. Neither of the subordinates has been named in the record and the petitioner has not provided any evidence to corroborate the number of employees claimed on the petition. Further, neither of the subordinates' duties, as described in the record, relate to the core business functions that have been attributed to the beneficiary. As such, the petitioner has not established how the subordinates will relieve the beneficiary from performing non-qualifying duties associated with the operation of the business, the majority of which the petitioner has specifically assigned to the beneficiary.

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). Here, the record indicates that the beneficiary's duties are comprised primarily of non-managerial and non-executive tasks; therefore, he cannot qualify for the beneficiary sought regardless of his supervision of subordinate staff or performance of some qualifying managerial or executive duties.

The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his 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. 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 Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

The petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or primarily executive capacity. Accordingly, the appeal will be dismissed.

D. The Beneficiary's Maintenance of Nonimmigrant Status

The remaining issue addressed on appeal is whether the director erred by finding that the beneficiary was not maintaining a valid nonimmigrant status as of the date of filing. Specifically, the petitioner asserts that "the beneficiary was in status and delayed filing was accepted due to extreme hardship." The petitioner suggests that the fact that the director issued an RFE in this matter indicates that USCIS did in fact consider the beneficiary to be in status as of the date of filing.

The regulation at 8 C.F.R. § 214.2(1)(15)(i) states the following, in pertinent part, with respect to requests for extensions of stay:

In individual petitions, the petitioner must apply for the petition extension and the alien's extension of stay concurrently on Form I-129. . . . Even though the requests to extend the visa petition and the alien's stay are combined on the petition, the director shall make a separate determination on each.

The regulation at 8 C.F.R. § 214.1(a)(3)(1) provides that every nonimmigrant alien who applies for admission to, or an extension of stay in, the United States, must establish that he or she is admissible to the United States, or that any ground of inadmissibility has been waived under section 212(d)(3) of the Act. There is no appeal from the denial of an application for extension of stay filed on Form I-129. 8 C.F.R. § 214.1(c)(5).

However, as the director addressed this issue in the decision denying the Form I-129, the AAO will briefly address the petitioner's claim. As the director is required to enter separate determinations regarding the beneficiary's eligibility for classification as an L-1A nonimmigrant and his eligibility for an extension of his nonimmigrant status, the fact that USCIS accepted and adjudicated the petition does not establish that USCIS made a favorable determination regarding the beneficiary's maintenance of nonimmigrant status.

The record shows that the beneficiary's previously granted H-1B status had an expiration date of July 27, 2009, more than eight months prior to the filing of the instant petition. The beneficiary has conceded that he last worked for the petitioning H-1B employer in September 2007, and that he has worked for the petitioning company since February 2007 without requesting any change or amendment in nonimmigrant status that would allow him to accept employment with a new employer. This issue is not properly before the AAO, and the director's determination that the beneficiary was not maintaining a valid nonimmigrant status at the time of filing will not be disturbed.

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving

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

ORDER: The appeal is dismissed.