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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**



17

DATE: **FEB 03 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:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, Vermont Service Center, denied the nonimmigrant visa petition and affirmed his decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this 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, a Delaware corporation, states that it is an Internet publisher and a subsidiary of Times Internet Limited, located in India. 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 executive manager for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The petitioner subsequently filed a motion to reconsider. The director granted the motion but affirmed his decision to deny the petition.

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 cites unpublished AAO decisions in support of his assertion that the beneficiary is primarily performing executive or managerial duties despite the small size of the U.S. company. Counsel further relies on a 2004 USCIS memorandum to support his assertion that the director should have given deference to the prior approval the L-1A petition filed on behalf of the beneficiary by the same employer. *See* Memorandum of William R. Yates, Assoc. Dir. Operations, "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity," (April 23, 2004).

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. The Issue on Appeal

The sole addressed by the director is whether the petitioner established that the U.S. company 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 filed the Form I-129, Petition for a Nonimmigrant Worker on October 1, 2008. The petitioner indicated its intent to employ the beneficiary as the executive manager of its Internet publishing business, and reported that the company had two employees and gross annual income of \$1.5 million at the time of filing.

In a letter accompanying the petition, counsel for the petitioner described the nature of the U.S. company's business as follows:

[The petitioner] is authorized to act as a liaison to locate and develop new business in the [United States]. [The petitioner] will also be looking in other areas for diverse business opportunities other than Media etc. The US subsidiary will locate new products for the Indian market and will provide quality products to India market that will help Indian customers to get sophisticated American know how and other fields.

With respect to the beneficiary's role as executive manager of the U.S. entity, counsel stated:

[The beneficiary] is working more than 50 Hrs per week. The beneficiary is supervising the hiring of all senior level personnel for the various departments to establish [the U.S. company] as a working business entity. The beneficiary is spending time meet [*sic*] other

related business houses. The beneficiary is also responsible for ongoing client servicing activities.

Counsel indicated that the beneficiary would oversee three departments, including personal and general administration, market development, and accounting. Specifically, counsel noted that the petitioning company will hire a part-time general administration and personal manager, two marketing and development officers, a personal secretary for the beneficiary, and a CPA. Counsel stated that "for the time being," the beneficiary "will be responsible for the day-to-day management, marketing, and administration as well as client negotiation."

The director issued a request for additional evidence ("RFE") on October 9, 2008, in which he requested, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties including a breakdown of the number of hours devoted to his job duties on a weekly basis; (2) a list of all U.S. employees, along with their names, job titles and complete job descriptions; (3) information regarding the number of subordinate supervisors the beneficiary manages and their job duties; and (4) evidence of wages paid to employees including copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for 2007 and 2008.

In a response dated January 2, 2009, counsel for the petitioner provided the following description of the beneficiary's role as "Senior Manager, North America":

As Senior Manager, [the beneficiary] will spearhead [the petitioner's] relationship building with global and US based accounts. He will, based on his understanding of Asian Indian community as a demographic group, solicit and develop relationships with business clients wanting to reach out to [the company's] primary audience – The Asian Indian community worldwide.

He will maintain and further develop [the petitioner] and other group properties market share. He will describe the potential business opportunities that the Asian Indian audience present[s] as consumers and how [the petitioner] will enable the client to reach that audience. . . .

He will develop and manage a hard charging sales organization, manage the roll out of all interactive advertising, promotion and custom revenue generating programs, while laying groundwork to prospect, present, propose, close, renew and service new and existing accounts. He will work to find synergies in account relationships that can extend around the world. Finally, providing the team and the Board with regular, timely forecasts, feedback, and reports on competitive evaluation and front line field intelligence.

. . . As Senior Manager, he will be responsible for developing sales and marketing strategies, setting and accomplishing sales targets in the primary areas of Advertising, which is in line with his education and experience. In shaping the strategy and forming the partnerships necessary to ensure the success of the company, he is responsible to identify desirable strategic partners in such key areas as content, distribution, communication and e-commerce. He will define and execute strategies for building convergence relationships. Understanding

of each partner's media goals, their role and position in the industry, basic value propositions in business partnerships, and the ability to work creatively to structure deals to satisfy [the company] and its business partners is essential. He will assist to identify and pursue strategic opportunities, negotiate terms and language to govern relationships and manage these business relationships after closing the deal. The strategic imperatives for the position are:

1. Create, nurture and manage revenue streams to predictably meet sales and business development targets, through advertising and sponsorships, offline and online content syndication and sales, e-commerce partnerships
2. To maintain and further develop market share through advertising and other activities
3. To launch and develop new products and brands.

The petitioner provided a list of three employees, including a product development employee who is responsible for: research on customer needs, brainstorming, input to product development, project planning and timely implementation and research on UGI. The second employee named is a business development employee responsible for: projection on reach and revenue, strategic alliances, online and offline partnerships and hiring as and when needed.

Finally, the petitioner indicated that it employs a sales, advertising and marketing employee who is responsible for: process definition, media buyer alliances, direct sales, advertising format input, hiring as needed, media plan, development of creatives, execution of media plan, billing, payment disbursement, payment collection, coordination with accountant, making payments, customer service and hiring as needed.

The petitioner submitted a copy of its 2007 IRS Form 1120, U.S. Corporation Income Tax Return, for the tax year ended on March 31, 2008. The petitioner reported gross sales of \$160,302 and payment of \$113,045 in salaries and wages.

The petitioner also submitted copies of its Forms NYS-45, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return, for the first three quarters of 2008. The petitioner reported two employees for each month of the first two quarters, and one employee during each month in the third quarter. Nevertheless, all three quarterly wage reports indicate the company's employees as the beneficiary and [REDACTED] who the petitioner identified as its product development employee.

The director denied the petition on January 13, 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. In denying the petition, the director observed that one of the beneficiary's primary duties is that of direct sales, and the petitioner failed to provide the requested breakdown of his responsibilities, such that it could be determined whether he performs primarily qualifying duties. Further, the director noted that the record did not clearly establish that the business has grown in size and scope to the extent that it requires the services of an L-1A manager or executive. The director noted that the job descriptions submitted for the claimed subordinate staff also failed to include the requested breakdown of responsibilities.

The petitioner subsequently filed a motion to reconsider. On motion, counsel for the petitioner reiterated the job description submitted in response to the RFE, but also added the following:

- Manpower planning/supervision (includes hiring/firing and training) – 40%
- Business Planning/Strategic direction to India team for International expansion – 30%
- Business Development/Partnerships/Sales, Administration – 30%
- Develop the organization's market share through innovative initiatives focused on the customer
- Create, nurture and manage revenue streams to predictably meet sales and business development targets, through advertising and sponsorships, offline and online content syndication and sales, e-commerce partnerships.
- To maintain and further develop market share through advertising and other activities
- To launch and develop new products and brands
- Identify desirable strategic partners in areas such as content, distribution, communication and e-commerce
- To manage and motivate team members to enable a performance oriented culture
- Develop systems and processes to prospect, present, propose, close, renew and service new and existing accounts
- Provide the management team with regular timely forecasts, feedback, and reports on competitive evaluation and front line intelligence.

Counsel emphasized that, due to the nature of the petitioner's business, which is internet based marketing, it does not require "a huge human resource." Finally, counsel cited to the above-referenced Yates memorandum, and emphasized that a prior approval should be given deference absent evidence that there has been a material error with regard to the initial approval, a substantial change in previous circumstances, or discovery of new material adverse information.

On July 16, 2009, the director affirmed his decision to deny the petition, concluding that the newly submitted job description failed to establish that the beneficiary's duties are primarily managerial or executive in nature.

On appeal, counsel for the petitioner reiterates that the beneficiary devotes 40 percent of his time to manpower planning and 60 percent of his time to "business planning, business development, sales and administration." Counsel cites to several unpublished AAO decisions to stand for the proposition that "overseeing a corporation and its employees is a functional managerial position even when subordinate employees are not professionals and they are no[t] mid-level supervisors." Counsel asserts that the beneficiary's three subordinates in this case are in fact "professionals dealing with Sales, Marketing, Product and Business development, Advertising Sales, accounting and Business Administration."

In addition, counsel contends that the beneficiary's duties "are clearly involving major executive decisions on a day to day basis." Specifically, counsel states that "beneficiary is responsible for marketing, developing marketing strategy and managing the business." Counsel reiterates that the petitioner's business is primarily internet based marketing and does not require "a huge human resource," as much business is handled through phone calls and e-mail. Finally, counsel asserts that the policy set forth in the 2004 Yates memorandum

requires deference to the previous L-1A approval absent a finding that the initial petition was approved in error, that there has been a significant change in circumstances, or discovery of adverse information.

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. Therefore, the director properly denied the petition and upheld the denial on motion.

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 either in an executive or 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 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 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"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioning entity in his role as executive manager for the petitioner, the petitioner has failed to demonstrate that his day-to-day duties will be primarily managerial or executive in nature.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(C), the petitioner was required to submit a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. At the time of filing the petition, counsel indicated that the beneficiary, "for the time being is responsible for the day-to-day management, marketing and administration as well as client negotiation" for the U.S. company," as well as hiring senior level personnel for the various departments, meeting with "other related business houses," and holding responsibility for "ongoing client servicing activities." This brief description fails to provide any meaningful insight into what the beneficiary primarily does on a day-to-day basis as the senior manager of the petitioner's Internet publishing business. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

In addition, at the time the petition was filed counsel described the petitioner's hiring plans in projected terms, noting that the beneficiary "will hire" the proposed staff listed. Based on this initial position description, and the fact that the petitioner indicated on the Form I-129 that the U.S. company had two employees as of October 1, 2008, it would be reasonable to conclude that the beneficiary, while responsible for the management of the company, was also performing the administrative, marketing, sales, client services, and other non-managerial functions of the company on a day-to-day basis as the company was not yet staffed. 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).

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. While the AAO does not doubt that the beneficiary was transferred to the United States with managerial authority over the new office, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial under the extended petition. The director specifically requested a comprehensive description of the beneficiary's duties with a breakdown of the number of hours he would devote to specific tasks on a weekly basis. While the petitioner submitted a lengthier position description in response to the RFE, it did not include the requested breakdown. 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). This failure of documentation is important because the job description at the time of filing the petition suggested that the beneficiary performs tasks that do not fall under traditional managerial or executive duties as defined in the statute. Therefore, the petitioner's description of the beneficiary's job duties did not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

On motion, the petitioner submitted a list of eleven duties to be performed by the beneficiary, but opted to assign percentages to only three of the duties. If the beneficiary devotes 100 percent of his time to "manpower planning/supervision," "business development/partnerships/sales, administration," and "business planning/strategic direction to India team," it is unclear why the petitioner included the eight other duties or how much time the beneficiary devotes to them. While the director questioned whether the beneficiary would actually devote 40 percent of his time to manpower planning and supervision, the AAO notes that the description as a whole is lacking in detail and failed to include the level of specificity that was requested by the director in the RFE. For example, the petitioner offered no concrete description of what tasks the beneficiary would perform to "launch and develop new products and brands" or "maintain and further development market share." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel

managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Therefore, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner indicated at the time of filing that the U.S. company employs two workers. In response to the RFE, the petitioner indicated that it employs [REDACTED] Product Development; [REDACTED] Business Development; and [REDACTED] Sales and Advertising and Marketing. The record contains no evidence of salaries, wages or any other payments made to [REDACTED] despite the director's request that the petitioner provide evidence of wages paid to all employees or otherwise identify their source of remuneration. 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)).

Of the beneficiary's claimed subordinates, only [REDACTED] listed on the petitioner's state quarterly wage reports for the first three quarters of 2008. In addition, although [REDACTED] is named on the report for the third quarter of 2008, the petitioner also indicated that it had only one employee in each month (July through September) during the quarter, so there is some question as to whether she was employed by the company on October 1, 2008 when the petition was filed. Nevertheless, based on the evidence submitted, the beneficiary had, at most, one subordinate at the time of filing.

The petitioner describes [REDACTED] duties as "research on customer needs, brainstorming, input to product development, project planning, and research on UGI." Though requested by the director, the petitioner did not provide the level of education required to perform the duties of [REDACTED] product development position. Again, any 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). Thus, the petitioner has not established that this individual possesses or requires a bachelor's degree, such that she could be classified as a professional.¹ Nor has the petitioner shown that this employee supervises subordinate staff members or

¹ In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968);

manages a clearly defined department or function of the petitioner, such that she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary supervises and controls supervisory, professional, or managerial staff, as required by section 101(a)(44)(A)(ii) of the Act

On appeal, counsel cites several unpublished AAO decisions to support his claim that the beneficiary qualifies as a function manager or executive. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. 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 term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description that clearly describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties, 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).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner has not clearly articulated a claim that the beneficiary manages an essential function of the petitioning organization or identified the essential function and the duties the beneficiary performs related to such function. Referring to an unpublished decision, counsel states that "overseeing a corporation and its employees is a functional managerial position." The claim consists solely of counsel's unsupported assertion that the beneficiary qualifies as a function manager. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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, as discussed above, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, and thus cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Matter of Shin, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of 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 the petitioner has established that the beneficiary maintains authority over the U.S. company as senior manager for North America, the record does not support a finding that the beneficiary's role is focused primarily on the broad goals and policies of the organization. Rather, the petitioner's initial description of the beneficiary's duties indicates that he is involved in the sales, marketing, client servicing and administrative aspects of the business, rather than delegating such functions to subordinate or external personnel, who, according to the petitioner, had yet to be hired.

Pursuant to section 101(a)(44)(C) of the Act, an individual shall not be considered to be acting in a managerial or executive capacity merely on the basis of the number of employees that the individual supervises or directs. As discussed above, the petitioner indicated at the time of filing its need to hire an administration manager, marketing and development officers, a secretary and accounting staff. The petitioner also indicated that the beneficiary is responsible for marketing, administration, client negotiation and ongoing client servicing activities. Collectively, the fact that the beneficiary had only one subordinate at the end of the first year of operations brings into question how much of the beneficiary's time could actually have been or would be devoted to managerial or executive duties.

Counsel correctly observes 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, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

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 predominantly managerial or executive position.

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

Finally, the AAO acknowledges counsel's argument that the instant matter is a request for an extension of the beneficiary's previously approved L-1A classification petition under the policy outlined in the Yates memorandum. Counsel's reliance on the Yates memorandum and contention that deference should be given to the prior approval are not persuasive. First and foremost, the memorandum specifically states that it does not apply to L-1 new office extension petitions like the case at hand. Memo at p.2, fn. 1. In the prior petition, the petitioner indicated that it was a new office, and the petition was adjudicated under the relevant regulations for new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). In the present matter, the petitioner is no longer a new office, and the regulation at 8 C.F.R. § 214.2(l)(3)(v) does not apply. As the petitioner is requesting a first extension after the opening of a new office, the petitioner must now satisfy its burden under the regulation at 8 C.F.R. § 214.2(l)(14)(ii) in order to establish eligibility. Accordingly, the fact that the petitioner is no longer a new office, and is now requesting a first extension after opening a new office, represents a changed circumstance. In fact, the director had a duty to carefully examine the present petition and render a full adjudication, as the petitioner has new regulatory requirements in the present proceeding that did not apply to the prior petition. *See* 8 C.F.R. § 214.2(l)(14)(ii). The Yates memorandum does not apply to new office extensions. The director's close analysis and detailed request for evidence were appropriate in light of the referenced memorandum and the petitioner's evidentiary burden.

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.