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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

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07

DATE: JAN 03 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:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Delaware corporation, states that it operates a security company. It claims to be an affiliate of [REDACTED]. The beneficiary was previously granted L-1A status for a period of one year, from January 2008 to January 2009, to open a new office in the United States, and the petitioner now seeks to extend his status so that he may continue to serve in the position of [REDACTED].

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Although not a basis for the director's decision, the director also noted that the evidence "is not clear if the United States entity actually physically exists." The director noted in his decision that "the instant petition is a first request for an extension for a new office." However, the AAO notes that a review of CIS records indicates that a Form I-129 petition ([REDACTED]) filed by the same petitioner for the same beneficiary and represented by the same attorney was denied on November 14, 2008, and notice of the denial was sent on November 21, 2008, approximately one month prior to the filing of the present petition for the same requested benefit on December 30, 2008. The AAO observes that the petitioner did not acknowledge the prior denial under Part 4, Item 8.b. on the Form I-129, and instead answered the question as "N/A" (not applicable). There is a single sheet of paper in the record that makes a parenthetical reference to the denial of [REDACTED]; however, neither counsel nor the petitioner provided any statement regarding the unfavorable decision on the previous extension petition.

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 record demonstrates that [the beneficiary] serves in an executive and managerial capacity." Counsel suggests that the director based his decision on factual inaccuracies and conclusions not supported by the record. 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.

II. The Issue on Appeal

The issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 29, 2008. The petitioner indicated on the Form I-129 that it is operating a security company with four employees and a projected gross annual income of \$725,000. The petitioner stated that the beneficiary performs the following duties:

Responsible for managing the U.S. operations and coordinating all necessary requirements from our parent company. Determine and formulate all policies and provide overall direction for our company. Responsible for all operational activities at the highest level of management, and oversees administration, accounting oversight support and personnel management. Directs and coordinates financial and budget activities to ensure continuing operations, to maximize returns on investments, and to increase parameters. Create a security

plan and security procedures for all clients and ensure the security activities meet all relevant standards, regulations and local laws. Implement the same quality procedures, workflows, relevant documentation, common language, definitions and global group culture, in respect to security, [REDACTED] Formalize, establish, coordinate, assess and review all core elements of security activities for each individual client in the U.S. Oversee the day-to-day operations of the company and our personnel, specifically the heads of our executive protection and physical protection divisions, who are each responsible for the day-to-day management of all security personnel and body guards in their respective divisions. Exercise discretion and has full authority for hiring and firing of employees and regularly evaluates each employee's performance to assure that the established protocol and procedures are being followed. Responsible for reviewing and updating contracts with clients, as needed. Establish a wide network of connections to facilitate our security services in the U.S., including representatives from the New York Police Department (NYPD) in the relevant districts, local security companies, fire protection, safety and emergency providers. Closely supervise all activities in the U.S. and when clients bring our services abroad, such as providing VIP Guards while escorting executives overseas and shipping valuables. Negotiate with each and every client, and keep apprised of all services to assure the best quality performance and benefits to our clients. Responsible for business development and locating adequate security and intelligence partners, as needed, in the U.S. Create and maintain effective communication between all relevant departments in the U.S. and Israel.

The petitioner submitted a letter in support of the petition and stated "[s]ince [REDACTED] is majority owned by [REDACTED] the appropriate relationship exists for intra-company transfers. A copy of the U.S. Stock Certificate is enclosed as evidence of common ownership." The petitioner also submitted a single stock certificate dated August 2, 2007 certifying that "[REDACTED] is the owner of TEN fully paid and non-assessable shares of [the petitioner]" (emphasis added).

The letter in support of the petition also described the beneficiary's daily work duties as follows:

- Marketing [REDACTED] services in the U.S. to bring in new business. (Approx 40%)
- Establishing the goals of [REDACTED] in the U.S. (Approx 15%)
- Supervising the Office Manager and the Chief Financial Officer. (Approx 15%)
- Overseeing/managing/providing guidance to the operations of the Physical Protection division. (Approx 15%)
- Overseeing/managing/providing guidance to the operations of the Executive Protection division. (Approx 10%)
- Overseeing/managing/providing guidance to the operations of the Data Security and Security Engineering divisions. (Approx 5%)

The director issued a request for additional evidence ("RFE") on April 10, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) a copy of the Certificate of Incorporation for the U.S. company; (2) a copy of the Articles of Incorporation for the U.S. entity including all amendments to the original document; (3) documentary evidence that shows that the U.S. company has acquired leased premises of sufficient size to conduct business; (4) original photographs of the interior and exterior of the premises secured for the U.S.

entity; (5) copies of the 2007 and 2008 U.S. federal income tax returns for the U.S. company, with all schedules and attachments; (6) photographs of the interior and exterior of the premises occupied by the foreign entity; (7) a list of all employees in the U.S. company, including a brief description of their duties, education, immigration status, and salary; and (8) evidence documenting the number of contractors utilized and the duties performed, including copies of all contracts.

In response to the RFE, the petitioner submitted the Certificate of Incorporation indicating that "[t]he total number of shares of stock which the Corporation shall have authority to issue is 100 shares of common stock, \$.01 par value." Additionally, the petitioner submitted a U.S. Corporation Income Tax Return for 2008. At Schedule A, question 3, which asks the petitioner for "cost of labor," the petitioner failed to declare any contract costs for 2008. Schedule E, Compensation of Officers, lists the beneficiary as an officer of the petitioner and states that he owns "100%" of common stock of the corporation. Schedule K, question 3 asks "is the corporation a subsidiary in an affiliated group or a parent-subsidiary controlled group?" The answer marked is "no." Question 4a asks "did any foreign or domestic corporation, partnership (including an entity treated as a partnership), or trust own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote?" The answer marked is "no." Question 4b asks "did any individual or estate own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote?" The answer marked is "yes" and the completed information lists the beneficiary, his U.S. social security number, his country of citizenship "Israel" and "100%" as his "percentage owned in voting stock." Question 7 asks "at any time during the tax year, did one foreign person own, directly or indirectly, at least 25% of (a) the total voting power of all classes of the corporation's stock entitled to vote or (b) the total value of all classes of the corporation's stock?" The answer marked is "no." Schedule L, question 22 asks for the equity amount of "capital stock." The answer indicated for "common stock" is \$100. The petitioner also submitted Form W-2 Wage and Tax Statement 2008 for five employees including the beneficiary. The petitioner failed to submit any U.S. income tax documentation for the 2007 calendar year as requested.

The petitioner was asked to submit a copy of the lease for its physical premises. The petitioner submitted an Identity Plan Agreement with [REDACTED] stating "[c]lient agrees to pay [REDACTED] [...] in consideration of the following services: A monthly allocation of furnished office or conference room use as specified in [REDACTED] price list." The petitioner also submitted photographs of an unidentified office space containing barren offices with only a desk, chairs, and a telephone. There is a photograph of a reception area with a woman answering a telephone, but this person is not identified and it is unknown if she is an employee of the petitioner. The director addressed this issue briefly in his decision stating "you have failed to provide evidence in the form of exterior photographs and interior office photographs to indicate that it is indeed the domestic business entity. Therefore, it is not clear if the United States entity actually physically exists." In contrast, the AAO notes that the photographs submitted for the foreign company demonstrate "lived-in" premises where employees appear to be working, desks are cluttered with documents and files, and offices have been personalized.

The petitioner submitted an organizational chart that lists the beneficiary as [REDACTED] and five direct subordinates: one Office Administrator, one Division Manager- Executive Protection/Body Guard, one Division Manager- Physical Protection, one Deputy Officer in Charge- Data Security, Planning, Research and Analysis, and one person (no title) for Security and Safety, Travel Advisory and Emergency Services. The petitioner provided a

brief description of each subordinates' duties along with their educational background and status in the U.S. The organizational chart also lists five outsourced employees through [REDACTED] and another outsourced task to [REDACTED]. The petitioner submitted a Service Agreement dated December 30, 2008 (the date of filing of the I-129) with [REDACTED]. The AAO notes that the signature page of the agreement calls for a signed date; but the date is not complete. The petitioner also submitted a Consulting Agreement dated August 19, 2008 with [REDACTED]. The agreement states "[t]he term of this Agreement shall commence as of the date of this Agreement and continue until September 15, 2008" (not even 30 days from the commencement date). A proposal by [REDACTED] dated April 20, 2009 is also in the record, but it is not a signed contract.

In the denial, the director stated that the petitioner had not provided a breakdown of the time spent by the beneficiary performing subordinates' duties; however, the record reflects that this information was provided by the petitioner with the initial petition and a more elaborate breakdown in response to the RFE. The petitioner lists the beneficiary's duties as follows:

1. Plan, organize and direct all aspects of the company, including organizational structure, establishing company policies and goals, making key personnel decisions, review key subordinate business decisions, identify areas for business expansion (approximately 25% of daily time);
2. Approve business strategy for the various divisions in [REDACTED] including allocation of resources (approximately 10% of daily time);
3. Overseeing the marketing and research of new markets and customers for [REDACTED] services in the U.S. (approximately 10% of daily time);
4. Establishing annual goals and objectives of [REDACTED] in the U.S. (approximately 10% of daily time);
5. Manage key personnel to assure that [REDACTED] personnel policies and procedures are fully being conformed with. Communicate with and direct company managers to ensure synergy between company divisions (approximately 10% of daily time);
6. Raise capital and resources for development and marketing of additional services, including, physical defense and intelligence mining development fields, as discussed at recent executive board meeting (approximately 10% of daily time);
7. Establishing a network of connections to facilitate and promote the security services that Gadish is providing. Identify additional business market segments. Develop and lead in creating a "Security Concept" for various new market segments (approximately 5% of daily time);
8. Attend, participate and lecture at international security forums and conferences, such as The Institute of Defense and Strategic Studies in Singapore, Security Asia, The Nigerian Cybercrime Working Group, the Office of the National Security Advisor, and other global conferences (approximately 5% of daily time);
9. Research purchasing existing security company(s) that have specific valuable knowledge in the security field to raise [REDACTED] image and value (approximately 5% of daily time);
10. Assisting with the negotiation and execution of service contracts with clients and contract employees (approximately 5% of daily time);

11. Preparing a yearly budget and prudently manage resources to ensure that the expenditures do not exceed the budget's parameters (approximately 5% of daily time).

As the [REDACTED], [the beneficiary] is responsible for managing the U.S. operation's activities, and overseeing the administration, accounting oversight support and personnel management. As the only executive working in the U.S. office, he has full discretionary authority over the day-to-day operations of [REDACTED] and its' [sic] personnel. He reports directly to the Managing Director of [REDACTED]

The director denied the petition on July 10, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition.

In support of the appeal, Counsel submits a brief in which he asserts, "[t]he record demonstrates that [the beneficiary] serves in an executive and managerial capacity. The denial is based on factual inaccuracies and conclusions not supported by the record." The only new evidence provided on appeal is a copy of the beneficiary's resume and educational documents; all other evidence was previously submitted by the petitioner and contained in the record.

Discussion

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. 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, or is otherwise not sufficiently operational, the petitioner is ineligible by regulation for an extension. In this matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

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

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

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* 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 AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its CEO. However, 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 owns and 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").

The petitioner provided several versions of the beneficiary's duties, each elaborating on the previous version. In the final breakdown of the beneficiary's duties, the petitioner describes the beneficiary's duties in very broad terms, noting he will "[e]stablish annual goals and objectives of ██████ in the U.S.," "[p]lan, organize and direct all aspects of the company," "ha[ve] full discretionary authority over the day-to-day operations of ██████ and its' [sic] personnel," "[a]pprove business strategy for the various divisions in ██████" and "[m]anage key personnel to assure that ██████ personnel policies and procedures are fully being conformed with." 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his 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 time on non-qualifying duties. 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).

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

Furthermore, the petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted a

proposed organizational chart depicting two tiers of proposed managerial employees¹ supervising a staff of contractors, the petitioner has not shown how it would support this staffing structure. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, 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).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

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).

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the

¹ As requested, the petitioner submitted the immigration status information for two of the beneficiary's subordinates, stating that they were each in LIB status. However, USCIS records indicate that one of the subordinates' LIB status was revoked on June 8, 2010 (██████████) and the other expired on October 14, 2010 (██████████). The petitioner has not filed subsequent petitions for either employee. The fact that two of the beneficiary's second tier management employees are no longer authorized to work in the U.S. casts doubt on the validity of the organizational chart and the lists of the beneficiary's duties submitted by the petitioner.

function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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 operational tasks 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.* The beneficiary has not been shown to be employed in a primarily managerial or executive capacity under the extended petition. The AAO concurs with the director's determination that the petitioner has not grown to the point where the beneficiary is primarily engaged in managerial or executive duties. Accordingly, the appeal will be dismissed.

III. Qualifying Relationship

Beyond the decision of the director, the petitioner's Internal Revenue Service (IRS) Form 1120 corporate tax returns reveal that it is not a subsidiary and is not affiliated with any other entity. The tax returns further indicate that the petitioner is wholly owned by the beneficiary, thus directly contradicting the claim that it is a subsidiary of a foreign entity. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). Furthermore, willful misrepresentation in these proceedings may render the beneficiary inadmissible to the United States. Section 212(a)(6)(C) of the Act.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. For these additional reasons, the appeal must be dismissed and the petition denied.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

IV. Physical Premises

Beyond the decision of the director, another issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner has submitted a copy of its lease; however, the document submitted is not a lease for a physical office, but a lease for a virtual office. In this matter, the petitioner has not described its anticipated space requirements for its security business and the lease in question does not specify the amount or type of space secured. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. For this additional reason, the petition may not be approved.

V. 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.