



U.S. Citizenship
and Immigration
Services



D7

DATE: NOV 28 2012 Office: CALIFORNIA 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 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, California 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 an 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 California corporation, operates a solar energy systems business. It states that it is an affiliate of [REDACTED] located in Israel. The beneficiary was previously granted L-1A status for a period of one year to open a new office in the United States, and the petitioner now seeks to extend his status for three additional years so that he may continue to serve in the position of owner/chief executive officer.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erroneously concluded that the beneficiary's role is comprised primarily of marketing tasks. Counsel contends that the beneficiary's duties and level of authority are consistent with the statutory definitions of managerial or executive capacity.

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.

The sole 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.

II. FACTS AND PROCEDURAL HISTORY

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129), on May 26, 2010. The petitioner stated on the petition that it has three employees. In a letter dated May 24, 2010, the petitioner described the U.S. company as a "world leader in the solar energy industry," and stated that its business model includes "research and development, innovative sales and marketing strategies, as well as a complete line of educational and installation services for residential and commercial clients."

The petitioner explained that the U.S. company is serving as a subcontractor for three construction companies while it awaits the issuance of its own contractor license. The petitioner noted that it is the exclusive provider of solar panel development for each project, and stated that it had a total of seven working contracts at the time of filing. The petitioner described the beneficiary's duties as president of the company as the following:

As the President, [the beneficiary] will continue to manage, develop and direct [the U.S. company] to ensure that all relevant business operations are continuously monitored as well as practiced and maintained. We believe that [the beneficiary's] continued assignment will enhance our company's competitiveness by assuring the cross-fertilization of ideas and skills between our employees in both the parent company in Israel and the U.S. branch.

Moreover, as the President of the U.S. Branch, he will continue to secure that the company develops as per the proposed business plan and goals to remain competitive in the market in the United States.

Additionally, [the beneficiary] will continue to ensure smooth transition, stable and time-tested implementation of corporate policies. Additionally, he will continue to implement and oversee the overall Advertising, Marketing, Inventory System, Quality Assurance/Control, Supplies and other Services of the business.

In terms of human resources management, [the beneficiary] will conduct performance reviews and ensure that the staff and crew will follow corporate procedures and policies. He will likewise exercise direct supervision over the key employees of our branch, and he will have the authority to implement personnel actions with the aforementioned employees such as hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals.

The petitioner stated that the company has three employees, including the beneficiary. The other two employees identified on the company's organizational chart are a [REDACTED], and an [REDACTED]. The organizational chart lists open positions for two sales representatives and an office receptionist. The petitioner further stated that the beneficiary is in the process of hiring five employees including sales positions, a marketing manager, and a receptionist. It provided a copy of a job listing posted on May 10, 2010, as well as resumes received from applicants.

The petitioner provided copies of IRS Forms W-4, Employee's Withholding Allowance Certificate, completed by the two employees hired in April 2010, along with a payroll journal for the pay period ending on May 21, 2010.

The director issued a request for additional evidence (RFE) on July 19, 2010, in which she instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties, including the percentage of time spent in each of his specific duties; (2) a detailed organizational chart for the U.S. company; (3) a list of all U.S. employees indicating their names, job titles, beginning and end dates of employment, wages per week, immigration status and source of remuneration; and (4) if the petitioner claims that the beneficiary is employed in an executive capacity, a list of the specific goals and policies the beneficiary established, a list of his discretionary decisions, and a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a letter dated August 9, 2010, the petitioner provided the following position description for the beneficiary:

- As the senior level position in the U.S. operations, [the beneficiary] will be responsible for expanding, organizing, directing and developing the business capabilities. (50% of time dedicated to this task)
 - Responsible for reviewing activity reports and financial statements to determine progress and status in attaining goals.
 - Direct and coordinate formulations of financial programs to provide funding for new and continuing clients to maximize returns and generate more income.

- Set up & maintain a solid framework for the growth of the U.S. operation and to acquire intensive contracts in the United States in order to identify strategic partners and new distribution venues.
- Manage and direct staff to ensure long-term growth of the company by overseeing development of marketing and sales strategies as well as overseeing on-going sales and purchasing training.
- As CEO, [the beneficiary] will have discretionary authority in all administrative, marketing, financial and personnel decisions. (25% of time dedicated to this task)
 - Continually review sales strategies to increase US market.
 - Administer promotional activities and implement strict sales quotas all geared towards increase in income and productivity.
 - Review activity reports and financial statements to determine progress and status in attaining objectives and review objectives and plans in accordance with current conditions.
 - Examine and review market opportunities;
 - Make financial decisions specifically related to investments to ensure continued financial growth.
 - Develop and establish policies and objectives of the company in accordance with the goals of [the U.S. company].
- As the CEO, he is responsible for determining the manpower requirements for the company. (25% of time dedicated to this task)
 - Responsible for recruitment and staffing needs (hiring and dismissal of workers).
 - Supervise and direct all the managers and employees within the company and the outside sales agents that may be employed by the company.
 - Review human resources policies and direct all the activities of the upcoming hiring.
 - Identify the functions of the managerial personnel; he will coordinate functions and operations between divisions and departments; and will evaluate performance of managers for compliance with established policies and objectives within the company and contributions in attaining objectives.
 - Oversee the training and development of new and existing employees.
 - Maintain close communication with Installation Manager and Outsourced Contract Managers and to ensure the compliance of policies between the management and the personnel are well understood.

The petitioner stated that the beneficiary developed the business during the first year of operation by securing office premises, attending more than ten business seminars to establish contacts and develop contracts, hiring company employees, developing and implementing marketing, and securing seven business contracts. The petitioner noted that, in addition to the seven contracts already secured, the beneficiary was developing nine additional contracts that are in the licensing/development stage.

The petitioner submitted an updated organizational chart which depicts four sales representatives reporting to the [REDACTED], and an office receptionist reporting to the [REDACTED] for a total staff of eight, including the beneficiary.

The petitioner indicated that the sales manager was hired in March 2010 and is responsible to: oversee and direct the sales team members; establish sales territories, quotas and goals; establish training programs; analyze sales statistics gather by staff to determine sales potential and inventory requirements and monitor the preferences of customers. The petitioner stated that the executive assistant/sales executive was also hired in March 2010 and is responsible to contact potential clients based on sales leads and make follow up calls based on leads secured by sales representatives.

The petitioner stated that its receptionist was hired in May 2010 and is responsible for answering the phone, opening mail, scheduling appointments and performing other office tasks. In addition the petitioner indicated that one of its sales representatives, [REDACTED] was hired on a commission basis in May 2010 and is responsible for contacting potential clients based on sales leads. The petitioner stated that [REDACTED] has served as the company's installation manager on a contract basis since March 2010, that he is paid per installation job, and is responsible for overseeing the installation of products at job sites and supervising the installation crew. Finally, the petitioner indicates that the remaining three sales representatives were hired in July 2010.

The petitioner also submitted copies of IRS Forms W-4 for three sales representatives (all of which are dated August 2, 2010); a Form W-9, Request for Taxpayer Identification Number and Certification for the fourth sales representative which is dated June 17, 2010; a Form W-4 for the receptionist dated June 17, 2010; and Forms W-9 for [REDACTED] (dated July 9, 2010) and [REDACTED] (dated July 1, 2010).

The director denied the petition on August 23, 2010, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director determined that the beneficiary's duties, as described by the petitioner, are primarily marketing tasks. The director concluded that the "record indicates that a preponderance of the beneficiary's duties will be directly providing the services of the organization and supervising seven non-professional employees. The director concluded that the petitioner had not developed to the extent that it requires the beneficiary to perform primarily managerial or executive duties on a day-to-day basis.

On appeal, counsel asserts that the director erred in determining that the beneficiary would not be primarily managing the organization, or a function, department, subdivision, function or component of the organization. Counsel states that the beneficiary "has discretionary authority in all administrative, marketing, financial and personnel decisions" of the U.S. company. Counsel also objects to the director's finding that the beneficiary performs primarily marketing tasks, while acknowledging that the beneficiary's responsibility for expanding and developing the business necessarily require some degree of marketing. Finally, counsel emphasizes that the petitioner has submitted "hundreds of pages of documentation" sufficient to establish that the beneficiary will be employed in a qualifying managerial or executive capacity.

III. ANALYSIS

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.

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.*

At the time of filing, the petitioner submitted a vague position description that failed to convey any insight into the beneficiary's day-to-day duties as the CEO of the three-person U.S. company at the end of its first year in operation. The petitioner noted that he will "manage, develop and direct" the company "to ensure that all relevant business operations are continuously monitored," and "secure that the company develops as per the proposed business plan and goals." The petitioner further noted that he will "implement corporate policies" and implement and oversee "the overall Advertising, Marketing, Inventory System, Quality Assurance/Control, Supplies and other Services of the Business." Such statements amount to little more than paraphrasing of 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.).

Further, the petitioner did not provide any explanation regarding the advertising, marketing, inventory, quality assurance, supply or other services the beneficiary is claimed to oversee. Given that the petitioner employed only two other workers, a sales manager and an executive assistant, at the time of filing, the AAO cannot determine who actually performed the non-qualifying duties associated with the activities. 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)).

When the director requested clarification with respect to the beneficiary's duties, the petitioner submitted a lengthy, but still vague position description which relied on the same overly broad language found in the initial description. For example the petitioner reiterated that the beneficiary will "manage, develop and direct" the company and be responsible for its "over-all direction" and implementation of company policies. The petitioner specified that the beneficiary would allocated 50 percent of his time to "expanding organizing directing and developing the business capabilities of the U.S. company," and stated that this responsibility includes "directing and coordinating formulation of financial programs," "reviewing activity reports and financial statements," setting up and maintaining a "solid framework for the growth of the U.S. operations," managing and directing staff, "overseeing the development of marketing and sales strategies," and acquiring contracts." The petitioner did not identify any subordinate staff who would support the beneficiary in his financial responsibilities, nor did it identify what specific tasks managerial or executive tasks he would perform to "set up and maintain a solid framework for growth," or to "acquire contracts," a responsibility that could be interpreted as a sales or marketing function, rather than a managerial function. 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).

The petitioner stated that the beneficiary would allocate an additional 25 percent of his time to exercising "discretionary authority in all administrative, marketing, financial and personnel decisions." The petitioner once again poorly defined the actual duties the beneficiary will perform, noting that he will "develop and establish policies and objectives of the company," "review activity reports and financial statements," "review sales strategies," and "examine and review marketing activities." Again, while the AAO does not doubt that the beneficiary is authorized to make decisions regarding the company's administration, marketing, finance and personnel, the petitioner has failed to provide sufficient explanation regarding his actual duties, such that they could be classified as primarily managerial or executive in nature. 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 petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO will not accept a vague position description and speculate as to the beneficiary's actual managerial or executive duties.

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 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 company as its owner and chief executive officer, the petitioner's overly broad descriptions of the beneficiary's position are insufficient to establish that the beneficiary's actual duties, as of the date of filing, were primarily managerial or executive in nature.

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 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).

At the time of filing, the petitioner indicated that it had three employees and provided evidence of wages paid to the individuals identified as "sales manager" and "executive assistant," who were also the only workers identified on the petitioner's initial organizational chart. While the petitioner indicated that it was actively engaged in hiring additional workers at the time of filing, and did hire additional workers while the petition was pending, the AAO emphasizes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Further, the AAO acknowledges the petitioner's claim that it hired a receptionist and commissioned sales representative in May 2010 and an installation manager in March 2010. The petitioner has not submitted required evidence of wages paid to these individuals prior to the date the petition was filed. See 8 C.F.R. § 214.2(l)(14)(ii)(D). 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)).

The petitioner has not established that the positions of sales manager or executive assistant require the completion of a bachelor's degree, such that they could be classified as professional.¹ Nor has the petitioner shown that either of these employees supervised subordinate staff members or managed a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors at the time the petition was filed. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

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

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, academics, 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); *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 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. In this case, the petitioner indicates that its sales manager has a high school diploma and its executive assistant has a bachelor's degree in business. The petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the sales-related duties of the executive assistant.

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 explains 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. Here, the petitioner has neither articulated a claim that the beneficiary qualifies for the benefit sought as a function manager, nor has it submitted a description of his position sufficient to establish that his actual duties are primarily managerial in nature.

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 managerial 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.* The petitioner has not established that the beneficiary is primarily focused on the company's broad policies and goals, or that he is removed from participation in the day-to-day operations of the enterprise as one of only three employees at the time of filing.

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).

Further, 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. The petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

At the time of filing, the petitioner was a two-year old company established for the purpose of designing and installing solar energy systems. The record shows that the company employed the beneficiary as owner/CEO, a sales manager, and an executive assistant at the time of filing. The petitioner indicates that both

subordinates perform sales duties. The petitioner has not indicated who is responsible for other non-managerial tasks associated with the ongoing establishment of the U.S. company, such as applying for licenses, administrative, marketing and financial tasks. As discussed above, the petitioner indicates that the beneficiary "oversees Advertising, Marketing, Inventory System, Quality Assurance/Control, Supplies and other Services of the business," but has not explained who performs duties associated with these activities, if not the beneficiary. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as CEO and two employees performing sales duties. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, the AAO emphasizes once again that the critical facts examined in this matter are those that were in existence at the actual time of filing the petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, while the petitioner indicates that its staffing levels grew from three employees to eight employees while the petition was pending, the AAO cannot consider hiring that occurred after the petition was filed. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it was sufficiently staffed during the previous year. 8 C.F.R. § 214.2(l)(14)(ii). There is no provision in USCIS regulations that allows for an extension of this one-year period. Accordingly, the appeal will be dismissed.

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

ORDER: The appeal is dismissed.