

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



D7

DATE: **SEP 28 2012** Office: CALIFORNIA 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, 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 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, an [REDACTED] states that it operates a carpet, upholstery, tile, area rug, and roof stains cleaning service. The petitioner claims to be an affiliate of [REDACTED] located in Carabobo, Venezuela. The beneficiary was previously granted L-1A status for a period of one year, from February 2008 to January 2009, to open a new office in the United States. The petitioner now seeks to extend his status so that he may continue to serve in the position of General Manager.

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 and that the beneficiary's employment in the United States will be of a temporary nature.

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's decision was in error.

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

A. Temporary Nature of the Beneficiary's Services

The first issue addressed by the director is whether the petitioner established that the beneficiary's employment in the United States is of a temporary nature.

The regulation at 8 C.F.R. § 214.2(l)(3)(vii) requires 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 evidence that the beneficiary will be transferred to an assignment abroad upon completion of the temporary services in the United States.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 15, 2009. The petitioner indicated that the beneficiary's services would be required for two years. The petitioner did not provide evidence of the temporary nature of the employment.

The director denied the petition on July 2, 2009, concluding that the petitioner failed to establish that the beneficiary's employment in the United States would be of a temporary nature. Specifically, the director found that the petitioner did not furnish evidence that the beneficiary's services are for a temporary period and he will be transferred abroad upon completion of the assignment. The director stated the petitioner failed to provide "a business plan or any documentation indicating the duration of the beneficiary's intended stay."

On appeal, counsel asserts that the beneficiary's services are of a temporary nature. Specifically, counsel states the following:

Notwithstanding the fact that the Beneficiary is the owner of [REDACTED] and a major stockholder of [REDACTED] the U.S. company and the foreign entity, the services rendered by the Beneficiary at the U.S. operations are temporary in nature...The Beneficiary was transferred to an assignment outside the United States and upon completion of the temporary services the Beneficiary is expected to return to his home country.

Counsel further explains that the beneficiary possesses personal and financial ties to his home country which will necessitate his return at an unspecified point in the future. Counsel points to the Beneficiary's personal assets, bank accounts, lease agreement, property, and family members in his home country. The petitioner attached copies of documents claimed to be the beneficiary's lease agreement and "property documents" of the beneficiary and his wife in their home country. The attached documents are not accompanied by certified translations.

Upon review, and for the reasons stated herein, the petitioner has not established 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 completion of the temporary services in the United States.

Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). The record indicates that the beneficiary is the majority owner of the petitioning organization and a major stockholder in the foreign organization.

Here, the petitioner did not provide any information with the initial petition regarding the temporary nature of the beneficiary's services other than the dates of employment stated on the I-129. On appeal, counsel does not contest the director's findings that the petitioner did not provide documentation with the initial filing proving that the beneficiary will be transferred abroad upon completion of the assignment. Rather, counsel asserts on appeal that "upon completion of the temporary services the Beneficiary is expected to return to his home country." The record does not include evidence from the petitioner to support counsel's claim that the beneficiary's services are only required for a temporary period.

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 Obaigbena*, 19

I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, the petitioner submits documents that counsel claims to evidence the beneficiary's ties to his home country. None of the documents provided were accompanied by translations. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion his assignment in the United States.

B. Employment in a Managerial or Executive Capacity

The second 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 15, 2009. The petitioner indicated on the Form I-129 that it is a carpet, upholstery, tile, area rug, and roof stains cleaning service with four employees and a projected net income in 2009 of \$500,000 as stated on the business plan. The petitioner did not provide the net income for 2008 on the Form I-129. The 2008 unaudited financial statements dated 4/14/09 show a net income of \$3,989.42 for the petitioner. The 2008 unaudited financial statement dated 2/21/09 show a net income of \$14,219.33. The petitioner stated that the beneficiary performs the following duties:

██████████ will continue to serve in an executive/managerial capacity as General Manager of ██████████. He will continue to oversee business concept study and planning functions, which will include studying the feasibility of future and long-term business concepts, allocation of resources, organization, system and development scheduled to achieve goals by fully utilizing carpet and upholstery cleaning functions and operations.

██████████ requires his participation in creating the concept of strategies for future operations. As such, ██████████ will continue to oversee the development of the client base and client relationships in order to increase business operations and sales. In addition, ██████████ will oversee the development of ██████████ business proposals for future strategies and plans for business growth.

██████████ will utilize his managerial skills to manage critically important functions at ██████████. As a General Manager, he will continue providing business planning, including how to operate and allocate functions and operations effectively, and company planning resources. During his assignment, ██████████ will also develop short-term and long-term plans to maximize ██████████ capabilities. ██████████ possesses the advanced level of managerial skills required to serve as a General Manager at ██████████.

As evidence of the company's staffing levels, the petitioner provided the resumes of ██████████ and ██████████. Along with the resumes were payroll document for the period ending 10/18/2008 for ██████████ and ██████████. The petitioner provided Forms 941 for 2008: Employer's QUARTERLY Federal Tax returns for the first and second quarters of 2008. The tax

returns show no wages reported. The 2009 business plan projected a Sales Executive and Project Consultant to be reporting to a president one project manager. The hiring plan anticipated hiring of "the first employee in January."

The initial petition included a copy of one customer receipt from November of 2008 and a contract with [REDACTED] to provide cleaning services to [REDACTED] clients signed on April 21, 2008. The terms of the contract included payments of 45% of gross sales less taxes procured or performed in the name of [REDACTED]. The petitioner included invoices for services to [REDACTED]. The petitioner also enclosed a business card for the petitioner, including his name, phone numbers, and address in Indiana. The business card did not include the beneficiary's job title.

The director issued a request for additional evidence ("RFE") on May 13, 2009 in which she instructed the petitioner to submit, *inter alia*, the following: (1) evidence to establish ownership of the foreign company, (2) evidence to establish that the beneficiary has been performing the duties of a manager or executive with the foreign company, (3) evidence establishing that the U.S. company and the foreign company have a qualifying relationship, (4) evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company, and (5) evidence to establish the presence of the U.S. company's business premises.

In a response dated May 12, 2009, counsel for the petitioner submitted a job description including percentage of time spent in each of the listed duties for the beneficiary as follows:

- Oversees business concept study and planning functions, which will include studying the feasibility of future and long-term business concepts, allocation of resources, organization, system and development schedules to achieve goals by fully utilizing carpet and upholstery cleaning functions and operations- 20%
- Oversees the development of the client base and client relationships in order to increase business operations and sale; and the development of [REDACTED] business proposals for future strategies and plans for business growth- 15%
- Provides business planning, including how to operate and allocate functions and operations effectively, and company planning resource- 15%
- Develops short-term and long-term plans to maximize [REDACTED] capabilities- 5%
- Conducts carpet, upholstery, tile, area rug, and roof stain cleaning services for commercial and residential clients- 35%
- Manages administrative duties within the company- 10%

The petitioner did not submit any evidence of the proposed job duties other than the May 12, 2009 letter from counsel. 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 Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's May 12, 2009 letter included a description of how the beneficiary's duties meet the definition of executive capacity. Counsel asserts that the beneficiary made specific discretionary decisions over the last six months including developing "a business concept by studying and planning marketing strategies in the city of Loveland and other suburbs of the Southwest area of the State of Ohio by conducting key business functions." Additionally, the beneficiary "has studied the feasibility of future and long-term business concepts and allocation of financial resources. He has developed schedules to achieve goals by fully utilizing carpet and upholstery cleaning functions and operations." Counsel further states that [REDACTED] "utilizes his managerial skills to manage critically important functions at [REDACTED]. Furthermore, [REDACTED] attends meetings with potential customers and serves as a main contact for meeting and business purposes."

Furthermore, in response to whether the beneficiary's job duties were considered managerial, counsel stated: "Again, [REDACTED] is the only employee at [REDACTED]. He is working as a General Manager for the company. Therefore, there are not employees supervised by the beneficiary."

The petitioner did not submit the requested organizational chart for the U.S. business. Counsel responded to the request by stating that, "Again, currently, [REDACTED] is the only employee at [REDACTED]. He serves as a General Manager for the company."

In response to the director's request for a list of all employees, counsel stated that [REDACTED] currently employs [REDACTED] pursuant to approved L-1A visa status. In the near future, the company will be fully operational and self-sufficient within a few months." The petitioner did not provide an explanation, as requested by the director, to the source of remuneration of all employees and whether the employees were on salary, wage, or paid by commission.

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).

In response to the director's request for an explanation regarding the beneficiary's purpose for coming to the United States, counsel stated:

[REDACTED] will continue to serve in an executive/managerial capacity as a General Manager of [REDACTED]. He will continue to oversee business concept study and planning functions. [REDACTED] required [REDACTED] participation in creating the concept of strategies for future operations. As such, [REDACTED] will continue to oversee the development of the client base and client relationships in order to increase business operations and sales.

[REDACTED] will utilize his managerial skills to manage critically important functions at [REDACTED]. As a General Manager, he will continue providing business planning, including how to operate and allocate functions and operations effectively, and company planning resources.

The director denied the petition on July 2, 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. The director determined that "it appears that the beneficiary has been and/or will be performing many aspects of the day-to-day operations of the business." The director cited to the nature of the proposed job duties, as well as the lack of any employees other than the beneficiary.

On appeal, counsel asserts that the beneficiary functions in a managerial capacity. Specifically, the "Beneficiary manages the entire organization; manages an essential function within the organization; has the authority to hire and fire or recommend those as well as other personnel actions; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority."

Counsel addresses the staffing levels by stating that it "is noteworthy the fact that the Petitioner is in the process of hiring the required subordinate staff, who will relieve the Beneficiary from performing non-managerial duties within the near future." Counsel explains that the petitioner "has experienced a slow, but successful commencement of operations in the United States and has established a sound financial footing, including an adequate client base, in a manner consistent with the overall business philosophy." Counsel also asserts that the petitioner "is in the process of hiring the required subordinate staff, which will relieve the Beneficiary from performing non-managerial duties within the next few months."

In support of the appeal, counsel restates the job duties from the initial petition, including but not limited to, directing and coordinating all business activities and operations of the petitioner; coordinating and controlling administration and management of the logistics of the company's services; overseeing business concept study and planning functions; and overseeing development of the client base and client relationships in order to increase business operations and sales.

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(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day 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's description of the beneficiary's duties fails to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. While the AAO does not doubt that the beneficiary exercises discretionary authority over the U.S. company as its sole employee, the petitioner has not submitted a consistent or credible breakdown of how the beneficiary will allocate his time among specific responsibilities. At the time of filing, the petitioner characterized the beneficiary's role as General Manager of [REDACTED]

The petitioner's initial description of the beneficiary's duties was general and non-specific, borrowing liberally from the statutory definitions of managerial and executive capacity. For example, the petitioner stated that the beneficiary will study "the feasibility of future and long-term business concepts," "create the strategies of future operations," and provide "business planning, including how to operate and allocate functions and operations efficiently, and company planning resources." While such responsibilities suggest that the beneficiary is responsible for oversight of the company, it provides little insight into how he would actually allocate his tasks on a day-to-day basis. 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 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the petitioner claims that its services include "carpet, upholstery, tile, area rug, and roof stain cleaning services" to both residential and commercial customers. The beneficiary is the sole employee working in the United States, and the petitioner did not attribute the provision of these services to any internal or external employees. To the extent that the company is doing business, the beneficiary is the sole employee available to provide these services.

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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The actual duties themselves 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 response to the RFE, counsel indicated that the beneficiary devotes 30% of his time to conducting "carpet, upholstery, tile, area rug, and roof stain cleaning services for commercial and residential client." Additionally, the petitioner indicates that the beneficiary will spend 10% of his time "managing administrative duties within the company." These duties relate directly to providing the services of the company and are not managerial or executive in nature. Furthermore, the petitioner stated that the beneficiary will spend 15% of his time developing the "client base and client relationships in order to increase business operations and sale" as well as the development of business proposals. Without additional explanation, this responsibility appears to amount directly to marketing and promoting the petitioner's services, rather than managing or directing these functions. Again, the petitioner failed to identify a subordinate to the beneficiary who would actually provide services to these potential clients once an agreement was reached.

Overall, these three areas of responsibility, based on the petitioner's representations, require 60% of the beneficiary's time, and have not been shown to be managerial or executive in nature. Therefore, it was

reasonable for the director to conclude that the beneficiary would not be performing in a primarily managerial or executive capacity under the extended petition.

As evidence of the beneficiary's executive duties, counsel described discretionary decisions made by the beneficiary over the last six months. These decisions include developing a "business concept by studying and planning marketing strategies" and studying the "feasibility of future and long-term business concepts and allocation of financial resources." Assuming *arguendo* that the beneficiary did make these decisions, and they are considered to be managerial or executive in nature, the record fails to support a finding that the qualifying duties related to these decisions compose a majority of the beneficiary's time. As explained above, the percentage breakdown of duties fails to support a finding that the beneficiary performs primarily managerial duties.

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See 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. Again, 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).

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 record shows that the beneficiary is the petitioner's sole employee. The AAO 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).

The petitioner indicates that it is in the process of hiring additional staff. On appeal, counsel stated that it "is noteworthy the fact that the Petitioner is in the process of hiring the required subordinate staff, who will

relieve the Beneficiary from performing non-managerial duties within the near future." However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). The AAO agrees 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.

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

Furthermore, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements.

At the time of filing, the petitioner was a one-year-old company established for the purpose of providing carpet, upholstery, tile, area rug, and roof stain cleaning services. The beneficiary, while charged with overall oversight of the business and making contacts with potential clients, is also the sole employee working for the U.S. company. Thus, it is reasonable to conclude, and has not been shown otherwise, that he provides any services the company is retained to provide, and performs all other administrative and operational tasks associated with the operation of a cleaning services business. The petitioner did not establish a reasonable need for the beneficiary to perform primarily managerial or executive tasks as of the date of filing. Sec. 101(a)(44)(C) of the Act.

Essentially, the beneficiary, at the end of his one-year period in L-1A status, is continuing to lay a foundation for the petitioner's provision of carpet, upholstery, tile, area rug, and roof stain cleaning services in the United States. The regulations governing the extension of a new office petition require the petitioner to establish that it has been doing business for the previous year and has grown to the extent that it requires the beneficiary to primarily perform qualifying duties pursuant to section 101(a)(44)(A) or (B) of the Act. Based on the evidence submitted with the current petition, it is evident that the petitioner was not prepared to commence the proposed business activities upon approval of its new office petition, and thus the beneficiary has not progressed beyond "development phase" activities in terms of his job responsibilities.

On appeal, counsel further contends that the evidence submitted with the original petition and the RFE response evidence that the beneficiary "manages an essential function within the organization." Counsel does not further develop his argument that the beneficiary qualifies for the benefit sought 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). 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. 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. 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 Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, 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 deduce 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).

For the above stated reasons, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

C. Physical Premises of the Petitioner

Beyond the decision of the director, the AAO finds that the petitioner did not submit sufficient evidence to establish that physical premises are secured for the company to continue doing business.

The petitioner provided the same lease copy with both the initial petition and in response to the RFE. The lease was entered into between [REDACTED] the lessor, and [REDACTED] the lessee. The petitioner appears to have redacted, or blocked out, the real estate location out both the lease copies provided with the initial petition and in response to the RFE. The petitioner did not provide an explanation for this redaction. The modification to the lease calls into question the reliability of the document. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Furthermore, the petitioner submitted an expired lease as evidence of sufficient physical premises. The leasehold was for a period of six months, from October 15, 2009 to April 15, 2009. The petitioner submitted

the RFE response on May 12, 2009. Upon review of the lease, there are no provisions for an extension of the six month occupancy term.

The AAO observes that the “physical premises” requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). A petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

In this case, the lack of sufficient business premises and the conflicting evidence of record fails to establish that the petitioner has been and will be doing business in a manner that will support the beneficiary’s claimed position. For this additional reason, the petition must be denied.

III. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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.