



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 01 2013

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: SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status as an L-1A 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 Michigan corporation established in June 2010, states that it engages in management and information technology consulting. The petitioner claims to be a subsidiary of [REDACTED] located in India. The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his employment in the position of vice president and chief executive officer for a period of two years.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying 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. On appeal, the petitioner asserts that it has established that the beneficiary is and will be employed in both a managerial and executive capacity. The petitioner submits a brief and duplicate copies of evidence already contained in the record 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.

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. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a primarily managerial or an executive capacity under the extended petition.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 1, 2011. The petitioner indicated on Form I-129 that it has six current employees and a gross annual income of \$848,689. In its letter of support, the petitioner indicates that it engages in management and information technology consulting.

The petitioner submitted a document titled "Personnel Plan and Detailed Duties Actual and Proposed to be Performed by Each Personnel" listing, in part, the beneficiary's duties and those of her subordinates as follows:

1. [The beneficiary] has been transferred as Vice President and Chief Executive Officer with effect from September 7, 2010 from our Indian parent [REDACTED] where she works as Vice President. She is being supervising team [*sic*] of five subordinates and reporting to the board of director of this corporation.

* * *

- (a) [The beneficiary] is heading the entire organization of the Company and thereby make[s] or reverse[s] the business decision, decide on the scope of the business entity and corporation at a large, decide[s] the quantum of business investment and take

appropriate steps to raise the resources for the same, add[s] or remove[s] product and service lines and all apex level business decisions. (15%)

- (b) Establishes the policies, procedures and goals for the entire organizations, which includes establishment of policies such as buying and selling policies e.g. whether or buy through open tender or through negotiation of contracts, from statutory authority or from private organization. The goals formation includes decision as to targeted return on investment, gross margin, net margin, break-even and margin of safety, sales volume, target market and market share etc. (14%)
- (c) [The beneficiary] has filled up entire initial personnel requirements for the corporation and then continuously filling the vacancies arise [sic] from time to time, she would fire deserving employees and would take all necessary personnel actions, such as promotion, rotation of duties, demotion, sanction of leave etc. for the employees directly reporting her [sic]. (7%)
- (d) Directing the supervisory and managerial employee under her to ensure achievement of the targets and goals for the organization. (7%)
- (e) She would act as a coordinator between the company and its overseas parent company for infusion of future capital needs for development purposes, if any arise. (3%)
- (f) She is/would be reporting to board of directors, who is again herself and her family members, through quarterly reports and not subject to restrictions for the board as to the manner in which the business of the corporation is to be conducted. (2%)
- (g) Approve the purchase and sales contract with major suppliers and buyers. (5%)
- (h) Approve the financial statements and tax and other returns for the corporation. (6%)
- (i) Approve the business and marketing plan and all the budgets for the corporation. (6%)
- (j) Sanction the purchase of all the fixed assets and real properties. (3%)
- (k) Direct and implement quality assurance system for the corporation. (5%)
- (l) Approve accounts and its components. (5%)
- (m) Appoint professionals and independent contractors and approve the terms and conditions for that appointment. (5%)
- (n) Lead the team of subordinates keeping in mind the management culture ethos of the Indian promoters. (5%)
- (o) Explore new business opportunities for the corporation. (5%)
- (p) Ensure compliance of the applicable laws. (4%)
- (q) Secure recognitions and licenses for the business of the corporation. (3%)

2. [REDACTED] General Manager (Operations), is U.S. Citizen and has been recruited by [the beneficiary] as per personnel budgets of the business plan and is/would be reporting to her directly. He has earned his graduate degree from India.

3. [REDACTED] Manager (Development & Marketing), is U.S. Legal Permanent Resident, the position is recruited by [the beneficiary] as per plan. This is a supervisory position in the middle management.

* * *

4. [REDACTED] Manager (Services), she is U.S. LPR, the position has been recruited by [the beneficiary] as per business plan. This is supervisory position in the middle management.

* * *

5. [REDACTED] Technician & Supervisor, she is U.S. LPR. The position is recruited by [the beneficiary] as per plan. This is lower management position.

* * *

6. [REDACTED] Officer, she [sic] is U.S. Citizen, this position is filled in by [REDACTED] in consultation with [the beneficiary] as per personnel budgets stated in the business plan.

The petitioner listed numerous duties for each of the subordinates and attached a percentage of time allocated to each duty for each employee.

The petitioner submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for 2010. The Form 1120 indicated that the petitioner paid \$3,375 in compensation to officers and \$4,120 in salaries and wages for 2010. The petitioner submitted IRS Form W-2, Wage and Tax Statement, for 2010 indicating that it paid the following salaries: \$3,375 to the beneficiary; \$1,000 to [REDACTED]; \$840 to [REDACTED]; \$760 to [REDACTED]; \$760 to [REDACTED]; and \$760 to [REDACTED]. The petitioner also submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2010 and the first and second quarters of 2011, each quarter indicating that the petitioner had six employees. The petitioner paid \$7,495 in wages, tips, and other compensation for the fourth quarter of 2010 and \$9,555 for the first and second quarters of 2011.

The petitioner provided an organizational chart for the U.S. company illustrating that it employs the beneficiary as the vice president. The chart identifies his subordinates as a general manager, [REDACTED], a manager of development and marketing, [REDACTED], and a manager of services, [REDACTED]. The general manager supervises a "technician and supervisor," [REDACTED] who supervises an officer, [REDACTED].

On September 30, 2011, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to provide additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company.

In response to the RFE, the petitioner provided the same list of job duties and percentage breakdown of time allocated to those duties submitted with the petition for the beneficiary and her subordinates.

On March 22, 2012, the director denied the petition concluding that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily managerial or an executive capacity in the United States. In denying the petition, the director found that the petitioner failed to clarify the nature of its business in the United States. The director further observed that the petitioner's six employees are all claimed to be managers, which brings into question who is performing the day-to-day duties of running the U.S. company. The director found that the duties outlined by the petitioner do not specify exactly what the beneficiary will be doing which would qualify her as a manager or executive and that the petitioner's unsupported assertions that the beneficiary will perform general managerial duties do not suffice to establish eligibility.

The director further observed that the photographs submitted by the petitioner do not suffice as evidence of the petitioner's physical premises and leased office space and further observed that the beneficiary's home address, listed on the Form I-129, is the same as the company address, and the address provided for the beneficiary's worksite. The director finally found that the petitioner submitted contradictory evidence in reference to its lease agreement in Florida and concluded that doubt cast on any evidence may lead to a re-evaluation of the reliability and sufficiency of the remaining evidence in support of the petition.

On appeal, the petitioner asserts that the beneficiary will be employed in a managerial and executive capacity. The petitioner contends that the director failed to properly review the documentation submitted in support of the petition. The petitioner further contends that the comprehensive description of the beneficiary's duties demonstrates the beneficiary's managerial and executive position.

The petitioner submits a brief addressing the beneficiary's role as follows:

The Center Director failed to appreciate fact [*sic*] that the beneficiary . . . is supervising work of General Manager [REDACTED] who is not a first line supervisor as he supervises the work of another supervisory employee i.e. Manager (Development and Marketing and Manager (Services). These two managers supervises work [*sic*] of a Technician & Supervisor, [REDACTED]. Therefore, the position is clearly an managerial [*sic*] position as contemplated by the classification sought.

Also, it is pertinent to note that the beneficiary is clearly an executive in as much as it proved (a) the beneficiary is heading the entire organization of the US entity as its Vice President and Chief Executive Officer (b) she being the sole decision maker of for and on behalf of an owner of both Indian and USA entities and directs the entire organization (c) she is responsible to establish goals and policies of the organization, which is proved by the fact

that she has approved the major corporate policies, capital budgets and business plan for the entities (d) she is in power position as head of the entire organization of this petitioner and is not responsible to anyone else but the director of boards and stock owners in both the organizations (e) she has approved the recruitment plan and actual recruitment of the personnel already recruited by the USA entity, taken all personnel actions (f) she being head of the USA organization and as Vice President and CEO in a position to exercise widest latitude in discretionary decision making.

The petitioner submits duplicate copies of evidence presented at the time of filing the petition and in response to the RFE.

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

As discussed above, the petitioner has requested the extension of a petition that involved a new office. 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.

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

In the instant matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. In fact, on appeal, the petitioner refers to the beneficiary as both an executive and a manager. A beneficiary may not claim employment as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

On review, it appears that the job duties provided for the beneficiary and her subordinates are comprehensive. However, the petitioner's claimed business type, management, information technology and marketing consulting, conflicts with some of the duties presented for the beneficiary's direct subordinate, the general manager of operations. For example, the petitioner states that this employee performs duties such as: "review and recommend contracts for purchases and sales of the product lines as well as fixed assets;" "recommend adoption of new product or service lines to the vice president"; "approve suppliers and buyers to do business with"; and "approve credit lines for over \$10000 for sales transactions." Given the duties listed above, it would appear that the petitioner's business is involved in sales but the petitioner does not employ any sales staff. Additionally, there are references in the position description to a "logistics manager" that has not been hired and does not appear on the petitioner's organizational chart.

The petitioner claims that the nature of its business is management and information technology consulting. However, the petitioner's profit and loss statement indicates that it received income from domestic sales and exported sales, and that it made extensive inventory purchases. Here, the petitioner has not indicated that it performs any sales, domestic or international, or that it requires any inventory to conduct its business. The petitioner has not identified any warehouse or storage space to house the extensive inventory purchased, nor has it indicated that it employs sales staff to conduct that part of the business. As such, it remains unclear as to what sales the petitioner is performing, what inventory the petitioner is housing (and where), and what the petitioner's actual business activities really are.

The inconsistent position descriptions and conflicting information as to the petitioner's actual business activities fail to establish that the beneficiary will be engaged in a primarily managerial or primarily executive position. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its vice president and CEO, the petitioner has not provided sufficient consistent information

to demonstrate that the listed duties qualify her as a manager or an executive. Further, because the record contains inconsistent evidence regarding the nature of the petitioner's business, the AAO is unable to review the beneficiary's duties or those of her subordinates in the appropriate context. Therefore, although the petitioner submitted a lengthy list of job duties for the beneficiary, the petitioner failed to provide detailed explanations of the beneficiary's duties within the scope of the type of business operated by the petitioner. 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 her 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). Based on the current record, and the conflicting information as to the petitioner's actual business activities, the AAO is unable to determine the beneficiary's actual duties, such that they could be classified as managerial or executive in nature.

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).

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

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

Here, although the petitioner claims that the beneficiary's direct subordinate, [REDACTED] holds a graduate degree from India, the job duties provided by the petitioner for the general manager of operations position demonstrates that the position itself does not require a professional degree. Further, the list of job duties provided for the general manager of operations position does list supervisory duties and the

organizational chart does indicate that he supervises other employees. As such, the petitioner has not shown that this employee supervises subordinate staff members, such that he could be classified as a supervisor.

The petitioner's evidence must substantiate that the duties of the beneficiary and those of her her 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 an organizational chart depicting herself as vice president and CEO supervising a general manager of operations, a manager of development and marketing, and a manager of services, the petitioner has not shown how the subordinate employees would free the beneficiary from performing non-qualifying operational duties. The petitioner has not provided credible evidence of a current 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 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). 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 position description that 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. Here, the petitioner did not indicate that the beneficiary is employed as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate she manages an essential function of the U.S. company.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff

comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, the petitioner asserts, on appeal, that the beneficiary carries out the duties of both an executive and a manager; however, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

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, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the petitioner indicates that the beneficiary has three direct subordinates, one of which supervises one additional employee. Due to the inconsistent position descriptions and conflicting information as to the petitioner's actual business activities, it remains unclear how the beneficiary's subordinates will relieve her from performing other non-qualifying administrative and operational duties.

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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has not established that the beneficiary has been and will be employed in a primarily managerial or primarily executive capacity. The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or an executive capacity in the United States. Accordingly, the appeal will be dismissed.

III. DOING BUSINESS

Beyond the decision of the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is

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engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States.

Where asked to describe the "type of business" on the Form I-129, the petitioner indicated, "for profit domestic corporation formed in the State of Florida and Michigan." The petitioner listed its company address as [REDACTED] Ocala, Florida and indicated that the beneficiary's work location would be the same.

In support of the petition, the petitioner submitted a letter explaining its business as follows:

The principal businesses of the corporation includes for profit business venture in management and information technology consulting

* * *

[The petitioner] has achieved a sales turnover of \$848,689, made purchases of inventories worth \$705,040 and earned a net-profit of \$58,339.26 in very first years of business operations during year 2010.

* * *

The petitioner has leased office premise to run its business at [REDACTED] Ocala, FL [REDACTED], which known for the conglomeration of the consulting business of the state of Florida, for a period of two years and thereafter will continue on month to month basis. The current and proposed employees have been / are being deployed thereat. The lease allowed its commercial usage and adequate enough to house six employees and to store inventories, if needed.

The petitioner submitted its Profit & Loss statement for the period of January 1, 2010 to December 31, 2010 indicating an "Income from Operations-Domestic" at \$263,757 and an "Income from Operations-Exports" at \$584,932. The petitioner's Form 1120 indicates that the U.S. company had \$848,689 in "gross receipts or sales" and \$705,040 in "cost of goods sold." The Form 1120, at Schedule K, indicates that the U.S. company's "business activity" is "management & other consulting" and its "product or service" is "consulting service."

The petitioner submitted a document titled "Commercial Net Lease for Part of Building" between [REDACTED] and the petitioner dated June 1, 2011 for a period of two years. The lease states:

- 3.Premises being leased: The portion of the lease is located at [REDACTED] St, Ocala, FL [REDACTED]
- 4.Part of the Building Only: [REDACTED] is leasing one office only and open space for monthly rent of \$800.00
- 5.Shared Facilities: As part of the lease the following facilities are common:

- Parking Space
- Restroom Facilities
- Hallways.

The director issued an RFE instructing the petitioner to submit clarification on the nature of its business operations in the United States. In response to the RFE, the petitioner submitted a document titled "Product & Services Offered, Our USPs and Scope of the Entity and Business Processes." The document states that the petitioner offers services in "Management Consulting" and "Marketing Consulting."

In response to the RFE, the petitioner also submitted a letter from [REDACTED] Manager of [REDACTED] confirming the following:

1. We have lease business premises owned by us and situated at [REDACTED] Ocala, FL [REDACTED] by way of commercial lease deed dated June 1, 2011 for the period of two years to [the petitioner].
2. The leased area covered under the said lease to [the petitioner] is having approximately 1037 sq. ft. of usable area along with parking spaces for ten cars, hall ways [sic] and rest rooms which is not included in above square foot.
3. We also confirm that the leased premises at . . . is zoned M-2 Medium Industry and the intended use of setting up management consulting business and administrative office is permitted by the said applicable zoning rules.

The petitioner submitted the following photos of its claimed office space where it is conducting its business:

- A photo of a stop sign showing an address of [REDACTED] in what appears to be a rural or suburban area;
- A photo of a mailbox on a post along what appears to be a rural or suburban road. The mailbox has an address of [REDACTED];
- A photo of the front door of a building with a brick façade which appears to face a street. The door has an adjacent mailbox with no visible address. The door has a large white sign with red lettering stating [REDACTED];
- Three photos of an unidentified female sitting at a desk (one photo with a second female leaning on the desk);
- A photo of an unidentified person sitting at a desk and the same female in previous photos leaning on the desk pointing at a document;
- Two photos of an unidentified female in random areas of an office;
- A photo of an unidentified male sitting at a desk; and
- Two random photos of an office area.

Upon review, the evidence in the record is insufficient to establish that the petitioner has acquired and maintained physical premises sufficient to conduct its business. In viewing the photographs presented by the

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petitioner, it is apparent that the stop sign showing an address of [REDACTED] and the mailbox showing an address of [REDACTED] are not at the same location as the office building (with the brick façade) showing a sign with the petitioner's name.

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 evidence 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.

Additionally, by misrepresenting or omitting the actual address of the petitioner's offices, the petitioner could prevent USCIS from verifying eligibility by conducting a site visit. The Department of Homeland Security and USCIS have the right to verify any information the petitioner submits to establish eligibility for the claimed immigration benefit. The legal right to verify this information is conferred by 8 U.S.C. §§ 1103, 1155, 1184, and 8 C.F.R. parts 103, 204, 205, and 214.

Additionally, the AAO notes that the petitioner's profit and loss statement indicates that it received income from domestic sales and exported sales, and that it made extensive inventory purchases. These business expenses raise serious doubts that the petitioner operates a consulting services business, as claimed in the record.

In this case, the lack of clear evidence of the petitioner's business premises and the conflicting evidence of record regarding the nature of the business fails to establish that the petitioner has been and will be doing business in a manner that will support the beneficiary's claimed position. 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. Accordingly, petition will be denied for this additional reason.

IV. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer, [REDACTED]. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed

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U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

Throughout most of the record, the petitioner claims that the foreign entity owns 51% the petitioning U.S. company. The petitioner submitted a document titled "Pre-Incorporation Agreement," dated June 1, 2010, containing conflicting qualifying relationship information as follows:

1. Shareholders' Names

[redacted] a Partnership firm organized and established in the Country of India under the provisions of the Indian Partnership Act, 1932 in India and having its corporate office and principal place of business at [redacted] India agree to the following terms and conditions.

* * *

6. Stock Subscriptions

The Shareholders agreed to subscribe for the following shares of stock:

Name: [redacted] to be Subscribed: 1080 (one thousand eighty). The total consideration agreed \$16741. And;

Name: [redacted] Shares Subscribed: 980 (nine hundred eighty). The total consideration agreed \$16085.20

Payment is due when called. The corporation will issue stock certificates to the Shareholders as evidence of stock ownership.

The petitioner also submitted a document titled "Minutes of the Organizational Meeting of Directors June 1, 2010," stating the following:

The organizational meeting of the Board of Directors of the [redacted] was called by [the beneficiary]

* * *

Ratification of Acts of Incorporator

RESOLVED: That all the acts of the Incorporator are ratified, approved and adopted as duly authorized acts of this Corporation.

Reporting as Subsidiary of [redacted] India.

RESOLVED: That the Corporation being a subsidiary of the Indian partnership firm, namely, [redacted] a private company limited by shares incorporated in the

country of India as the hundred percent of the share of stock of this corporation is directly as well as beneficially held and owned by the said parent company, be and is hereby reported and keep reported as subsidiary of the said Indian company to the appropriate authorities in India and USA as well to comply with all the applicable laws.

The petitioner submitted two "Stock Subscription Agreement[s]" dated June 2, 2010, for the purchase of 1020 shares by [REDACTED] of India and the purchase of 980 shares by [REDACTED]. The petitioner then submitted two more "Stock Subscription Agreement[s]" dated December 3, 2010, for the purchase of 574 shares by [REDACTED] of India and the purchase of 550 shares by [REDACTED]. The petitioner also submitted a "Minutes of Shareholders' Meeting," dated June 1, 2010, listing [REDACTED] India" as the shareholder of 1020 shares of common stock, and [REDACTED] as the shareholder of 980 shares of common stock. The petitioner then submitted a "Minutes of Shareholders' Meeting," dated December 3, 2010, listing [REDACTED] India" as the shareholder of 550 shares of common stock and [REDACTED] as the shareholder of 574 shares of common stock. The shareholder information in the minutes of the shareholders' meeting dated December 3, 2010 clearly conflicts with the shareholder information in the stock subscription agreements dated December 3, 2010. The stock ledger submitted by the petitioner lists certificate one was issued on June 2, 2010 for 1020 shares to [REDACTED] certificate two was issued on June 2, 2010 for 980 shares to [REDACTED] certificate three was issued on December 3, 2010 for 574 shares to [REDACTED] and certificate four was issued on December 3, 2010 for 550 shares to [REDACTED].

In this case, the inconsistent evidence presented to corroborate the petitioner's claims of ownership and affiliation to the foreign entity raises serious doubts regarding the claim that the petitioner is a subsidiary of the foreign entity. 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Due to the inconsistencies detailed above, the petitioner has not met its burden to establish that the petitioner has a qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. 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). 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 v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

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.