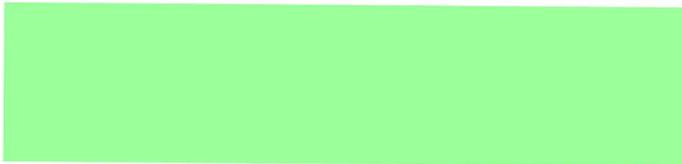
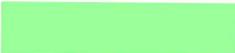


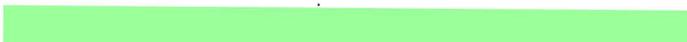


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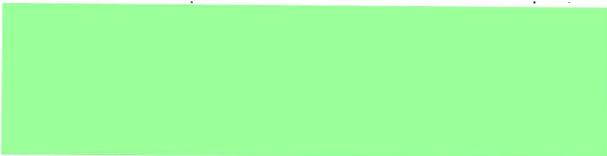
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DATE: **MAR 22 2013** Office: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

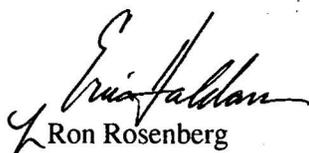
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:


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

If you believe the 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 classify the beneficiary 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 Pennsylvania corporation, states that it engages in the distribution of abrasive materials. It claims to be a subsidiary of [REDACTED] located in Moscow, Russia. The petitioner seeks to employ the beneficiary as the president of its new office in the United States.

The director denied the petition on two alternative grounds, concluding that the petitioner failed to establish that: (1) it had procured sufficient physical premises to house the new office as of the date of filing; and (2) the beneficiary will be employed in the United States in a qualifying managerial or executive capacity within one year of approval of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the director applied the wrong legal standard and failed to substantiate the denial. Counsel asserts that the petitioner has submitted evidence to establish that sufficient physical premises have been secured and that the new office will support an executive or managerial position within one year of the approval of the petition. Counsel for the petitioner submits a brief on 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)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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 ISSUES ON APPEAL

A. PHYSICAL PREMISES

The first issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office. See 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 12, 2011. The petitioner indicated on the Form I-129 that it engages in the distribution of abrasive materials. The petitioner indicated that the beneficiary's worksite will be located at [REDACTED], Pennsylvania.

Throughout the record, the petitioner indicated that it had two employees, including the beneficiary, and it planned to hire at least two more employees, a web portal administrator and a sales manager.

In support of the petition, the petitioner submitted an "Office License Agreement" with [REDACTED] leasing 180 square feet of office space with two executive desks and two executive chairs at suite [REDACTED], Pennsylvania. The first paragraph of the lease is dated June 28, 2011 and the commencement date is listed as July 1, 2011. The first paragraph of the lease is blank where the "client" name, the petitioner, should be and the lease is not signed and executed by either party.

On December 21, 2011, the director issued a request for additional evidence ("RFE") instructing the petitioner to submit, *inter alia*, evidence that shows the petitioner has acquired a leased premise of sufficient size to conduct international trade.

In response to the RFE, the petitioner submitted a "Commercial Lease" with [REDACTED] leasing 1,000 square feet of "storage space." The rental period indicated on the lease is month-to-month commencing on January 1, 2012. The lease is signed by both parties and the notary seal affixed is dated January 6, 2012.

The director denied the petition on March 27, 2012, concluding, in part, that the petitioner failed to establish that it has secured sufficient physical premises to house the new operation. In denying the petition, the director found that the lease was signed after the date of filing the petition and as such, could not be considered sufficient physical premises at the time of filing.

On appeal, counsel for the petitioner asserts that the petitioner has acquired sufficient physical premises for the U.S. operation. Counsel for the petitioner also addresses this issue by stating:

In the instant case, the US CIS [*sic*] has found that the warehouse space has been procured in response to the request for evidence. This finding, first, is contrary to the regulations, as the instant petition is for a new office, and mere business plan with certain affirmative steps towards its implementation should suffice. Rental of a warehouse space is not required until the operations have begun, and the petitioner has clearly indicated that the operations here will begin upon the beneficiary's arrival to the US. . . .

Furthermore, the US CIS [*sic*] stated that the space rented is not sufficient. The US CIS [*sic*] failed to apply the preponderance of the evidence standard to the evidence at hand in making this speculative and unsupported finding. US CIS [*sic*] did not doubt the efficiency of the petitioner's proposed operations. The petitioner has submitted evidence that it has already secured agreements with the purchasers, so prolonged storage of the product is not needed. Second, the warehouse space rent agreement allows to expand the rented premises as needed and does not preclude the petitioner from doing so.

Upon review, the AAO concurs with the director's determination that the petitioner failed to establish that it has secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that sufficient physical premises to house the new office have been secured. This requirement must be met at the time of filing the petition. In the instant matter, the petitioner has not clearly demonstrated that it had acquired any physical premises at the time of filing the petition.

In support of the petition, the petitioner submitted an "Office License Agreement" dated June 28, 2011 with a commencement date of July 1, 2011. The first paragraph of the lease is blank where the "client" name, the petitioner, should be and the lease is not signed and executed by either party. It appears that this is a blank lease obtained by the petitioner and the petitioner did not submit any other evidence of existing physical premises secured prior to the filing of the petition. In response to the RFE, the petitioner submitted a "Commercial Lease" with a term commencing on January 1, 2012. The lease is signed by both parties and the notary seal affixed is dated January 6, 2012. In the instant matter, it remains unclear whether the petitioner had acquired any physical premises prior to the filing of the petition, as is required pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner must establish eligibility at the time of filing the nonimmigrant visa

petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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).

Based on the foregoing deficiencies, the petitioner has not established that it had secured sufficient physical premises to house the new office as of the date of filing the petition. Accordingly, the appeal will be dismissed.

B. EMPLOYMENT IN AN EXECUTIVE OR MANAGERIAL CAPACITY

The second issue addressed by the director is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the petition.

The petitioner stated on the Form I-129 that the beneficiary would be employed as the president of the new office. In support of the petition, counsel for the petitioner stated the following about the beneficiary's proposed position of president:

This position will include but will not be limited to the following duties and responsibilities:

- Direct strategic business development.
- Confer with partners and staff members to establish goals and formulate plans.
- Direct professional personnel in negotiating and approving contracts with new U.S. clients.
- Coordinate (remotely) workgroup managers and projects in Russia for the company's key accounts.
- Direct professional personnel in screening, selecting, and hiring new employees.
- Direct professional personnel and exercises general control over promotions, and dismissal of employees.
- Assign responsibilities to subordinates.
- Direct professional personnel in coordinating advertising and marketing efforts in the U.S. market.
- Direct professional sales managers in identifying and closing opportunities to increase sales and revenue.
- Provide mentoring and guidance to Sales and PR personnel.

The offered position is executive in nature, since the beneficiary will direct overall management of the company's affiliate in the United States, establish the goals and policies of the company, exercise wide latitude in discretionary decision making and receive only general supervision from the Board of Directors. As demonstrated by attached documentation, the beneficiary will be managing the holders.

The petitioner submitted a business plan; however, the business plan does not discuss the petitioner's staffing structure or future plans for personnel at the U.S. company.

The petitioner submitted an organizational chart depicting the beneficiary as president supervising one manager, [REDACTED] who supervises one web portal administrator and one sales manager, both to be hired in the future.

In the RFE issued on December 21, 2011, the director instructed the petitioner to provide the following to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company: (1) the number of employees and the wage or salary paid to each; and (2) the job titles and the duties with the percentage of time dedicated to each duty to be performed by each employee. The director advised the petitioner that its evidence should demonstrate that the beneficiary will be relieved from performing the non-managerial, day-to-day operations involved in producing a product or providing a service within one year.

In response to the RFE, the petitioner submitted job duties for each of the beneficiary's proposed subordinates and included the percentages of time they would spend on each task. The petitioner also submitted the following list of duties with the percentages of time the beneficiary would spend on each duty:

- Directs strategic business development. (20%)
- Supervises and coordinates workgroup managers in the course of supervision over major client accounts. (15%)
- Negotiates with major abrasive and tool producers. (15%)
- Supervises personnel responsible for control of quality and timing for the delivery of projects. (10%)
- Makes decisions regarding promotions, hiring and dismissal of employees. (5%)
- Assign responsibilities to subordinates. (10%)
- Supervises and directs non-merchandising departments of the company, such as advertising, purchasing, credit, and accounting[.] (10%)
- Reviews financial statements, sales and activity reports to ensure that company's objectives are achieved. (15%)

The director denied the petition, concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the petition. In denying the petition, the director found that it appears the beneficiary will be a first-line supervisor of non-professional personnel and would not have sufficient staff to relieve him from performing the services of the corporation within one year of approval of the petition.

On appeal, counsel for the petitioner submits a brief addressing the beneficiary's role as a manager and executive as follows:

The petitioner provided a detailed business plan, explaining how the company's operations will be outsourced. The company's employees will clearly be working in professional capacity, performing the duties outlined in the organizational chart. Having accepted the business plan, and the proposed operational plan, the US CIS [sic] should have accepted the

organizational chart that is based on it. . . . Furthermore, the finding in this case appears contrary to the definition of a functional manager and contrary to the intent of the regulations allowing for functional managers.

* * *

The beneficiary will not perform non-managerial administrative or operational duties, but rather primarily will perform executive duties squarely fitting the statutory definitions. Beyond the beneficiary's proposed job duties, evaluating the totality of the evidence, including the nature of the petitioner's proposed business, as well as beneficiary's proposed role in growing this business, establishing strategies ties with business partners and paving the way for the company's continued success projected for the future, one may clearly see that his role is clearly executive, visionary and leading [*sic*]. The organization in question here clearly does not have any artificial tiers of subordinate employees or inflated job titles. Rather, its proposed structure is lean and functional and fully corresponds to the company's business model of outsourced service model.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the petition.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (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.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

On review, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will be engaged in a primarily managerial or executive position. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its president, the petitioner has not provided sufficient information detailing the beneficiary's proposed duties at the U.S. company to demonstrate that these duties qualify him as a manager or executive. Here, the petitioner described the beneficiary's duties in very broad terms, noting he will "direct strategic business development"; "review financial statements, sales and activity reports"; "negotiate with major abrasive and tool producers"; and "supervise and coordinate workgroup managers in the course of supervision over major client accounts." While these tasks are undoubtedly necessary in order to establish the U.S. operations, the petitioner has not indicated how such duties qualify as either managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's actual activities in the course of his daily routine. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative or operational duties.

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).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties will 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). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

Here, although the beneficiary's direct subordinate, [REDACTED] holds a bachelor's degree, the job duties provided by the petitioner for the manager position, demonstrates that the position itself does not require a

professional degree. The position description for the beneficiary's direct subordinate includes tasks that are not indicative of a managerial, supervisory, or otherwise professional position, such as "direct and coordinate the supportive services department of [the petitioner]"; "set goals and deadlines for the company"; and "review financial statements, sales and activity reports, and other performance data" The petitioner has not established that the beneficiary's direct subordinate requires a bachelor's degree, such that she could be classified as professional. Nor has the petitioner shown that this employee will supervise subordinate staff members, despite her placement on the organizational chart, or manages a clearly defined department or function of the petitioner, such that she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employee is a supervisor, professional or manager, as required by section 101(a)(44)(A)(ii) of the Act.

Regardless, even if it were established that the subordinate general manager is a supervisor or manager, the AAO notes that the petitioner's job duty descriptions for the beneficiary indicate that he will be responsible for supervising personnel responsible for advertising, marketing, public relations, quality control, and logistics, and indicate that he will be supervising the "advertising, purchasing, credit and accounting" departments. None of these personnel or departments have been included on the petitioner's proposed organizational chart, and, as noted, the petitioner's business plan is silent on the issue of the company's proposed organizational structure and projected staffing levels. As such, the business plan does not clearly support the petitioner's claim that it would have the four positions identified in the organizational chart by the end of the first year of operations, much less separate advertising, purchasing, credit and accounting departments or quality control and public relations employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Therefore, the record does not support the petitioner's claim that the beneficiary will have subordinates to relieve him from performing these operational functions within one year.

The petitioner has not established, in the alternative, that the beneficiary would be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Here, counsel for the petitioner makes a vague reference to the definition of a functional manager; however, neither counsel nor the petitioner articulated the beneficiary's duties as a function manager, identified the function he would manage or provided a breakdown indicating the amount of time the beneficiary would spend duties that would clearly demonstrate that he will manage an essential function of the U.S. company.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The beneficiary in this matter 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 day-to-day operations. In fact, the petitioner has not established that the beneficiary would have sufficient subordinate employees to relieve him from performing non-qualifying operational and administrative duties.

The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the petitioner indicates that the beneficiary will have one direct subordinate, a manager, and two additional subordinates. Due to the broad and vague description of the beneficiary's and his subordinates' job duties, it remains unclear how the subordinates will relieve the beneficiary from performing other non-qualifying administrative and operational duties, particularly as the petitioner indicating that the beneficiary would be managing personnel who are not included on the proposed organizational chart

The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity or as a function manager within one year of the approval of the petition. Accordingly, the appeal will be dismissed.

III. 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.