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

(b)(6)

DATE: MAR 29 2013 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, ("the director") denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

This nonimmigrant petition was filed 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 was organized under the laws of the State of North Carolina as a limited liability company in February 2010. On the Form I-129 (Petition for a Nonimmigrant Worker), the petitioner noted that it employed three individuals and had earned a gross annual income of $91,482 when the petition was filed. The Form I-129 lists the petitioner's type of business as "information technology services." The Form I-129 Supplement L indicates that the petitioner is a subsidiary of). According to the petition, the petitioner seeks to continue the employment of the beneficiary in L-1A classification as its manager for an additional two years.[1]

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in either a 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, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes that the beneficiary would be employed in a primarily managerial or executive position.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of the foreign employer.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

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[1] The petitioner notes that United States Citizenship and Immigration Services approved a Form I-129 petition filed by the petitioner on the beneficiary's behalf providing the beneficiary L-1A classification to open a new office in the United States. The initial Form I-129 was for a validity period of June 7, 2010 until June 6, 2011. USCIS also approved a second Form I-129 petition extending the beneficiary's classification in an L-1A classification for a validity period of June 7, 2011 until November 11, 2011.

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 regulation at 8 C.F.R. § 214.2(l)(3) provides 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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive position.

In counsel's letter appended to the petition, counsel claimed that the petitioner provides a range of information technology (IT) services to clients in and the United States and is capable of tailoring services to suit client needs whether local or global. Counsel noted that the petitioner provides web hosting services for personal and business websites which includes dedicated servers and virtual dedicated servers for hosting multiple traffic-intensive on one server, running enterprise or operating development environments; domain name services; strategic planning for processes and technologies [with] the power and flexibility to handle any aspect of their customer's needs; and anti-spam software.

In the foreign entity's letter appended to the petition as an exhibit, the foreign entity indicated that the beneficiary, as manager of the petitioner, "has full authority over the day-to-day management and normal affairs of the business, including the operational, technical, marketing, fiscal and administrative duties." The foreign entity added that the beneficiary "has full authority to hire and fire employees, train and supervise staff while providing leadership, direction and management to [the petitioner's] employees." The foreign entity also noted that the beneficiary is "responsible for strategic planning for [the petitioner] in conjunction with the goals set by the [foreign entity]."

The record also included a table listing the beneficiary's duties on an hourly basis for a one-week period. The petitioner indicated the beneficiary spent:

- Five hours per week planning implementation and follow up of daily business activities;
- Five hours per week reporting and updating [the foreign entity];
- Five hours per week on accounting and banking;
- Two hours per week prospecting for new customers and setting up appointment with new customers;
- Five hours per week visiting customers;
- Two hours per week in business meetings with partners and vendors;
- One hour per week visiting the datacenter related to IT infrastructure;
- Ten hours per week on sales/marketing/advertising activities;

- Seven and one-half hours per week analyzing operational, technical and financial reports in order to direct the company; and,
- Five hours per week following up new trends and ideas in the IT sector, focusing on development of new products and services.

The petitioner also provided an overview of the beneficiary's duties as follows:

- Manage the operational, technical and fiscal, administrative activities of [the petitioner].
- Manage the marketing and administration of the overall core activities of [the petitioner].
- Decide employment related issues such as recruiting, training, supervising, evaluating and firing staff.
- Plan and develop systems and procedures.
- Analyze and document business processes and problems.
- Set short and long term goals and objectives for [the petitioner], and develop strategies and programs to ensure attainment of these goals and objectives.
- Monitor and analyze sales and marketing activities against goals.
- Control operational budget and expenditures.
- Develop solutions to enhance efficiencies.
- Scenario planning and sensitivity analysis to drive effective decision making for [the foreign entity].
- Report [to the foreign entity] regarding daily activities of [the petitioner].
- Evaluate strategic planning for [the petitioner] with [the foreign entity].
- Identify trendsetter ideas by researching industry and related events in USA for Market.
- Ensure that [the petitioner's] affairs are managed in accordance with business principles, such as profitability and compliance with articles of incorporation.
- Prepare and direct operations towards securing targets.
- Select vendors with which to conduct business.
- Develop customers in accordance with the company's services.
- Develop customer relation management strategies.
- Prepare contracts including setting terms, conditions, and price quotes.
- Select, hire and work with an Advertising Agency to represent [the petitioner].
- Determine sales and marketing brochures for products and services provided by [the petitioner] in cooperation with the Advertising Agency.
- Supervise and develop the company's website.
- Determine costs associated with business ventures, calculate gross margin and risk factors, and prepare services provided by [the petitioner] accordingly.
- Develop negotiating strategies and positions by studying integration of new ventures with company strategies and operations; examining risks and potentials, estimating partners' needs and goals.
- Provide leadership, direction, and management to all [the petitioner's] employees.
- Study, analyze and evaluate the local competition environment.
- Evaluate [the petitioner's] ongoing operations.

The petitioner also provided its organizational chart in support of the petition showing the beneficiary in the position of "manager" and identifying a second individual as the "assistant manager" and a third individual as the "technical support."

The petitioner also provided a table identifying the duties of the assistant manager on an hourly basis for a one-week period. The petitioner indicated the assistant manager spent:

- Five hours reporting and updating [the foreign entity] with [the beneficiary];
- Two hours preparing weekly appointment schedule with the potential customers;
- Eight hours on accounting and banking;
- One and one-half hours keeping accounting and budget reports;
- Four and one-half hours arranging new appointments with the customers and researching for new customers;
- Six hours visiting customers;
- One and one-half hours searching for the appropriate outsourcing companies on the basis of the principles determined by the manager, conducting pre-interviews with the outsourcing companies and reporting them to the manager;
- One and one-half hours preparing presentations for the customers and updating them;
- Two hours following up the incoming mails and providing necessary information flow and giving feedbacks to the vice-manager [*sic*];
- Two hours preparing sales and marketing brochures for products and services provided by the company in the US with the Advertising Agency;
- Three hours following up daily and weekly stationery of the office; and
- One and one-half hours reporting weekly activities to the [beneficiary].

The petitioner also indicated that the technical support individual would work 25 hours per week and would devote 24 hours responding to customer support requests and providing technical support and one hour reporting to the beneficiary. The petitioner further indicated that it planned to hire a marketing and public relations manager in 2012.

The director issued a request for evidence (RFE) instructing the petitioner to submit additional evidence establishing that the beneficiary will be employed in a managerial capacity with the U.S. company. The director noted that after one year a new company must show that the manager does not actually perform the day-to-day duties of running the company. The director also noted that the petitioner had not identified the photographs provided but that it appeared that the beneficiary was promoting the petitioner's product or performing the duties of selling the product. The director provided the petitioner an opportunity to provide additional evidence establishing that the proffered position was a managerial or executive position within the U.S. office.

In response, counsel for the petitioner noted that the petitioner had hired a marketing and public relations manager on November 1, 2011 and that this individual is responsible for all sales, marketing, and advertising activities. Counsel asserted that the beneficiary was relieved of certain non-managerial duties which had been reallocated to the assistant manager, the technical support person, and the marketing and public relations manager. Counsel contended that the assistant manager, the technical support person, and the marketing and public relations manager had the

equivalent of U.S. bachelor's degrees and thus the beneficiary supervises and controls the work of professional or managerial employees. The petitioner provided a copy of an uncertified Form 941, Employer's Quarterly Federal Tax Return for the fourth quarter of 2011 indicating that the petitioner employed four individuals, as well as the petitioner's paycheck detail report identifying the four individuals.

The petitioner also revised the beneficiary's duties as follows:

- Provide leadership, direction, supervision and management to all [the petitioner's] employees;
- Oversee the operational, technical and fiscal, administrative activities of [the petitioner].
- Decide employment related issues such as recruiting, training, supervising, evaluating and hiring and firing of staff.
- Set short and long term goals and objectives for [the petitioner], and develop strategies and programs to ensure attainment of these goals and objectives.
- Oversee sales and marketing activities performed by Marketing and Public Relations Manager, including observing customer visits conducted by [the petitioner's] employees, to improve sales and marketing activities.
- Receive and analyze marketing reports from Marketing and Public Relations Manager;
- Receive and analyze technical, operational and other reports from the Assistant Manager.
- Oversee operational budget and expenditures.
- Scenario planning and sensitivity analysis to drive effective decision making for [the foreign entity].
- Report [to the foreign entity] regarding daily activities of [the petitioner].
- Evaluate strategic planning for [the petitioner] with [the foreign entity].
- Ensure that [the petitioner's] affairs are managed in accordance with business principles, such as profitability and compliance with articles of incorporation.
- Determine costs associated with business venture, calculate gross margins and risk factors and prepare services provided by [the petitioner] accordingly.
- Prepare and direct operations towards securing targets.
- Supervise contracts prepared by assistant manager.
- Authorize the selection, hiring process of the Advertising Agency to represent [the petitioner].
- Develop negotiating strategies and positions by studying integration of new ventures with company strategies and operations; examining risks and potentials, estimating partners' needs and goals.
- Evaluate employees' performance on a regular basis.
- Meet regularly with [the petitioner's] management team to evaluate company's activities.

The petitioner also amended the duties of the assistant manager and provided a list of duties to be performed by the marketing and public relations manager. The petitioner submitted a revised

organizational chart adding the marketing and public relations manager as an employee supervised by the beneficiary.

The director determined that the petitioner had not established the beneficiary would be employed in either a managerial or executive capacity. On appeal, counsel for the petitioner notes that if United States Citizenship and Immigration Services (USCIS) considers staffing levels in determining whether the beneficiary is acting in a managerial capacity, USCIS must take into account the reasonable needs of the organization. Counsel asserts that the petitioner has established that the beneficiary devotes more than half of his time to executive or managerial duties. Counsel contends that with the hiring of a "marketing and sales manager" and the reallocation of duties, the beneficiary was further relieved of performing non-qualifying duties. Counsel, citing various cases, avers that a person may be a "functional" manager or executive even if he is the sole employee and that this classification is not meant to limit managers and executives to persons who supervise a large number of persons or a large enterprise. Counsel further claims that the director relied on and misstated the holdings in cases cited and relied upon in reaching his decision. Counsel concludes that the petitioner after a year of operating in a challenging U.S. economy met its benchmarks, hired new workers, and continues to do business and thus met the regulatory requirements for an extension of the beneficiary's L-1A status.

III. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in the United States in a managerial or executive capacity as defined at 101(a)(44)(A) or (B) of the Act. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.* In this 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. Merely asserting or referencing that the beneficiary is a manager or an executive does not meet the petitioner's burden of proof. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. The record does not provide probative consistent descriptions of the job duties sufficient to satisfy either the executive capacity or managerial capacity definition.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

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*).

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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. 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. *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 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 Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). The petitioner has not provided the requisite evidence to establish that the beneficiary manages an essential function.

Although counsel on appeal references eligibility for this classification based on executive capacity, managerial capacity and functional managerial capacity, neither counsel nor the petitioner identify the beneficiary as primarily an executive or primarily a functional manager. The record does not identify specific duties as managerial duties or executive duties. The petitioner may not claim to employ 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 capacity and the statutory definition for managerial capacity. The petitioner has not satisfied either definition in this matter.

The initial description of the beneficiary's job duties presented a broad overview of the beneficiary's daily job duties. Upon review of the hourly breakdown of the beneficiary's duties, the beneficiary spent ten hours directly performing duties relating to prospecting for and visiting customers, vendors, partners, and the datacenter. The petitioner spent an additional ten hours on sales, marketing and advertising activities and a further five hours attempting to develop new products and services. Accordingly, the majority of the beneficiary's time is spent performing duties involved in establishing customers. The petitioner, without further description of the duties involved also noted that the beneficiary spent five hours per week on accounting and banking. The reference to

accounting and banking does not include sufficient detail to ascertain the actual duties involved in this activity. Even when reviewing the petitioner's list of "specific" duties performed by the beneficiary, there is little probative detail showing what the beneficiary will actually do in carrying out the accounting and banking duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v.* Sava, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner's general reference to planning, implementing and following up on daily business activities and analyzing operational, technical, and financial reports to direct the company are insufficient to establish what these duties actually encompass. Reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, Id.*

Although the petitioner also provided a description of the duties performed by the assistant manager, the duties appear primarily administrative in nature. Again, the lack of probative detail regarding the assistant manager's actual daily duties fails to establish what the assistant manager actually does on a daily basis. 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)).

As the initial record did not provide detailed information establishing that the petitioner's operations had advanced sufficiently to relieve the beneficiary from primarily performing operational and administrative tasks, the director properly issued a request for further evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978).[2] If significant changes are made to the initial benefit request, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for evidence did not clarify or provide more specificity to the original duties of the position, but rather deleted specific operational duties performed by the beneficiary and added those duties to the duties of other employees.

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[2] On appeal, counsel attempts to distinguish the *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978) which held that 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 from the matter at hand. However, counsel fails to acknowledge that this holding has been codified in USCIS regulations which affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1).

For example, the petitioner excluded references from the beneficiary's description of duties such as managing the marketing and administration of the petitioner, monitoring and analyzing sales and marketing activities, identifying trendsetter ideas by researching, preparing contracts, selecting and working with an advertising agency, determining sales and marketing brochures, selecting vendors, developing customers and customer relation management strategies, supervising and developing the website, and studying, analyzing and evaluating the local competition environment. The petitioner replaced these duties with references to the beneficiary overseeing the sales and marketing activities performed by the marketing and public relations manager, receiving and analyzing marketing reports from the marketing and public relations manager, supervising contracts prepared by the assistant manager, authorizing the selection and hiring of an advertising agency, and meeting regularly with the petitioner's management team. In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job duties has the beneficiary managing more of the work done in the petitioner's operation. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The petitioner introduced a new employee for the first time in response to the request for evidence, although claiming that the employee had been hired November 1, 2011, prior to filing the extension request. Neither counsel nor the petitioner explains why this important employee, a marketing and public relations manager, had not been referenced in the extension petition. Not only did the petitioner fail to identify this individual as an employee hired prior to filing the extension petition, the petitioner failed to include a list of this individual's duties and did not include her position on the organizational chart submitted with the initial petition. 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).

Counsel appears to suggest that the beneficiary supervises subordinate employees that are professional or managerial and thus he is performing in a managerial capacity. However, the description of the duties of the assistant manager and the IT support technician do not demonstrate that either of these individuals will perform duties that are professional or managerial duties. As observed above, the duties of the assistant manager appear to be administrative in nature and the duties of the IT support technician have not been sufficiently described to conclude that the duties require any more than the appropriate technical certifications. Thus, the petitioner has not established that these positions require a bachelor's or higher degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. As the petitioner did not reference the position of marketing and public relations manager initially, further discussion of this individual's claimed duties and whether the duties are professional or managerial is unnecessary. In brief, however, the marketing and public relations manager's duties are insufficiently described to establish that her duties are either professional or managerial. Accordingly, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel on appeal also challenges the director's consideration of the petitioner's staffing levels when determining whether the beneficiary will be acting in a managerial or executive capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor

in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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.[3] There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not established that it has reached the point that it can employ the beneficiary in a primarily managerial or executive position.

Counsel's assertion on appeal that the petitioner established that the beneficiary devotes more than half of his time to executive or managerial duties is not supported in the record. 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).

Beyond the required description of the job duties, 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. While several of the overbroad duties described by the petitioner may fall generally under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual primary responsibilities. Moreover, the petitioner's late addition of an employee to relieve the beneficiary from performing marketing duties coupled with the reallocation of operational duties to an assistant manager, raise concern regarding the accuracy of the petitioner's various descriptions of its actual operations. Again, doubt cast on any aspect of the petitioner's proof may 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).

In this matter, the petitioner failed to provide probative, descriptive, and consistent evidence regarding the beneficiary's duties. Accordingly, the AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary will be employed in a bona fide managerial or executive capacity for the petitioning entity.

IV. Conclusion

[3] As the foreign entity indicated, the beneficiary was not admitted into the United States to open the "new office" until November 12, 2010, due to the U.S. Consulate's delay in issuing the beneficiary's L-1A visa.

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.