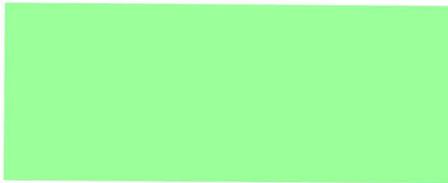


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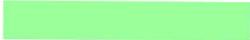
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

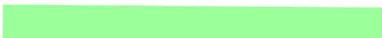


U.S. Citizenship
and Immigration
Services



DATE: **MAY 13 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition to extend the beneficiary's employment as an intracompany transferee (L-1A) 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 Virginia limited liability company established in 2010, states that it operates an engineering consultancy business. It claims to be an affiliate of [REDACTED] located in Turkey. The beneficiary was previously granted L-1A status in order to open the petitioner's new office, and the petitioner now seeks to extend her status for two years so that she may continue to serve in the position of general manager.

The director denied the petition concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; and (2) that the beneficiary's former employer continues to do business as a qualifying organization abroad.

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 erred by failing to treat the petitioner as a "new office" and by improperly relying on the size of the U.S. company in determining that it could not employ the beneficiary in a qualifying capacity. Counsel asserts that the denial should be reversed as the petitioner was not given the opportunity to operate for one year from the date the initial petition was approved. In addition, counsel contends that the petitioner provided sufficient documentation to establish that the beneficiary's former employer continues to actively do business in Turkey. Counsel submits a brief 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. NEW OFFICE EXTENSION

As a preliminary matter, the AAO will address counsel's claim that the director erred by adjudicating this petition pursuant to the regulations applicable to a petition that involves the extension of a "new office" petition at 8 C.F.R. § 214.2(l)(14)(ii). Specifically, counsel asserts:

The basis of the Appeal is that contrary to the USCIS (Service) position, the "new office" continues to be a "new office" as it has only been operating since November 2010, when the initial L-1A approval was granted, and not since May 2010, when the application was submitted. In addition, the excessive delay of the Service, which is mandated by statute to adjudicate the L1 petition within thirty (30) days, caused unreasonable hardship on the company creating the basis of denial that the Service now relies in its decision.

* * *

The Service might be correct that there may not be any regulation for an additional grant of time, but the regulation clearly states that the time is one year after approval, and the approval did not occur until November 23, 2010, and notice of approval was not given until November

30, 2010. The Service continues in its analogy to consider the company being in full operation for one year, when as a matter of common sense it could not have been in full operation for more than six months.

Upon review, counsel's assertions that the petitioner should be treated as a new office are not persuasive.

On the L Classification Supplement to Form I-129, the petitioner stated that the beneficiary's prior period of stay in L classification was from June 18, 2010 until June 17, 2011. The petitioner marked "no" on the Form I-129 where asked to indicate whether the beneficiary will be employed in a new office. The petitioner's initial evidence included a copy of the Form I-797A Approval Notice for the initial petition, which was valid from June 18, 2010 until June 17, 2011 (EAC 10 179 50999).

The AAO acknowledges that the initial petition was filed on June 18, 2010 and approved on November 19, 2010, notwithstanding the approval dates granting the beneficiary a full year in L-1A status.¹ However, the petitioner did not initially request that it be adjudicated as a new office, nor did it request an extension of status for the remainder of the first year, through November 18, 2011. It requested a full two-year extension of the beneficiary's status.

In response to the RFE, the counsel asserted that the petitioner remains a "new office" and that it has until November 2011 to support a managerial or executive position. At the same time, counsel requested "a one year extension and a second chance to allow for a full vesting in a 'new office,'" and the petitioner provided projections for the business through November 2012 to support its claims that it will support a managerial or executive position by that date. In effect, counsel requested, contrary to the regulations, that the petitioner be granted a total of one year and seven months in order to establish its new office.

Despite counsel assertions, the petitioner may not be granted a second "new office" L-1A visa approval. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner. 8 C.F.R. § 214.2(l)(14)(ii).

Further, the record reflects that the petitioner was engaged in the provision of services prior to filing the new office petition, as reflected by invoices issued for "design/rebuild costing" dating back to May 4, 2010, and throughout the time the initial petition was pending. Therefore, the petitioner's claim that it could not hire employees until the petition was approved in November 2010 is not persuasive, as someone was clearly responsible for carrying out the work for which the petitioner was billing its clients prior to that date.

¹¹ The AAO notes that, while the petitioner asserts that there was an unreasonable delay in the adjudication of the initial petition, USCIS records reflect that, in the course of adjudicating the petition, the director issued a request for evidence and the petitioner took the full 12 weeks allowed by regulation to respond to it. The petition was adjudicated promptly once the petitioner's response was submitted.

Accordingly, the director properly adjudicated the petition as an extension of a petition involving a "new office" pursuant to the regulations at 8 C.F.R. § 214.2(l)(14)(ii).

III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The next issue to be addressed is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

A. Facts and Procedural History

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it is engaged in "engineering consulting," with two employees and \$38,000 in gross annual income in 2010. On the L Classification Supplement to Form I-129, the petitioner stated "same as previous Petition" where asked to provide a description of the beneficiary's proposed duties as its general manager.

The petitioner's initial evidence included: evidence of the foreign entity's ownership and business activities; a copy of the petitioner's 2010 IRS Form 1065, U.S. Return of Partnership Income; bank statements for the period June 2010 through April 2011; the petitioner's "Contractor Contract" with [REDACTED] under which the petitioner provides measurement, design, costing, design review, contract preparation and materials ordering services; and a letter from [REDACTED] confirming that the petitioner serves as a supplier for residential and commercial design and consulting services for kitchen and bath remodeling. The petitioner did not provide a statement of the beneficiary's duties or a statement describing the staffing of the new operation accompanied by evidence of wages paid to employees. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

Accordingly, the director issued a request for additional evidence (RFE) in which he advised the petitioner that it had not sufficiently described the beneficiary's duties to demonstrate that she would be employed in a qualifying capacity. The director further instructed the petitioner to submit: a detailed explanation of the nature and scope of the petitioner's business; evidence of staffing, including the number of employees, duties performed by each employee, and their salaries and wages; and additional evidence to demonstrate that the petitioner can support a qualifying managerial or executive position.

The petitioner's response to the RFE included the following duty description for the beneficiary, which was stated to represent her duties "in the next 2 years":

- Perform benchmarking and market research to determine the supply-demand trends.
- Stating the company strategy
- Define the mission statement
- Continuously evaluation [*sic*] of targets and redefining new targets
- Defining the human resources need to reach the targets, and build the team required
- Evaluating the department managers['] activities periodically and defining new duties
- Continuous evaluation of customer satisfaction data

- Approve bi-weekly cash flow prepared by accounting manager
- Approve the customer satisfaction letters taken when the project completed
- Define a system for logistics and material and services to be transferred to customer in a timely manner
- Approve the sales above \$30,000
- Take the managerial decisions on behalf of the company

The list of departments directly reporting to General Manager:

- Business Development
- Engineering
- Operations
- Accountant
- Responsible to evaluate all the staff reporting to her.
- Evaluate the human resources decisions taken by department managers.
- Perform benchmarking and market research to determine the supply-demand.

Number of subordinate supervisors under the beneficiary's management

- 5 subordinate supervisors were under the beneficiary's management. They are Business Development, Engineering, Operations, Accountant and Project Manager.

The petitioner stated that "[a]most 40% of all her duties were managerial functions for the previous year" and that "100% of all her duties will be managerial/executive capacity functions in the next 2 years, beginning from end of November 2011."

The petitioner's response also included an explanation regarding the nature of the business, and noted that the company has worked as a construction consulting service provider, with plans to also engage in total remodeling implementation projects. The petitioner indicated that it has completed one remodeling project with the assistance of subcontractors, and that the beneficiary was responsible for managing the project, including preparation of the quotation, selection of the subcontractor, and following up with the other staff.² The petitioner provided the names of three clients to which the company provides "design cost build" and other consulting services and described the nature and scope of the work it performs for these clients. The petitioner stated that it has begun to hire staff "to take over the specific duties that [the beneficiary] should not be doing" and indicated that it anticipates hiring two additional workers over the next three months so that the beneficiary can "leave the position of Engineering Manager" and act solely as general manager.

In a separate letter, the petitioner specified that, in August 2011, it hired an engineer with a master's degree to work as its project manager for the company's design build costing and residential remodeling projects. The petitioner further stated that this employee will help the business development department by preparing

² The petitioner provided an invoice from a subcontractor who billed the petitioner for a variety of construction and remodeling services on August 4, 2010.

quotations. The petitioner stated that the project manager manages budgeting, timing, resource planning and contractor follow-up for projects. In addition, the petitioner indicated its intent to hire a kitchen and bathroom designer and a consultant during the next two months. The petitioner stated that [REDACTED] the petitioner's majority owner and the beneficiary's spouse, would be taking over as the engineering department manager when the new employees are hired and that the beneficiary would no longer manage the engineering department.

The petitioner submitted three different organizational charts in response to the RFE. The first reflected the petitioner's staffing as of September 1, 2011. The chart depicts the beneficiary as general manager and as manager of the engineering department. The chart identifies [REDACTED] as the head of the business development and operations departments, and as a "design office" employee. In addition, the chart reflects the newly hired project manager, with no subordinates, and a named finance employee, whose duties have not been described. The chart shows open positions for a consultant and a "design build costing" employee in the engineering department.

The second organizational chart shows the petitioner's projected staffing as of November 15, 2011 and identifies [REDACTED] as head of the Engineering department, while continuing to hold three additional positions. The chart identifies "new employees" in the positions of consultant and "design build costing."

Finally, the petitioner submitted a projected chart depicting the anticipated structure of the company through the end of December 2012. This chart depicts an organization with 19 employees, including new employees to serve in the positions of sales, investment planning, logistics, purchasing, quality assurance, project management, consulting and accounting.

The petitioner also submitted a five-year forecasted profit and loss statement for the period 2011 through 2015 which indicates that through the end of 2011, the petitioner anticipates payroll expenses of \$46,000 and total income of \$115,038. The petitioner has not provided evidence of wages paid to any employees other than one paystub issued to the project manager for the month of August 2011.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director advised that there is no provision in the regulations that would allow the approval of an additional "new office" petition. The director observed that the petitioner claims to have two managerial employees, but no employees to perform the actual day-to-day non-qualifying duties associated with operating a consulting business. The director found insufficient evidence to establish that the beneficiary is relieved from performing non-managerial duties.

On appeal, counsel asserts that it is "only because the company had less than 6 months it has been unable to properly establish its growth and the proper role of the beneficiary as the executive of the company." Counsel further emphasizes that the statute and regulations do not require that the petitioning company be of a certain size or employ only full-time workers. However, counsel's contentions on appeal are primarily based

on his position that the instant petition must be treated as a new office and that the petitioner need not establish that it can currently support a managerial or executive position.

B. Analysis

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

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

Here, the petitioner has failed to submit the required description of the beneficiary's actual duties as of the date of filing. With its initial submission, the petitioner simply referred USCIS to review the duties submitted with the prior new office petition. However, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(C) requires the petitioner to provide a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. Therefore, simply referring to the beneficiary's anticipated duties at the time the new office petition was filed was insufficient. 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)).

While the petitioner submitted a duty description in response to the RFE, it contained a combination of vague and speculative duties that is insufficient to establish that the beneficiary is currently engaged in primarily managerial or executive duties. For example, the petitioner stated that the beneficiary is responsible for defining the company's mission statement and strategy, continuously evaluating and defining new targets and objectives, and making "managerial decisions" on behalf of the company. While such duties imply that the beneficiary exercises authority over the company's goals, the petitioner does not define her specific tasks or indicate the amount of time she allocates to these responsibilities. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The beneficiary's remaining duties as described in the record involve operational tasks or overseeing operational departments that have not yet been staffed. In fact, the petitioner specified that the job description represents duties the beneficiary will perform "in the next two years." For example, the petitioner asserts that

the beneficiary "performs benchmarking and market research," approves major sales, defines a system for logistics, approves cash flow statements prepared by an accounting manager, evaluates customer satisfaction data, and evaluates and supervises department managers identified as business development manager, engineering manager, operations manager, project manager and accountant. All of these responsibilities imply that there are employees subordinate to the beneficiary to perform sales and marketing tasks, carry out logistics functions, perform finance and accounting tasks, collect customer data, and manage distinct departments within the organization. The record does not support that such employees existed when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. See 8 C.F.R. § 103.2(b)(1). 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).

The fact that the beneficiary manages or directs a business as its "general manager" and minority shareholder does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioning company, the petitioner has failed to demonstrate that her actual day-to-day duties as of the date of filing the petition were primarily managerial or executive. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, while the record is lacking a sufficiently detailed description of the beneficiary's actual duties as of the date of filing the petition, the petitioner's own statements implied that the beneficiary was not engaged in primarily qualifying duties. Specifically, it stated that she has allocated only 40% of her time to qualifying duties, with the expectation of spending 100% of her time on managerial and executive duties upon hiring two additional engineering department employees. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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 petitioner claimed two employees as of the date of filing the petition. The petitioner has not provided evidence of wages paid to any employees during the validity of the new office petition; however, it is assumed that these two employees are the beneficiary herself and the petitioner's majority member.

The petitioner also identified a finance employee on its organizational chart but it has not corroborated that it has paid a salary, wages or other fees to this worker. The petitioner indicates that the beneficiary serves as its general manager and engineering manager, while [REDACTED], according to the organizational chart as of September 2011, fills three positions, including business development, operations and "design office." Although the director requested position descriptions for all employees, the petitioner failed to provide any description of the duties performed by [REDACTED] or the named finance employee. Rather, it provided duty descriptions for a "project manager" hired after the petition was filed and for two positions that would be filled within two to three months of the petitioner's submission of the RFE response. Therefore, based on the limited evidence submitted, it cannot be concluded that the beneficiary was engaged in the supervision of professional, managerial or supervisory employees as of the date of filing the petition. Rather, it is evident that she and [REDACTED] despite their managerial job titles, were responsible for essentially all day-to-day duties necessary for the company to operate.

Even if the AAO considered the petitioner's hiring of a project manager in August 2011, the record contains insufficient evidence regarding this employee's duties and qualifications to establish that he would actually perform managerial or supervisory duties, that he is a professional, or that the beneficiary would be primarily supervising this employee rather than performing non-qualifying operational and administrative tasks.³ 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function,

³ 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. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties assigned to the project manager, despite the petitioner's statement that he is an engineer with a Master's degree.

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)). In this matter, the petitioner has neither articulated a claim that the beneficiary will primarily manage an essential function, nor has it submitted evidence to establish that she performs primarily managerial duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the petitioner indicates that the beneficiary is responsible for setting the company's goals, strategies and objectives, the record does not support a finding that these tasks are the beneficiary's primarily responsibilities. On appeal, counsel concedes that the petitioner has been "unable to properly establish its growth and the proper role of the beneficiary as the executive of the company."

Counsel correctly observes 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). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, 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). If the business does not have sufficient staffing in place to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. The petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The petitioner had two employees as of the date of filing the petition, its owners, and added a third employee while the petition was pending. While the beneficiary and her spouse

have managerial job titles, the AAO concurs with the director's finding that the petitioner has not established a reasonable need for either of them to engage in primarily managerial or executive duties.

As stated above, the AAO does not doubt that the beneficiary has the appropriate level of authority to make decisions for and on behalf of the U.S. company. While the beneficiary appears to have some degree of discretion and decision-making authority over the company, the petitioner has not shown how she is relieved from involvement in the day-to-day operations of the business so that she is free to spend the majority of her time performing the claimed managerial or executive duties.

For the foregoing reasons, the petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

III. QUALIFYING ORGANIZATION ABROAD

The remaining issue addressed by the director is whether the petitioner maintains a qualifying relationship with the beneficiary's foreign employer. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to provide evidence that the United States and foreign entities are still qualifying organizations.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
 - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
 - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

The director acknowledged that the evidence established that the petitioner and the foreign entity are affiliates based on common ownership. However, the director determined that "[e]ven though many invoices were submitted to demonstrate that the foreign entity has conducted some transactions, nothing was submitted to show that the business is still functioning in a qualifying on-going basis while the owners have been residing in the United States." The director found that the documents submitted "do not demonstrate the structure of the organization and/or that it still has any employees who provide a product or service."

On appeal, counsel contends that many documents were submitted to show that the foreign entity continues to be a legally-recognized entity actively doing business in Turkey. Counsel suggests that the director applied a subjective standard as to "how active is active enough."

Upon review, counsel's assertions are persuasive. The only evidence requested by the director to establish the foreign entity's ongoing operations were a tax return and a current organizational chart for the company. The petitioner submitted the requested evidence, as well as monthly tax documents and detailed balance sheets for the foreign entity. The petitioner has established that its affiliate continues to do business as a qualifying organization in Turkey. Accordingly, the director's determination with respect to this issue only will be withdrawn.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. 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.