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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: **NOV 29 2013** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.

Thank you,

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

Ron Rosenberg

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a North Carolina corporation, states that it engages in providing advertising, media, and film services. The petitioner claims to be a subsidiary of [REDACTED] located in [REDACTED] Brazil. The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States and the Director, Vermont Service Center denied the petition to extend his status on December 3, 2012. The petitioner immediately filed this new petition seeking to employ the beneficiary as its general manager for period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity in the United States.

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 beneficiary manages an essential function for the U.S. entity, the business strategy and development function, and he exercises authority on a senior level over other supervisors/managers." Counsel for the petitioner submits a brief and additional evidence 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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 26, 2012. The petitioner stated on the Form I-129 that the beneficiary will be employed as its general manager and indicated that the company had three employees and a gross annual income of \$52,672 as of the date of filing.

In an addendum to the Form I-129, the petitioner described the beneficiary's proposed duties as follows:

Manage the U.S. office, Department of Management, as a General Manager, [the beneficiary] would perform the following job duties: 20% manage employees and make sure that they are working according to best market practice, and develop and implement new business strategy. 30% manage activities to provide growth, develop new clients, and identify opportunities for [the petitioner]. 20% manage activities to develop commercial proposals. 10% manage international contracts. 20% manage activities to increase the amount of Brazilian media sold to American ministries and bring Brazilian ministries to buy media in the USA. As the General Manager, [the beneficiary] would be responsible for hiring and developing the employees of [the petitioner]. He would supervise two employees at [the petitioner].

In its letter of support, the petitioner indicated that the beneficiary will be employed in a managerial capacity and provided the same description of his job duties as on the Form I-129. The petitioner then provided a summary of tasks performed by the beneficiary on a weekly basis, including the number of hours he spends on each duty. The petitioner went on to summarize some managerial decisions made by the beneficiary and their impact on the business' expansion into other areas, such as film production and distribution. The petitioner stated that the beneficiary "would spend 100% of his time towards executive and managerial duties. He would not perform job duties that are not directly related and absolutely essential to his managerial role at [the petitioner]."

The petitioner also provided information about the beneficiary's two subordinate employees, [redacted] whose job title is "Creative Services and Editing," and [redacted] whose job title is "Account Executive and Production Assistant." The petitioner provided their resumes and a brief summary of their duties and indicated the percentage of time they devote to their tasks.

The petitioner submitted 2011 IRS Forms W-2, Wage and Tax Statement, for the beneficiary showing \$21,000 in wages, tips, and other compensation, and a 2011 Form 1099, Miscellaneous Income, for the beneficiary showing \$2,200 in nonemployee compensation. The Form W-2 for [redacted] shows he was paid \$14,500 in wages, tips, and other compensation, and the petitioner's 2011 Form W-3, Transmittal of Wage and Tax Statements, shows that it paid a total of \$35,500 in wages, tips, and other compensation to all employees.

The petitioner submitted pay stubs for the beneficiary showing that petitioner employed him from August 25, 2012 to November 30, 2012. The petitioner also submitted an online payroll print out from Suntrust bank showing that it employed the beneficiary, [REDACTED] and [REDACTED] in May and June of 2012.

The petitioner submitted an organizational chart for the U.S. company listing the beneficiary as general manager, reporting to the owner. The general manager supervises [REDACTED], "Account Executive and Production Assistant," [REDACTED] "Creative Services and Editing," and a vacant position for an "Assistand [sic] Editor." The organizational chart states that the assistant editor position is "to be hired as upon demand as a temporary."

The petitioner submitted copies of its Internal Revenue Service (IRS) Forms 941X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund, for the first, second, and third quarters of 2012. The adjustment indicates that the original Forms 941 filed listed two employees, which was actually three employees, [REDACTED] and the beneficiary for all three quarters. On the Forms 941X, the petitioner explains that all of the wages and taxes were reported correctly each quarter; it was only the number of employees that was reported incorrectly each quarter due to a system error.

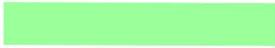
On January 8, 2013, the director issued a request for additional evidence ("RFE") in which she instructed the petitioner to submit, *inter alia*, evidence that the beneficiary will be employed in a managerial capacity.

In response, counsel for the petitioner stated that the beneficiary is a functional manager, supervises a manager, [REDACTED] and supervises a supervisor, [REDACTED]. The petitioner submitted a letter describing the beneficiary's duties as follows:

As the General Manager of [the petitioner], [the beneficiary] manages the business strategy and development function of the company, which is essential for the company to grow and become more profitable. This function is essential for the company's sales figures, and the failure or success of the company depends upon it. Seeking new opportunities and expanding our services is critical for the company's growth and survival. In 2012, [the beneficiary] added film production as a new service offered by the company. [The beneficiary] had no prior experience in film production and, thus, brought in help, [REDACTED] is uniquely qualified to manage and perform the operational activities associated with creative services and editing for film production.

* * *

To help us better position ourselves as solutions providers . . . [the beneficiary] decided to hire a very talented and creative employee, [REDACTED] who was placed in charge of creative services and editing for film production. . . . He was given complete control to make important decisions over creative services and editing.



Though [redacted] is in charge of creative services and editing, [the beneficiary] supervises [redacted] on a daily basis to make sure that [redacted] is managing and performing this service in accordance with a client's request and the best market practice. [The beneficiary] also manages the strategic development of our film production business segment.

* * *

[The beneficiary] supervises [redacted] day-to-day activities making sure [he] meet[s] the best market practice and a client's request.

* * *

[The beneficiary] manages the business strategy and development function for the company. [The beneficiary's] strategies to develop [the petitioner] have worked out and have provided [redacted] with a position to supervise creative services and editing for the company. He has expanded the company to ensure the future of [the petitioner] and is completely capable of develop strategies [*sic*] to keep the company relevant and profitable.

* * *

How [the beneficiary] has been able to develop film production for [the petitioner] is quite a feat especially considering how he has no experience in the industry. He has really relied on [redacted] to supervise and perform the creative services and editing for the film production business segment of the company.

* * *

[The beneficiary's] main function at [the petitioner] is to manage business strategy and development for the company.

- 20% Manage employees and make sure that they are working according to best market practice, and develop and implement new business strategy.
- 30% Manage activities to provide growth, develop new clients, and identify opportunities for [the petitioner].
- 20% Manage activities to develop commercial proposals.
- 10% Manage international contracts.
- 20% Manage activities to increase the amount of Brazilian media sold to American ministries and bring Brazilian ministries to buy media in the USA.

The petitioner's letter goes on to state that the beneficiary works 40 hours per week and provides a breakdown of how he spends that time. The most time-consuming tasks listed, taking up 10 hours per week each, are "direct and implement strategies for new business and new projects based on research and

analysis," and "managing a segment of international business involving [REDACTED] strategizes about getting Christian ministries media content in overseas and local networks."

The petitioner submitted a new organizational chart for the U.S. company listing the beneficiary as general manager, reporting to the owner. The general manager supervises [REDACTED] "Account Executive and Production Assistant," and [REDACTED] "Creative Services and Editing." [REDACTED] supervises "Interns from [REDACTED]" and both [REDACTED] supervise a vacant position for an "Assistant Editor." The organizational chart states that the assistant editor position will be supervised by either employee on a project-by-project basis and will help with film production services; the position will require "training in vocational schools, related on-the-job experience, and/or an Associate's degree." The organizational chart also states that the interns were not listed on the first organizational chart because they are not direct employees of the U.S. company; however, the petitioner indicated that Owen R. Hutchings began his internship on October 18, 2012 after receiving a Bachelor's degree in September 2012.

The petitioner submitted a letter from [REDACTED] stating that he held an internship at the U.S. company from May 2012 to August 2012, and a letter from Mr. [REDACTED] stating that he began his internship in October 2012 for 90 days. The petitioner also provided copies of certificates indicating the [REDACTED] and [REDACTED] both have Associate's degrees in "Digital Filmmaking" from the [REDACTED]

The petitioner submitted a copy of its Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2012, indicating that it had two employees and paid \$27,000 in wages, tips, and other compensation. The petitioner also submitted 2012 Forms W-2 for the beneficiary showing \$77,000 in wages, tips, and other compensation; for [REDACTED] showing \$26,000 in wages, tips, and other compensation; and for [REDACTED] showing \$23,000 in wages, tips, and other compensation.

On March 21, 2013, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity or that the organization can currently support such a position. In denying the petition, the director found that the petitioner did not establish that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relive him from performing the services of the corporation. The director observed contradictory statements within the petitioner's documentation indicating that the beneficiary may be directly involved in the day-to-day operations of the company. The director further found that it appears the beneficiary must be primarily engaged in providing sales and other services to the organization's clients, not solely directing the organization's business expansion as asserted by the petitioner.

On appeal, counsel for the petitioner contends that the beneficiary manages the U.S. entity, manages the essential business strategy and development function, and exercises authority on a senior level over other supervisors/managers. Counsel restates the list of duties provided in response to the RFE with the percentages, along with the same description of the beneficiary's efforts to expand the U.S. business into film editing.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, or as a function manager.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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

In the instant matter, the petitioner characterized the beneficiary's role as general manager, noting he will devote 20% of his time to managing employees and develop and implement new business strategy; 30% of his time to managing activities to provide growth, develop new clients, and identify opportunities; 20% of his time to managing activities to develop commercial proposals; 10% of his time to managing international contracts; and 20% of his time to managing activities to increase media sales in Brazil and the U.S. The petitioner then provided a breakdown of tasks by the number of hours the beneficiary devotes to them each week. According to the hourly breakdown, the beneficiary devotes five hours (approximately 13%) of his time to new business research and development; 10 hours (25%) of his time to directing and implementing strategies for new business and new projects based on the research and analysis; four hours (10%) of his time supervising his two subordinates' work; and 10 hours (25%) of his time managing a specific segment of international business with [REDACTED]. While these tasks are undoubtedly necessary in order to continue operations, the petitioner has not indicated how the majority of these duties qualify as managerial or executive in nature. Although several of the duties appear to fall under the new business and projects category, the beneficiary devotes a significant amount of time to providing support to clients in terms of his involvement in the management of international business/contracts. The job duties indicate that the beneficiary not only manages the contracts, but also provides significant support to the clients. Further, based on the evidence submitted, the petitioner has not established that anyone other than the beneficiary is involved with marketing or selling the petitioner's services to clients.

Given the vague and general descriptions of the beneficiary's duties and the specific tasks listed in the hourly breakdown, the record reflects that the beneficiary would more likely than not allocate more than 50% of his time to duties that are non-qualifying. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Further, on appeal, the petitioner submits a "proposed" organizational chart indicating that one employee will be promoted to supervisor and that additional employees will be hired as subordinates to existing department supervisors. As those employees have not yet been hired and the organizational chart is proposed, it cannot be considered in this proceeding. 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).

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

Here, the organizational chart submitted shows that the beneficiary directly supervises two individuals, neither of which have a "supervisor" position title, or currently have any subordinates. The list of job duties for each of the beneficiary's subordinates do not list any managerial or supervisory duties or include tasks that are indicative of a managerial, supervisory, or otherwise professional position. In response to the RFE,

the petitioner submitted a new organizational chart and added two interns as subordinates to the "account executive and production assistant," [REDACTED]. However, the addition of the interns does not deem him a supervisor. Additionally, the petitioner has not established that any of the beneficiary's subordinates require a bachelor's degree to perform their duties, such that they could be classified as professionals. 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 in a specific field of study is actually necessary to perform the duties assigned to the beneficiary's subordinates. Nor has the petitioner shown that any of the beneficiary's subordinates supervise subordinate staff members, or manage a clearly defined department or function of the petitioner, such that he or she could be classified as a manager or supervisor. Thus, 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.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted an organizational chart depicting the beneficiary as the general manager supervising an account executive and production assistant and a creative services and editing position, the petitioner's original organizational chart and letter did not identify "supervisor" or managerial positions. The petitioner has not provided credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Further, even if the petitioner had established that one or more of the beneficiary's subordinates is a professional, the petitioner has not established that the beneficiary was engaged primarily in supervisory duties at the time the petition was filed. The petitioner stated that the beneficiary would allocate only 10% of his time on supervisory duties.

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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

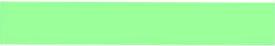
Here, the petitioner described the beneficiary's function as "business strategy and development," but failed to articulate the beneficiary's duties as a function manager. It is not sufficient for the petitioner to merely state that he will be in charge of the business strategy and development function without specifically indicating what that entails. The petitioner provided information on the beneficiary's involvement in its expansion into

film production; however, the petitioner has not provided a consistent account of the beneficiary's current role at the U.S. company to demonstrate that he primarily devotes his time to managing this function, rather than performing the tasks required to carry-out the function. In the instant matter, it appears that the beneficiary will function as a first-line supervisor of non-professional employees and is directly involved in all functional areas of the business, as well as a number of administrative areas. Although the petitioner provided a very brief list of duties for each of the beneficiary's subordinates, it has not demonstrated that those subordinates will relieve the beneficiary from performing non-qualifying operational duties, such as sales, marketing, and consulting.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Here, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

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



Here, the petitioner indicates that the beneficiary has two direct subordinates. However, the job duties provided for the beneficiary and for his subordinates demonstrate that the beneficiary's subordinates will not relieve him from performing non-qualifying administrative and operational duties. While the beneficiary's subordinates perform film-related services offered by the company, the petitioner has not established that the beneficiary is relieved from other non-qualifying duties such as sales, marketing, research and administrative duties. Further, the petitioner indicates that it provides consultancy in areas other than film and video production, including marketing and advertising consultancy, and it is unclear who is providing these services.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, or as a function manager. Accordingly, the appeal will be dismissed.

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.