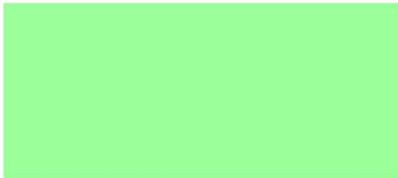


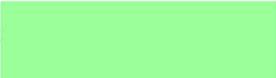
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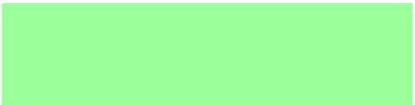
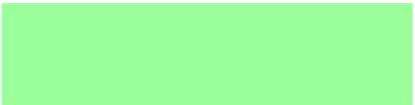
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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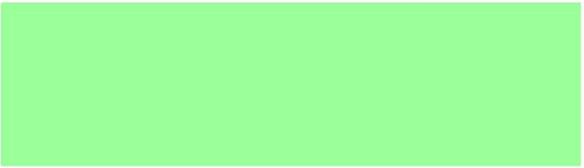


DATE: JAN 30 2014 OFFICE: VERMONT SERVICE CENTER FILE: 

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:

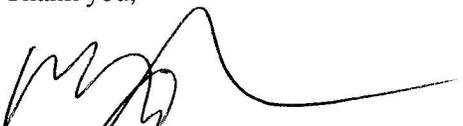


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an 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 Florida corporation, states that it is a subsidiary of [REDACTED] located in Venezuela. The petitioner is engaged in the marketing and sale of international long distance calling services through the brand name [REDACTED]. The beneficiary was previously granted one year in L-1A status in order to open a new office. The petitioner now seeks to extend his status so that he may continue his employment as general manager.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a primarily 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 misapplied the statutory and regulatory provisions under which a manager may direct the work of subordinate supervisors, mischaracterized the beneficiary's role as it relates to the rendering of the petitioner's services, and failed to consider the reasonable needs of the petitioner's organization by questioning its number of employees in light of its business activities.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

II. The Issue on Appeal

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

A. Facts

The petitioner filed the Form I-129 on August 31, 2012. The petitioner indicated on the Form I-129 that it operates a business engaged in marketing and selling "telecommunications solutions" with four current employees. In an addendum to the petition, the petitioner described the beneficiary's proposed duties under the extended petition as follows:

- Plan, develop, and establish business policies and objectives for the organization.
- Review activity reports and financial statements to determine progress.
- Direct and coordinate formulation of financial programs to maximize returns on investments and increase productivity.
- Approve capital investments required for the company's initial and continued operations.
- Plan and develop industrial, labor, and public relations policies designed to improve the company's image and relations with customers, employees, and the communities.
- Evaluate the performance of managerial, professional and entry-level staff for compliance with established business policies and objectives of the corporation and team contribution as attaining objectives.
- Enter into executive service contracts with local, domestic and international companies for the supply of services and products required to start operations in the United States.

- Negotiate, discuss, and enter into agreements and contracts required to complete the start-up phase and begin the subsidiary's operations in the United States, such as, although not limited to, secure the corporate premises, open and maintain the corporate bank accounts, enter into services contracts, among many others.
- Direct the company's human resources activities, including the approval of human resources plans and activities, the selection of managers and other high-level staff, and the establishment and organization of the organization's departments.
- Appoint department heads of managers, and assign or delegate responsibilities to them.

In a letter dated August 27, 2012, the petitioner included the same list of duties, and added the following:

[The beneficiary] will continue being responsible for the decision-making process, the purchasing of corporate assets, the planning of business objectives to develop organizational policies and strategies, the coordination of functions between divisions and departments as the company continues growing and placing its products and services in the market, the establishment of responsibilities and procedures for attaining those objectives, and obtaining and executing of new contracts with domestic and international companies for the corporate development.

* * *

He will plan, direct and coordinate the company's operational activities at the highest level of managers, direct and review the operational and financial development, and analyze the management with the support and help of subordinate managers and staff employees. Moreover, [the beneficiary] will continue being accountable for directing and reviewing the operational and financial development, planning and directing programs to develop new markets, and obtaining a competitive position of the company's products within the market segment.

[The beneficiary] will continue to exercise his sole and unfettered authority to hire capable personnel, as well as terminate the employment contracts. During the first year of operations in the United States, [the beneficiary] has employed 3 full-time employees at [the petitioner]. Therefore, as [the petitioner] has already three full time employees, [the beneficiary] as the General Manager, is primarily exercising his discretion over the day to day operations of the United States Subsidiary as compared to executing those daily functions of the company such as offering the company's products, closing sales, etc.

The petitioner indicated that the beneficiary's subordinates include a sales manager, a sales representative, and an administrative assistant. The petitioner provided the names and job duty descriptions for each employee. The petitioner indicated that the sales manager: directs the distribution and movement of the company's product to the customer; coordinates sales distribution by establishing sales territories and quotas; establishes training programs for sales representatives; analyzes sales statistics to determine sales potential inventory requirements and customer preferences; conducts performance evaluations; determines price schedules and

discount rates; and confers with customers regarding equipment needs and advises customers on what types of products and equipment to purchase.

The petitioner indicated that the sales representative is responsible for: contacting new and existing customers to discuss their needs; answering customers' questions about products, prices, availability, product uses and credit terms; quoting prices, credit terms and other bid specifications; emphasizing product features based on technical knowledge of product capabilities; negotiating prices and terms of sales and service agreements; maintaining customer records; identifying prospective customers; preparing sales contracts; and assisting customers in making product selections based on their needs, product specifications and applicable regulations.

The petitioner provided an organizational chart which identified the above-named employees as well as a "marketing" employee and a CPA. The petitioner also provided copies of its Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return, and state quarterly wage reports for the first two quarters of 2012. In the second quarter of 2012, the petitioner reported three employees in Florida, including the beneficiary, the sales manager, and the administrative assistant, and indicated that the subordinate employees were hired in June 2012. The petitioner also submitted an Employer's Quarterly Wage and Tax Report filed in North Carolina, which indicates that it paid \$850 to the employee identified as the sales representative for the month of May 2012. According to this quarterly report, the petitioner did not pay this employee in April or June 2012. The petitioner included contracts of employment for the administrative assistant and salesperson positions which indicate that both employees were hired to work for 30 hours per week.

The director issued a request for evidence (RFE) on September 11, 2012, instructing the petitioner to provide additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity. Specifically, the director requested: (1) a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; and (2) additional evidence of wages paid to employees. The director also requested that the petitioner provide additional explanation of the nature of its business and the services it provides.

In response, the petitioner submitted a chart outlining the beneficiary's duties and provided the number of hours and percentage of time he allocates to each duty, as follows:

Reviews the company activity reports including financial statements, tax reports (monthly, quarterly, and annual), monthly budget, sales report, inventory reports, cash flow reports, and bank transaction report in order to determine the company's overall progress and status and to revise plans in action. Analyze information obtained from reports and evaluate results to choose the best solution. (12 hours per week, 30%)

Develop a weekly sales plan and that will help the company to advance its mission and offer planning, strategies and implementation of objectives to subordinate managerial employees. (6 hours per week, 15%)

Meet with the subordinate management team to evaluate progress in weekly, monthly, and quarterly goals and discuss actions to be taken so that the plans and strategies are achieved and/or meet with members of the Board of Directors to report status of achievement of goals. (4 hours per week, 10%)

Identify opportunities for expansion geographically and operationally by identifying business opportunities and direct the implementation of these activities. (6 hours per week, 15%)

Oversee the operations of the company in order to ensure that they [*sic*] company shows efficiency as a whole, provides quality and service and offers insight into more cost effective resource management. (6 hours per week, 15%)

Direct the negotiation process for entering into contracts with vendors and corporate clients in satisfactory terms for the company and its financial feasibility in a profitable manner for the Company so that the corporate goals are met. (3 hours per week, 7.5%)

Handle and resolve management complaints, settling disputes and resolving grievances and conflicts in a manner that results in the best interest of the organization. (3 hours per week, 7.5%)

In a letter dated November 30, 2012, counsel emphasized that the beneficiary will be employed in a managerial capacity based on his supervision of subordinate managerial, professional or supervisory staff, and based on his management of an essential function "such as the sales activities." Counsel stated that the subordinate employees are primarily in charge of performing the day-to-day functions of the company, which include marketing telecommunications solutions to individuals and corporations with international calling needs, targeting clients, and selling telecommunications products.

The petitioner included a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2012, which included the month in which the petition was filed. The accompanying Florida and North Carolina quarterly wage reports indicate that the petitioner paid the following employees between July and September 2012: the beneficiary (\$6,000), the sales manager (\$3,672) and the North Carolina-based sales representative (\$2,550).

The petitioner also provided a different description of duties for the sales representative which indicates that she is responsible for direct sales to customers, visiting clients in their locations, selling to and negotiating with retailers, and writing and sending sales reports.

Finally, the petitioner included the requested explanation of its services:

[The petitioner] provides, markets and sells a service of international long distance calls, with our own brand [redacted] There are three different services we provide: 1. – Refill paid minutes for international calls, 2. – plans for international calls (package of minutes), and 3. – PBX and DID numbers.

* * *

The company count[s] on servers, computer software Systems to route the international minutes and celebrate contracts with various companies, carriers of international minutes who provide us with the international minutes we sell; other companies provide us with the PBX services and others with DID numbers.

The petitioner provided a list of providers who supply its technical systems, including web and server hosts, VOIP programs and software, PBX hosting, DID numbers, and access telephone numbers in different states. The petitioner stated that it also uses PBX to host its own call center, and also resells this service to other customers.

With respect to sales and marketing, the petitioner explained that it markets its services through newspaper, radio, television and internet advertising, and uses the following sales channels: (1) sales to the public from the company's office; (2) independent sales agents recruited through the company's web page; (3) customer service via phone (call center); (4) via Internet using the company's own website; and (5) through retail establishments. The petitioner stated that it uses a merchant payment processing service to directly charge customers for the services they purchase.

The director denied the petition on January 23, 2013, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner provided a vague description of the beneficiary's duties that failed to specify what he will be doing on a day-to-day basis within the context of the petitioner's staffing arrangement. The director further found a discrepancy in the evidence with respect to the petitioner's number of employees, noting that the petitioner documented only three employees, including the beneficiary, as of the date of filing, not four as indicated on the petition.

Finally, the director reviewed photographs of the petitioner's office that were submitted in response to the RFE and determined that "everyone with your company occupies the same type of office space, which lends itself to a belief that they all do similar jobs." The director's unsupported conclusion regarding employees' job duties based on photographs of the petitioner's office is inappropriate and will be withdrawn. The petitioner adequately responded to the director's request for photographs of its physical premises and such photographs were sufficient to establish the company's existence and current operations.

On appeal, counsel asserts that the director relied on irrelevant factors, mischaracterized the nature of the beneficiary's duties and failed to consider the petitioner's reasonable needs in light of its purpose and overall stage of development. With respect to the director's finding of a discrepancy in the petitioner's staffing levels, counsel asserts that all employers experience changes in staffing levels from time to time, and the decrease in employees in the third quarter of 2012 was due to the beneficiary's exercise of his authority to dismiss an underperforming employee, and should not cast doubt on the job descriptions provided for the remaining employees. Counsel asserts that the petitioner hired a new administrative assistant and an additional sales employee in January 2013 and currently has five employees.

Counsel contends that, regardless of any variations in staffing levels, the beneficiary has been employed in a primarily managerial capacity because he is responsible for negotiating and signing legally binding contracts, developing business strategies, managing supervisory employees, making personnel decisions, determining budgets, and managing and administering the company's income. Specifically, counsel asserts that the sales manager is a managerial employee who possesses a professional degree.

Finally, counsel asserts that the director's determination "appears to be based in part on the director's pre-conceived impression of the non-complex operations of petitioner's organization" rather than on the petitioner's evidence.

B. Analysis

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

When examining the executive or managerial capacity of the beneficiary, United States Citizenship and Immigration Services (USCIS) 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.* The petitioner has consistently stated that the beneficiary will be employed in a managerial capacity.

The petitioner, after being given an opportunity to supplement the record with additional details regarding the beneficiary's duties, provided a vague position description that provided little insight into what the beneficiary does on a day-to-day basis within the context of the petitioner's business. The petitioner stated that the beneficiary allocates 30% of his time to reviewing and analyzing financial statements, bank transactions, sales reports, inventory reports, cash flow reports, etc., but it has not identified who on its staff is responsible for preparing most of these reports. While the beneficiary, as the senior employee in the three-person company, exercises authority for planning, the petitioner has not established that his day-to-day tasks associated with overall planning are primarily managerial in nature. Similarly, the beneficiary's responsibilities for overseeing "the operations of the company," "identifying business opportunities" and directing their implementation, which would require another 30% of his time, are poorly defined and fail to explain what specific tasks he performs. 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).

Thus, while several of the stated responsibilities would generally fall under the definitions of managerial or executive capacity, due to the lack of specificity, the petitioner has not met its burden to provide a detailed description of duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's job duties. The petitioner has failed to provide sufficient detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, 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.

At the time of filing and in response to the RFE, the petitioner claimed to employ a sales manager, a sales representative and an administrative assistant. The director observed that the record reflects that the petitioner did not actually employ the administrative assistant at the time of filing, and the petitioner concedes that this conclusion was accurate. A review of the petitioner's quarterly wage reports and pay statements reflects that the administrative assistant received a total of \$49.50 for one or two days of employment at the end of June 2012 and was not employed at all during the quarter in which the petition was filed. Counsel contends that as with any employer, the petitioner's "staffing levels may vary from time to time" and this is no reason to doubt the credibility of the remainder of the information provided regarding the company's staffing levels. However, the petitioner misrepresented its number of employees both at the time of filing the petition and in response to the RFE and has not established that the company regularly employed an administrative assistant at the end of its first year in operation. The petitioner included this employee on its organizational chart, provided a copy of her employment contract, and provided a description of her duties, but failed to mention that she was no longer employed at the time of filing. 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).

Therefore, at the time of filing, the petitioner actually employed a sales manager who works at the beneficiary's worksite in Florida, and one sales representative who resides in North Carolina, where the petitioner no longer claims to have an office. The petitioner also included a CPA and a marketing employee on its organizational chart, but offered no evidence of payments to these workers or information regarding the nature and scope of their services. 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)).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See sections 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." See 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. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner indicates that the sales manager qualifies as a supervisory employee. While the petitioner submitted an organizational chart that depicts the sales manager position as senior to the sales representative,

the positions are located in two different states. Further, the position description provided for the sales representative in the petitioner's initial letter is not entirely credible, as it refers to selling "equipment," which the petitioner does not otherwise claim to sell. Notably, the petitioner submitted two different position descriptions of duties for the sales representative, which further calls into question the position descriptions included in the petitioner's initial letter. Finally, the petitioner claims to be engaged in sales in both North Carolina and Florida. As the sales representative is located in North Carolina and, according to one version of her job description, is required to personally visit clients at their locations, it is reasonable to believe that the sales manager, as the sole sales employee at the petitioner's main location, is actively engaged in sales in Florida, rather than primarily supervising lower-level sales employees.

Overall, the evidence of record does not establish that the beneficiary, who allocates four hours per week to meeting with the "subordinate management team" is primarily engaged in the supervision of a subordinate staff comprised of managerial, supervisory or professional employees.

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 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). Here, the petitioner has not submitted evidence establishing these essential elements. 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. The petitioner indicated that the beneficiary manages the petitioner's sales function. As discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that he performs primarily managerial duties and thus the petitioner has not established that he primarily manages an essential function of the business.

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 section 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 the present matter, 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. 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.

The petitioner indicates that it operates a call center and sells long distance calling and PBX services to individual and commercial clients. The petitioner has established that it employs two sales employees, one located in Florida and one located in North Carolina. The petitioner has not established that these employees relieve the beneficiary from performing duties related to marketing and advertising the petitioner's services, arranging services with telecommunications providers, handling day-to-day administrative and financial matters or responding to all calls received in its call center, which, based on the call logs provided, appear to be routed to "sales" and "support" lines. Further, the petitioner indicated that its business hours are Monday through Friday from 8:00 a.m. to 7:00 p.m. or 66 hours per week. The petitioner has not explained how its staff of three, which includes a part-time sales representative, is able to maintain this schedule without the beneficiary's participation in the non-managerial operational aspects of the business.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

The petitioner indicates on appeal that it hired an administrative employee and an additional sales person in January 2013. However, 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).

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a qualifying managerial capacity. Accordingly, the appeal will be dismissed.

III. Conclusion

The appeal will be dismissed for the above stated reasons. 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.