



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: NOV 17 2014 OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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

PETITION: Petition for a Nonimmigrant Worker under 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,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed a Form I-129 Petition for a Nonimmigrant Worker seeking to extend the beneficiary's status as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation established in 2012, states that it operates as a systems and technical employment search consultant. The petitioner indicates that it is an affiliate of the beneficiary's foreign employer, [REDACTED], located in the United Kingdom. The beneficiary was previously granted one year as an L-1A intracompany transferee in order to open a "new office" in the United States as the petitioner's "Head of Key Accounts." The petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition, concluding that the petitioner did not establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner filed the instant appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the beneficiary is the manager of an essential function and that the director erred in concluding that the beneficiary will not be relieved from primarily performing non-qualifying duties.

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.

II. Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying managerial capacity under the extended petition. The petitioner does not assert that the beneficiary is employed in an executive capacity.

A. Facts

The petitioner filed the instant Form I-129 on December 12, 2013, seeking to extend the beneficiary's employment as its head of key accounts. A letter submitted in support of the petition states that the foreign entity is "a London based boutique international search consultant, specializing in providing services across: Infrastructure Technology; Accountancy and Finance; Key Accounts; Executive Search; Telecommunications; SAP; Software Development and Architecture; Quants and Traders; and Banking." The petitioner indicates that it was formed in September 2012, to help service the U.S. marketplace. The Form I-129 further indicates that the petitioner has a projected annual income of \$500,000 and four U.S. employees.

The petitioner stated that the beneficiary is the head of key accounts. The petitioner described key accounts as a core function/operation of the petitioner's business and a leading supplier of contingent and permanent workforce solutions. The petitioner states that the growth of the function is achieved by retaining and servicing existing accounts and then developing new accounts. The petitioner states that the beneficiary's current managerial duties and responsibilities are as follows:

- Overseeing the operations of the Key Accounts desk and forecasting sales revenue against budgets to the CEO in London, managing the Key Accounts cost center, setting Key Performance indicators, for sales and client meetings (*estimated 8 hours/week*);
- Interviewing and hiring subordinate staff; training and mentoring staff; setting up recruitment to recruitment suppliers, agreeing fee and compensation structure, agreeing rebate structure with all suppliers(*estimated 7 hours/week*);
- Handling existing U.S. clients (ensuring all clients have issue resolution process in place, ensuring our inside-sales staff are selling staff/solutions we can deliver against) (*estimated 6 hours/week*). The following clients are committed to [REDACTED] (US), with \$225,000 in sales in the first year and \$1 million projected sales in

our second year: [REDACTED]

- Advising and setting Service Level Agreements (SLA) for bid proposals (to oversee and manage marketing material produced[]); sign off all SLA (*estimated 2 hours/week*);
- Mentoring and serving as an advisor for Human Capital delivery across [REDACTED] (UK) (Ensuring the highest standards of delivery are set and maintained, train staff on Algorithmic searching techniques, oversee full search process (*estimated 4 hours/week*);
- Managing the end-to-end recruitment process for outsourcing Key Accounts clients and taking full responsibility for deliverables and results (*estimated 2 hours/week*);
- Developing the inside Sales strategy for outsourcing Key Accounts clients in relation to recruitment solutions (*estimated 4 hours/week*);
- Managing Key Accounts relationships to ensure successful delivery to clients (*estimated 3 hours/week*);
- Resolving issues for outsourcing and Key Accounts clients in relation to recruitment and human resource management (*estimated 2 hours/week*); and
- Serving as a key point of contact within the specific Key Accounts business for issue resolution, take accountability for each client (*estimated 2 hours/week*)

The petitioner further describes the beneficiary's managerial authority as:

- Continuing the set-up of Key Accounts for the U.S. operation;
- Having bank signing authority for the U.S. company;
- Signing off Key Accounts Account's payables (payments to suppliers);
- Implementing and overseeing strategic objectives for Key Accounts (New York);
- Hiring new staff members, including managing their performance ongoing reviews and evaluation (Performance Review Evaluation form attached). We are seeking to fill one professional position- Senior Consultant- Infrastructure by the end of 2013 or 2014;
- Agreeing, maintaining and leading new business through initiatives; and
- Acting as mentor and point of contact for all issues.

The petitioner's organization chart depicts the CEO at the apex of the company's structure. The beneficiary, "Vice President Finance" and "Head of Quants and Trading" are directly subordinate to the CEO. The chart depicts four positions under the beneficiary and five positions under the head of quants and trading. The positions under the beneficiary are identified as: NH 2013, NH 2014, NH 2015, and NH 2016. The positions under the head of quants and trading are identified as: inside sales consultant, senior head hunter, NH 2014, NH 2016, and NH 2017.

The petitioner submitted its IRS form 941, Employer's Quarterly Federal Tax Return, from the third quarter of 2013 indicating that the petitioner paid \$72,840.37 in wages to three employees.

The petitioner also submitted documents from 2012 with the instant petition. A letter dated November 12, 2012 indicates that the petitioner intended to hire and train 13 additional employees within 12 to 18 months. An organization chart is included as an appendix. The 2012 organization chart indicates that the beneficiary and "Head of Quants and Trading" are directly subordinate to the CEO. The chart indicates that the petitioner intended to hire two positions subordinated to the beneficiary before the end of 2013. According to the chart, the petitioner intended to have twelve employees before the end of 2013.

The petitioner also submitted a letter which appeared to have been previously submitted in response to a request for evidence issued during the adjudication of the beneficiary's previous L-1A petition in December 2012. The letter identifies the positions subordinate to the beneficiary as: technology banking consultant; technology inside sales consultant, and technology software development and architecture. The petitioner states each of the positions require a bachelor's degree in a related field. The letter also indicates that the petitioner, as of December 2012, had made employment offers to three individuals, anticipated to start working in January and February of 2013. The individuals are identified as [REDACTED]. The letter indicates that Kevin Tarantino was offered the position of SAP recruitment consultant and would be subordinate to the beneficiary.

The director issued an RFE informing the petitioner that its initial evidence was insufficient to establish that the beneficiary would be managing a function of the business rather than executing the day-to-day operational duties of the function. The director suggested that the petitioner submit, *inter alia*, the following additional evidence: a revised statement of the beneficiary's duties; a detailed statement listing the number of employees and the types positions; its quarterly wage reports for the last four quarters; its payroll summary; copies of IRS W-2 and W-3 forms showing wages paid to employees in the past year; a current organization chart identifying the name, position title, summary of duties, and salary for all employees in the beneficiary's division, department, or team; and federal or state income tax returns.

Through counsel, the petitioner submitted a response to the RFE. The petitioner stated that each function within the company has a manager and a subordinate staff of between one and six professionals. The petitioner indicates that it offered employment to two individuals, a recruitment and delivery manager and a senior head hunter, but both declined the offer. The petitioner indicated that both positions would have reported to the beneficiary. The petitioner submits a copy of an employment agreement dated October 1, 2013 for Kevin Tarantino which was never executed.

The petitioner also further described the beneficiary's duties during the past year, as follows:

During the past year, [the beneficiary] has been able to focus on the essential managerial duties for our Key Accounts department and is responsible for: preparing and executing the candidate/client contracts; handling candidate's paperwork; and preparing client proposals for the Key Accounts department. He has exclusive authority in the U.S. for handling this essential business function of our company. [The beneficiary] deals with all aspects of our Key Accounts and is our senior most Key Accounts representative in the US, ensuring that our clients are properly serviced, including the interviewing and hiring

of staff as we continue these efforts. [The beneficiary] is also a main interface with Metis, our accountants and is responsible for all our US advertising agreements.

The petitioner stated that the phone, mail, and conference room duties are performed by [REDACTED]. The petitioner further indicated that [REDACTED] provides secretarial services and works with the United Kingdom back office to provide IT support. The petitioner also claimed that its U.K. affiliate maintains responsibility for all invoicing and credit control, and that the beneficiary does not perform any non-qualifying duties. A letter from [REDACTED] states that this firm "has assisted [the petitioner] with accounting, payroll preparation and support of its United States of America office accounting services throughout 2013." The petitioner provided a lease agreement with [REDACTED] indicating the services provided and the costs. The document indicates that the petitioner does not pay for monthly phone answering services, call forwarding services, or call screening services. The lease also indicates that "[a]ll programming and configuration required to connect the Client's computers to the network are the Client's responsibility", but that "[c]onfiguration and maintenance services are available through [REDACTED] at an hourly rate."

The petitioner submitted state and federal employer quarterly tax returns. The employer quarterly reports indicate that the beneficiary paid wages to three individuals the first, second, and third quarter of 2013. In addition to the beneficiary and the individual identified as the Head of Quants and Trading, the New York employer quarterly returns indicate the beneficiary paid [REDACTED] in the first and second quarter and [REDACTED] in the third quarter. The petitioner did not submit the New York employer quarterly returns for the fourth quarter; however, federal quarterly reports indicate the petitioner had two employees during that three-month period.

The petitioner also provided service agreements signed by [REDACTED] identified as the CEO and [REDACTED] identified as the Associate Director/Head of Business Development.

The director ultimately 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. The director noted that the petitioner has only three to four employees all holding executive or managerial positions and that these employees have no subordinate employees to perform the non-qualifying operational duties of the business. The director found that this lack of operational staff and the described duties suggest that the beneficiary is primarily engaged in the performance of non-qualifying duties. Further, the director concluded that the petitioner did not establish that the beneficiary is managing an essential function of the business, noting that the revenue generated by the beneficiary's department represents only a small portion of the foreign entity's overall revenue and further noting the lack of staff to perform the petitioner's non-managerial duties. The director determined that the petitioner had failed to submit evidence to establish sufficient staffing after one year to support the beneficiary in a qualifying managerial capacity.

On appeal, the petitioner asserts that the director erred in finding that the beneficiary does not manage an essential function and in finding that the petitioner employs only executive and managerial staff. The petitioner concedes that the petitioner has not hired any employees subordinate to the beneficiary, but

explains that the petitioner made employment offers to two employees who would have been his subordinates had they accepted such offers. Further, the petitioner claims that the director failed to consider the additional support provided by the United Kingdom back office team, which allows the beneficiary to focus on essential managerial duties. The petitioner contends that the petitioner's staffing levels should not be the determinative factor when determining whether the beneficiary manages an essential function. In addition, the petitioner claims that the director applied an incorrect standard with respect to determining whether the function managed by the beneficiary is "essential."

The petitioner reiterates the beneficiary's responsibilities for "preparing and executing the candidate/client contracts; handling candidate's paperwork; and preparing client proposals for the Key Accounts department" and submits an updated organization chart in support of the appeal.

The updated organizational chart reflects that the beneficiary's position is at a higher level in the organizational hierarchy. He is identified as head of key accounts and as a senior vice president supervising three managers to be hired in 2014, 2016 and 2017. The chart indicates that each prospective manager position would have between two and four subordinate employees. The Manager Key Accounts to be hired in 2014, has a subordinate Senior Consultant identified as [REDACTED]. The chart indicates that the status of this position is "role offered TBC."

B. Analysis

Upon review of the record, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

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 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 functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The duties in the position description that do suggest the beneficiary's level of authority are overly broad and fail to explain how the beneficiary spends the majority of his time. For example, the petitioner states that the beneficiary's duties include: overseeing the operations of the key accounts desk; managing key accounts relationships; overseeing and managing marketing materials; overseeing the full search process; and managing the end-to-end recruitment process for outsourcing key clients. The broad descriptions encompass numerous potentially qualifying and non-qualifying duties. Without a more detailed description of the activities the beneficiary performs, it is impossible to determine that the beneficiary spends a majority of his time on managerial duties. The regulations require the petitioner to submit a detailed description of the beneficiary's duties. See 8 C.F.R. § 214.2(l)(3)(ii). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. at 1108.

Other potentially managerial duties are inconsistent with the evidence on record. The petitioner claims that the beneficiary spends approximately 17 hours performing duties that include: "interviewing and hiring subordinate staff"; "training and mentoring staff"; "training staff on algorithmic searching techniques"; and ensuring that inside sales staff are selling staff/solutions. However, it is noted that the beneficiary had no subordinate staff at the time of filing. As such, it is unclear how the beneficiary spends the time allocated to these activities. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the position description suggests that the beneficiary performs several duties that do not qualify as managerial in nature. Specifically, the petitioner states that the beneficiary's duties include: handling existing U.S. clients; setting up recruitment to recruitment suppliers; agreeing fee and compensation structure; agreeing rebate structure with all suppliers; developing the inside sales strategy; advising and settling Service Level Agreements (SLA) for bid proposals; sign off all SLA; agreeing to fee and compensation structures; agreeing to rebate structures with all suppliers; resolving issues for outsourcing and key accounts clients in relation to recruitment and human resource management; serving as a key point of contact with the specific Key Accounts business for issue resolution; and continuing the set-up of key accounts for the U.S. operation. Given the nature of the petitioner's business, the petitioner had not sufficiently explained how negotiating agreements between suppliers and clients is more than providing the company's "professional search" services. 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 International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. According to the petitioner's hourly breakdown of the beneficiary's duties, these non-qualifying duties will require over half of his time. Without a detailed description distinguishing the beneficiary's managerial duties from his non-managerial duties and without an accurate description of the amount time the beneficiary spends performing each duty, the petitioner has failed to establish that the beneficiary is employed in a qualifying managerial capacity. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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.

Counsel suggests that the beneficiary qualifies as a function manager by virtue of his oversight of an essential function of the organization. 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 explains the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In the instant matter, the petitioner has failed to establish that the beneficiary manages an essential function. As noted above, the petitioner must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. As discussed, the position description and the lack of subordinate employees suggest that the beneficiary is primarily performing the duties related to the function by directly providing services to the petitioner's clients. The beneficiary may exercise authority over the Key Accounts department, but the petitioner must still establish that someone other than the beneficiary performs the services offered by that department or function, as well as other non-managerial tasks associated with it. The petitioner has not established who would relieve the beneficiary from providing the non-managerial marketing and recruitment duties of the Key Accounts department.

Although the petitioner submitted an updated organization chart indicating its future hiring plans and increasing the level of the beneficiary's authority, 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The evidence shows the petitioner had two employees at the time of filing. It is noted that the petitioner submits a letters and organization charts indicating that before November 2012, it offered employment to [REDACTED] as a SAP Recruitment Consultant subordinate to the beneficiary. However, in response to the RFE, the petitioner submitted an unsigned employment agreement for [REDACTED] indicating that the petitioner offered him employment as Recruitment and Delivery Manager in October 2013. The organization chart submitted in response to the RFE places a Senior Head Hunter and Delivery Manager subordinate to the beneficiary; however, the employee agreement states that "the employee shall report to and shall be subject to the oversight of [REDACTED]" 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).

Furthermore, the evidence suggests that the petitioner has had difficulty maintaining staff subordinate to the beneficiary to relieve him from providing the company's services to key accounts, leaving question as to whether the petitioner has developed sufficiently after one year to support the beneficiary in a qualifying managerial capacity. Indeed, the petitioner's projections indicate that it expected to earn over \$700,000 in revenue and pay approximately \$360,000 in wages and commissions during the first year. However, the petitioner's balance sheet reflects that the petitioner earned just over \$176,000 during the first ten months of operation and that it paid approximately \$160,000 in wages and salaries during this time. In addition, the petitioner's 2012 business plan reflected the expectation that it would have twelve employees at the end of 2013, but the record as of the date of the filing the petition reflects that it only has two employees, including the beneficiary. Therefore, the evidence suggests that the petitioner has not developed to the extent projected or to the point where it can support the beneficiary in a qualifying managerial capacity after one year as required by 8 C.F.R. § 214.2(I)(14)(ii)(D).

In response to the RFE, Counsel asserted that secretarial and IT support is provided by [REDACTED] and the United Kingdom back office. However, the beneficiary's position description includes operational duties reflecting the direct provision of services to his clients and his involvement in marketing and sales, duties that are clearly not delegated to [REDACTED]. Additionally, the agreement with [REDACTED] does not indicate that the petitioner pays for the phone answering services or other secretarial services through the company. The petitioner has not submitted sufficient evidence that the recruitment and sales services of the Key Accounts department are provided by anyone other than the beneficiary. 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)).

Counsel accurately states 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, 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 sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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).

Further, the evidentiary requirements for the extension of a "new office" petition require USCIS to examine the organizational structure and staffing levels of the petitioner.¹ See 8 C.F.R. §

¹ Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(I)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing,

214.2(l)(14)(ii)(D). The regulations allow intended United States operations one year within the date of approval of the petition to support an executive or managerial position. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not established that it reached a point where it can employ the beneficiary in a qualifying managerial or executive position.

Based on the evidence furnished, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. 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.

among other criteria, at the time that the new office seeks an extension of the visa petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).