



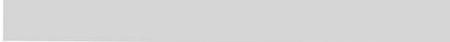
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 15 2015**

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner filed a motion to reopen to the service center. The director granted the motion to reopen the petition and subsequently affirmed the denial of the 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 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 Texas corporation established in [REDACTED] states that it operates as an importer and distributor of hunting and sports products. The petitioner claims to be a subsidiary of [REDACTED] located in Pakistan. The petitioner seeks to extend the beneficiary's employment as its director/president for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner filed a motion to reopen the denied petition. The director granted the motion to reopen and affirmed his decision to deny the petition on the same grounds.

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, the petitioner contends that the director's decision is erroneous as the evidence presented in response to the request for evidence and the motion proved that the beneficiary has been and will be employed in an executive capacity. The petitioner submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

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

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

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

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

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 primarily managerial or executive capacity.

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;
- (v) establishes the goals and policies of the organization, component, or function;
- (vi) exercises wide latitude in discretionary decision-making; and
- (vii) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 2, 2013. The petitioner indicated on Form I-129 that it operates as an importer and distributor of hunting and sports products with one current employee¹ and an estimated gross annual income of \$480,000 in 2013. On the Form I-129 Supplement L, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

President & Director: [The beneficiary] will be responsible for overall operation of the U.S. Operation. [REDACTED], Texas [sic]

- Authority to hire, train, direct, supervise and discharge managerial personnel who in turn perform [sic] the same functions on lower echelon staff members.
- Direct & coordinates activities of the organization in accordance with identified Company goals to obtain optimum efficiency, economy of operations, and maximize profits by performing the duties personally and through subordinate managers & supervisors.
- Duties include, Plan, develops and implements company policies and goal: Direct and coordinates promotion of products or services performed to develop new markets, increase share of market and obtain competitive position in Garments, designer jewelry and Fragrance.

¹ On the Form I-129, where asked the current number of employees in the United States, the petitioner specifically stated "currently 1 (6 more within one year)."

- [The beneficiary] is also responsible for all the Taxes Local, state and federal. He will be equally responsible for develop cordial relation with Vendor, Suplier [sic], and financial institute.
- [The beneficiary] hold Master degree and has over 8 years of managerial experience. He is able to communicate effectively and present information to Clients, customers, vendors, and to Governmental authority, such as IRS, Permit department City, State and Federal level

The petitioner submitted an undated business plan stating that its U.S. company was established in Texas "for the sale and marketing of side range of semi-custom knives and accessories to various types of customers." The business plan does not include the petitioner's staffing plan or current personnel, but includes cash flow projections showing salaries at \$40,950 in 2013, the year of filing the instant petition.

The petitioner submitted its organizational chart depicting the beneficiary as president, reporting to the board of directors, who appear to report to the parent company in Pakistan. As president, the beneficiary directly supervises a vice president/director, [REDACTED], who supervises a marketing manager, [REDACTED], and an office manager, which indicates will be "filled by U.S. worker." The marketing manager supervises two sales and marketing staff, also to be filled by U.S. workers, who will then supervise four shipping, receiving, and delivery staff, all to be filled by U.S. workers. The office manager supervises an unknown number of "office personnel" to be filled by U.S. workers.

The petitioner submitted a document titled Employees Job Description, briefly listing three to nine duties for each of the following positions: president/director marketing, the beneficiary; vice president, [REDACTED] a foreign employee that is currently overseas; office manager, [REDACTED]; sales manager, [REDACTED] sales executive, to be hired by U.S. office; four sales executive (field), [REDACTED] and one to be hired by U.S. office; assistant manager (database & internet promotion), to be hired by U.S. office, currently operated by foreign office; assistant (shipping & handling), to be hired by U.S. office; and a clerk, to be hired by U.S. office. The document lists the beneficiary's duties as president/director marketing, as follows:

- To overall run and manage company operations
- To Communicate and implement company vision, mission and overall directions
- To Lead, Guide, Direct and evaluate employees
- Devise and implement strategies to achieve company targets
- Devise and implement marketing and sales plan
- Corporate communication

The director issued a request for additional evidence ("RFE") on October 24, 2013, advising the petitioner that its brief and general description of the beneficiary's duties in the U.S. is insufficient to show that he will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve him from performing the services of the corporation. The director further advised the petitioner of the discrepancy in the current number of employees, where the petitioner stated it had one current employee on the Form I-129, the organizational chart includes three named individuals, one of which is the beneficiary and another who is overseas, and the employees' job description document includes seven named individuals. The director also advised the petitioner that it failed to submit evidence of wages paid to

employees while the beneficiary was employed in a managerial or executive capacity. The director instructed the petitioner to provide additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company, an explanation of the apparent discrepancy between the number of employees described above, and evidence of wages paid to employees in the United States.

In response to the RFE, the petitioner indicated that the beneficiary performs executive duties and provided the following explanation regarding its current employees in the United States:

[The petitioner] has hired various employees at different job positions, during the last business year. As per how the business market works, the company varies with the number of employees, as some employees leave, and the position gets filled up with new employees. So, it is really hard to maintain the exact set number of employees, as mentioned in the projected organizational chart. Further, the number of employees depend on the projected progress/need of the business. [The petitioner] has hired workers, as well as sub-contractor, based on the need, and availability of the qualified job position holders.

Currently, [the petitioner] has seven (7) workers.

The petitioner submitted a new organizational chart depicting the beneficiary as president, directly supervising "manager operations," [REDACTED] and "accounts," [REDACTED]. The "manager operations" supervises "manager logistics," [REDACTED]. The "manager logistics" supervises a sales executive (East coast), [REDACTED] a sales executive (Texas), [REDACTED] and a sales executive (knife shows), [REDACTED].

The petitioner submitted a document listing all of its current employees, including their name, job title, summary of duties, education level, and remuneration. The list includes the following employees: president/director, the beneficiary; managing operations, [REDACTED]; accounts, [REDACTED]; logistics, [REDACTED] sales executive (East coast), [REDACTED]; sales executive (Texas region), [REDACTED]; and sales executive (knife shows), [REDACTED]. The document lists the beneficiary's duties as president/director, as follows:

- Plan, develop and implement company policies and goals;
- Direct and coordinate promotion of product or services performed to develop new markets, increase share of market, and obtain competitive position;
- To overall run and manage company operations;
- Communicate and implement company vision, mission and overall directions;
- Lead, guide, direct and evaluate employees;
- Devise and implement strategies to achieve company targets;
- Devise and implement marketing and sales plan;
- Corporate communication with the parent company, along with the presentation of the company to the vendors, and prospective business alliances;
- Direct and coordinate activities of the organization in accordance with identified company goals to obtain optimum efficiency, economy of operations, and maximize profits by performing the duties personally and through subordinate managers and supervisors.

The petitioner also submitted a document titled "Explanation of Executive Role Played by [Beneficiary] as President/Director Marketing in [Petitioner]" describing his duties and allocating accompanying percentages of time devoted to each duty, such as directing the management of the organization 35%, establishing the goals and policies of the organization 35%, and exercising wide latitude in discretionary decision making 30%. In allocating the percentages of time to the three overarching responsibilities, the petitioner incorporated the duties listed above in a corresponding group and added that the beneficiary is only receiving general supervision from the board of directors and that he is exclusively performing executive job duties and "is in no way involved in non-executive duties" that are performed by other employees in managerial and personnel capacities.

The petitioner submitted a newly revised copy of the Form I-129 page five, indicating that it had seven current employees at the time of filing the instant petition.

The petitioner submitted a payroll summary for July through September 2013, indicating that it paid \$208.00 to [redacted] .., \$2,871.25 to [redacted] .., \$9,000 to the beneficiary, \$1,500 to [redacted] .., \$2,100.00 to [redacted] .., and \$210.00 to [redacted] .. in gross pay during that period. The petitioner submitted its 2012 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that it paid \$9,000.00 in compensation of officers and \$8,000.00 in salaries and wages. The petitioner also submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first, second, and third quarters of 2013, indicating that it had 4 employees and paid \$15,889.25 in wages, tips, and other compensation during the third quarter, 5 employees and paid \$16,262.00 in wages, tips, and other compensation during the second quarter, and 2 employees and paid \$12,000.00 in wages, tips, and other compensation during the first quarter.

The director denied the petition on December 24, 2013, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director found that the brief and general job description did not establish that the beneficiary would be primarily engaged in executive duties. The director found that the job descriptions for the beneficiary's subordinates did not demonstrate that they are supervisory, professional, or managerial in nature. The director further found that, given the current staffing arrangements, the evidence leads to a conclusion that the beneficiary will be involved in the actual day-to-day duties of operating the company.

The petitioner filed a motion to reopen the denied petition. The director granted the motion to reopen and, on July 28, 2014, affirmed the denial of the petition making the same observations as in the initial denial. The director found that because the original organizational chart indicates that the beneficiary directly supervises a vice president that is employed by the foreign entity, and the vice president cannot be considered part of the new operation staffing. As such, the beneficiary must directly supervise the marketing manager, whose position is not supervisory, professional, or managerial. Therefore, the beneficiary would be the first-line supervisor for the company's only employee and, cannot be considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional. The director further found that the petitioner's response to the request for evidence contained significant changes to the original information provided at the time of filing regarding its current employees and their job duties, which could not be considered as a petitioner may not make changes to the original information provided.

On appeal, the petitioner asserts that the beneficiary has been and will be employed in an executive capacity. The petitioner contends it provided sufficiently detailed duties for the beneficiary's position at its U.S. company and that the director failed to properly review all of the documents submitted. The petitioner contends that it did not make material changes to the beneficiary's position in response to the RFE or on motion, the company simply evolved over time and new staff was hired. The petitioner also contends that the director may not require that subordinate employees have a bachelor's degree; its employees have specialized knowledge in sales and the company product, and therefore, are considered managerial and professional. The petitioner explains that its Texas Wage Report for the third quarter of 2013 clearly shows that it had four employees, but the additional three employees do not show up as they were issued Forms 1099 Misc, thus the total number of employees was seven, and the petitioner has not provided any false information.

In support of the appeal, the petitioner submits its IRS Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, for 2013, showing that it paid a total of \$58,146.25 to all employees. The petitioner submits its IRS Form 1120 for 2013, showing that it paid \$36,000 in compensation of officers and \$22,146 in salaries and wages in 2013. The petitioner submits its Forms W-2 showing that it paid the beneficiary \$36,000, \$10,200, \$5,400, \$4,266.25, \$892, and \$1,388 in wages, tips, and other compensation in 2013.

The petitioner submits a current list of employees, indicating the start and end dates for each. According to this list, the petitioner specifically employed the beneficiary, , , , , and at the time of filing the instant petition.

The petitioner submits a new organizational chart depicting the beneficiary at the top tier of the hierarchy as president, directly supervising "accounts," and "manager operations," . The manager of operations supervises a "manufacturer rep.," a sales executive (East coast), a sales executive (Texas), , and a sales executive (knife shows), . The petitioner also submits its payroll summary for the period of January through March 2014 showing that it paid total gross salaries of \$14,100 to , , , and the beneficiary.

The petitioner submits copies of the beneficiary's subordinates' resumes and degree certificates, demonstrating that acquired a bachelor of education and a bachelor of arts and acquired a bachelor of arts.

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 under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are 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 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 first characterized the beneficiary's role as president and director and briefly described his duties in very broad terms: authority to hire, train, direct, supervise and discharge managerial personnel; direct and coordinates activities of the organization in accordance with identified company goals; plan, develop, and implement company policies and goals; direct and coordinate promotion of products or services performed to develop new markets, increase share of market and obtain competitive position in garments, designer jewelry and fragrance; responsible for all taxes; and responsible for developing cordial relationships with vendors, suppliers, and financial institutions. In a document listing job duties for all of its U.S. company employees, the petitioner added that the beneficiary will run and manage overall company operations; communicate and implement company vision, mission, and overall directions; lead, guide, direct, and evaluate employees; devise and implement strategies to achieve company targets; devise and implement marketing and sales plan; and corporate communication.

This initial description is insufficient to show that the beneficiary will primarily perform qualifying duties. The petitioner failed to document what proportion of the beneficiary's duties would consist of managerial duties and what proportion would consist of non-managerial duties. The petitioner listed the beneficiary's duties but failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because the beneficiary's proposed daily tasks, as noted above, do not all fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in either a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the RFE and on appeal, the petitioner provided the same list of job duties discussed above and clustered the duties within three overarching responsibilities with allocated percentages, such as directing the management of the organization 35%, establishing the goals and policies of the organization 35%, and exercising wide latitude in discretionary decision making 30%. In allocating the percentages of time to the three overarching responsibilities, the petitioner incorporated the duties listed above in a corresponding group and added that the beneficiary is only receiving general supervision from the board of directors and that he is exclusively performing executive job duties and "is in no way involved in non-executive duties" that are performed by other employees in managerial and personnel capacities. The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. 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 1103.

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or executive. 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 daily job duties. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive 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 *supra*.

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 "current" organizational chart indicating that some employees have changed positions and that additional employees have been hired in the proposed positions at the time of filing the petition. As those employees were hired after the filing of the petition, they 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, we 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, although the beneficiary's indirect subordinates, [REDACTED] and [REDACTED] hold bachelor's degrees, the job duties provided by the petitioner for the office manager, accounts, and operations manager² demonstrate that the positions themselves do not require professional degrees. The position description for the beneficiary's subordinates include tasks that are not indicative of a managerial, supervisory, or otherwise professional position. Thus, the petitioner has not established that the beneficiary's subordinates require bachelor's degrees, such that they could be classified as professional. 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. Here, 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 has not established, in the alternative, that the beneficiary is 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 did not indicate that the beneficiary is a function manager. The petitioner did not describe an essential function to be managed by the beneficiary or provide a breakdown of the beneficiary's job duties to support such a claim. On appeal, the petitioner clearly indicated that the beneficiary is an executive at the U.S. company.

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 an "activity" or "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

² In the initial organizational chart, [REDACTED] was listed as the marketing manager; in the document describing each employee's duties, [REDACTED] was listed as the office manager; in the organizational chart and document describing each employee's duties submitted in response to the RFE, [REDACTED] was listed as "accounts" and [REDACTED] was listed as operations manager.

enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, the petitioner asserts that the beneficiary is an executive; however, 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. In fact, although the petitioner has shown that some of the beneficiary's subordinates have been hired, the petitioner has not established that the beneficiary's subordinate employees relieve him from performing non-qualifying operational duties. The job duties provided for the beneficiary and his subordinates fail to demonstrate that the beneficiary will focus 51% of his time on executive duties rather than the day-to-day operations of the business.

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).

Further, 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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

III. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.