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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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File: WAC 06 115 50632 Office: CALIFORNIA SERVICE CENTER Date: **OCT 02 2007**

IN RE: Petitioner:  
Beneficiary:



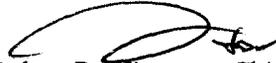
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president and general manager 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 is a corporation organized under the laws of the State of California and is allegedly a provider of architectural and engineering drafting services. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner has a qualifying relationship with the foreign entity because the petitioner failed to establish that it is doing business as defined by the regulations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the beneficiary's duties will be primarily those of an executive or manager. Counsel argues that the director erred in failing to consider the role of foreign employees and independent contractors as well as the beneficiary's claimed supervision of these workers. Counsel also submits a brief and additional evidence, including a statement addressing the percentage of time to be devoted by the beneficiary to performing qualifying duties, evidence addressing the beneficiary's purported supervision of foreign employees and independent contractors, the petitioner's tax return, its bank statements, and its lease.

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.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity 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;
- (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.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner described the beneficiary's job duties in a statement attached to the initial petition as follows:

**Responsibilities:**

In charge of day-to-day operations of the company. Responsible for the planning, organizing, directing and controlling the operations of the business. Responsible for developing new market initiatives, assessing new markets, and analyzing business opportunities.

**Duties:**

Plans and directs all aspects of an organization's operational and marketing policies, objectives, and initiatives.

Develops policies and procedures for operational processes in order to ensure optimization and compliance with established standards and regulations.

Develops strategies in order to sell company's services to the related industry and businesses.

Conducts financial feasibility studies and develops proposals for new business opportunities.

Identifies changes in the marketing environment or competitive strategies and evaluates, adjusts, or redrafts the organization's marketing plan and philosophy accordingly.

Ensures that the company meets budgeted financial goals and objectives.

Negotiates contracts, initiates proposals, and closes deals.

Communicates organization's objectives to state, city or local government and other necessary associations.

Demonstrates expertise in a variety of the field's concepts, practices, and procedures.

Relies on extensive experience and judgment to plan and accomplish goals.

Leads and directs the work of all the employees of the company.

Hires and fires employees of the company when necessary.

Performs a variety of tasks.

Reports to the Board of Directors.

The petitioner submitted an organizational chart for the United States operation. The chart shows the beneficiary at the top of the organization supervising one finance and administration "vice president/section manager," one data transcription "section manager," and one computer-aided design drafter. The organizational chart also indicates that the beneficiary serves a computer-aided design draftsman. All other positions on the chart are listed as "vacant" or "to be hired."

The petitioner also submitted its quarterly wage reports, payroll summaries, and 2005 Forms W-2, W-3, 1096, and 1099-MISC. Despite the assertions in the organizational chart, these documents indicate that the petitioner employed only the beneficiary and his spouse, the finance and administration "vice president/section manager," in the third and fourth quarters of 2005. The instant petition was filed on February 27, 2006. The finance and administration "vice president/section manager" appears to have been a part-time employee as she was paid a total of \$1,575.00 in the fourth quarter of 2005. Furthermore, there is no evidence in the record that the petitioner employed the data transcription "section manager," Virgil Sangria, after the second quarter of 2005. He does not appear in the wage reports for the last two quarters of 2005, and there is no evidence that he continues to work for the petitioner in any capacity. Also, while the petitioner submitted a 2005 Form 1099-MISC for \$2,640.00 in income paid to the computer-aided design drafter, [REDACTED] the record is devoid of evidence establishing when in 2005, exactly, [REDACTED] provided these services to the petitioner, whether he still provides services, or whether he will provide services in the future, and, if so, the magnitude or nature of his future commitment to the petitioner.

Finally, the petitioner submitted job descriptions for the subordinate workers. The finance and administration "vice president/section manager" is described as overseeing the petitioner's financial and administrative

matters and as having a bachelor's degree in civil engineering. The computer-aided design drafter, a purported independent contractor, is described as performing design related tasks and as having a bachelor's degree in civil engineering. The data transcription "section manager" is described as performing data transcription and encoding tasks and as having a bachelor's degree in commerce.

The job descriptions for the subordinate workers also describe the beneficiary's role as "section manager" of computer-aided design services. These duties are described as follows:

Plans and designs programs and assembles project staffs. Responsible for organizing activities for the development and implementation of projects. Responsible for the coordination and completion of projects. Oversees all aspects of projects. Sets deadlines, assigns responsibilities, and monitors and summarizes progress of project. Prepares reports for upper management regarding status of project. May negotiate contracts/agreements with client companies. Familiar with a variety of the field's concepts, practices, and procedures. Relies on extensive experience and judgment to plan and accomplish goals. Performs a variety of tasks. Leads and directs the work of others. Reports to the General Manager.

On April 12, 2006, the director requested additional evidence. The director requested, *inter alia*, an organizational chart describing all employees under the beneficiary's supervision, which includes job titles, duties, educational levels, salaries/wages, and immigration status. The director also requested a more detailed description of the beneficiary's duties in the United States. The director instructed that the petitioner should "[i]ndicate exactly whom the beneficiary directs including their job title and position description" and should "[l]ist all employees under the beneficiary's direction." Finally, the director requested that the petitioner "indicate percentage of time spent in each of the listed duties."

In response, the petitioner submitted the same job description for the beneficiary that was submitted with the initial petition. The petitioner also submitted the identical organizational chart. While the petitioner disclosed the salaries of the subordinate staff members, it submitted identical job descriptions. The petitioner did not indicate the percentage of time spent on each duty. The petitioner also did not further describe the beneficiary's duties or identify any overseas employees or additional independent contractors under his supervision and control.

On August 18, 2006, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary's duties will be primarily those of an executive or manager. Counsel argues that the director erred in failing to consider the role of foreign employees and independent contractors in providing services to clients. Counsel also argues that the director should have considered the beneficiary's supervision and control of these foreign employees and independent contractors in assessing whether the beneficiary will primarily perform qualifying duties. Counsel submits a brief and additional evidence, including a statement addressing the percentage of time to be devoted by the beneficiary to performing qualifying duties, materials concerning the petitioner's business activities as these relate to the supervision of foreign staff members, and other evidence addressing the beneficiary's purported supervision

of foreign employees, professionals, and independent contractors.

Upon review, the petitioner's assertions are not persuasive.

Title 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 Citizenship and Immigration Services (CIS) 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. Future hiring plans or projections of business growth may not be used to qualify a beneficiary for an extension. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant matter, the petitioner failed to establish that the United States operation has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

As a threshold issue, it must be noted that the petitioner's attempt to supplement the record on appeal with evidence addressing the beneficiary's proposed job duties and his purported supervision of foreign employees and other workers not previously identified was inappropriate and will not be considered by the AAO on appeal. As indicated above, the director's Request for Evidence specifically requested that the petitioner identify all employees under the beneficiary's direction and describe the job duties of "exactly whom the beneficiary directs." The director also requested a more detailed description of the beneficiary's duties in the United States, which includes the "percentage of time spent in each of the listed duties." The petitioner, however, failed to provide any evidence addressing the foreign employees, or other workers not identified in the initial petition, purportedly being supervised and controlled by the beneficiary. The petitioner also failed to provide a breakdown of how much time the beneficiary will devote to performing qualifying duties. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Furthermore, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

In view of the above, 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 will be either in an executive or managerial capacity. *Id.* The petitioner must specifically

state whether the beneficiary will primarily be employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will develop operational and marketing policies and be responsible for the planning, organizing, directing, and controlling the operations of the business. However, the petitioner does not explain what, exactly, the beneficiary will do on a day-to-day basis. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes overly broad duties does not establish that the beneficiary will actually perform managerial duties. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the many duties ascribed to him even though this breakdown was specifically requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). This breakdown is particularly important in this matter because many of the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner describes the beneficiary, in his role as "section manager" of computer-aided drafting services, as planning and designing programs, negotiating contracts, and performing "a variety of tasks." Furthermore, the petitioner describes the beneficiary, in his role as president/general manager, as conducting financial feasibility studies, developing proposals for new business, and directing the petitioner's marketing policies, objectives, and initiatives. However, marketing, negotiating, performing design services for clients, and conducting studies constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the record fails to identify any employees or contractors who will regularly and predictably relieve the beneficiary of the need to perform the non-qualifying tasks inherent to the ascribed duties and to the management of the business in general, it must be concluded that he will perform these tasks. As explained above, the petitioner has failed to establish the ongoing employment of any employees or independent contractors other than the beneficiary and his spouse. Thus, as the petitioner has not established how much time the beneficiary will devote to non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. 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. 1988). To the contrary, given the nature of the petitioner's business and the lack of a subordinate staff, it must

be concluded that the beneficiary will be primarily performing the tasks necessary to provide services to clients.<sup>1</sup>

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate staff members, it appears that the beneficiary will supervise one part-time worker, the finance and administration "vice president/section manager," who is also the beneficiary's spouse. As indicated above, the petitioner has not established that the other workers identified in the organizational chart, the data transcription "section manager" and the computer-aided drafter, will be employed in any capacity, and their claimed employment will not be considered. Therefore, in this matter, the petitioner has not established that the finance and administration "vice president/section manager" will be engaged in performing supervisory or managerial duties. To the contrary, it appears that this employee will perform the tasks necessary to produce a product or to provide a service. Furthermore, it must be noted that the supervision or management of independent contractors will not qualify a beneficiary to be classified as a managerial employee as a matter of law. See section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that only the management of *employees* may be considered qualifying managerial duties for purposes of this visa classification.<sup>2</sup>

In view of the above, it appears that the beneficiary will be primarily a first-line supervisor of a non-professional employee, the provider of actual services to customers, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the petitioner has not established

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<sup>1</sup>It is noted that, even if the additional evidence submitted on appeal was considered by the AAO, this evidence does not appear probative of the beneficiary primarily performing qualifying duties. The use of foreign workers abroad to perform professional services for the petitioner's clients still does not clarify who, other than the beneficiary, will perform the non-qualifying tasks inherent to the marketing duties as well as to the operation of the business in general. Furthermore, the beneficiary's self-serving affidavit submitted on appeal in which he claims to devote 55% of his time to "managerial" duties without specifically defining these duties would not be probative of his being primarily employed in a managerial or executive capacity even if considered by the AAO. Once again, 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, *aff'd*, 905 F.2d 41.

<sup>2</sup>It is again noted that, even if the additional evidence submitted on appeal was considered by the AAO, this evidence does not appear probative of the beneficiary supervising and controlling the work of other supervisory, managerial, or professional employees, or managing an essential function of the organization. The definition of "intracompany transferee" foresees beneficiaries rendering services to the United States operation. See 8 C.F.R. § 214.2(l)(1)(ii)(A). Rendering supervisory or managerial services to an overseas employer, even in conjunction with the provision of services in the United States, is not a qualifying duty under the Act and the regulations.

that the beneficiary will manage professional employees.<sup>3</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>4</sup>

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<sup>3</sup>In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee or contractor does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the drafting, financial, administrative, or data transcription duties ascribed to the beneficiary's purported subordinates. Furthermore, the petitioner has not established that any of the claimed employees or contractors has earned the equivalent of United States bachelor's degrees. Once again, 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

<sup>4</sup>While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. 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 written job offer 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(1)(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 tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will be primarily a first-line supervisor of a non-professional employee and/or will be engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will be primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. 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 employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor and/or will perform the tasks necessary to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act; *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988). However, it is appropriate for CIS 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). Furthermore, 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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.<sup>5</sup>

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<sup>5</sup>It is noted that counsel to the petitioner cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of his contention that the beneficiary is primarily employed as an executive or manager. In that decision, the AAO recognized that the sole employee of the petitioner could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Second, as explained above, the petitioner has not established that the beneficiary is primarily employed in an executive or managerial capacity. This is paramount to the analysis, and a beneficiary may not be classified as a manager or an executive if he or she is not primarily performing managerial or executive duties regardless of the number of

The second issue in the present matter is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." An "affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(I). "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization."

In this matter, the petitioner asserts that it is 100% owned by the beneficiary and that it is an affiliate of the foreign employer, which is 60% owned by the beneficiary. In support, the petitioner provided a variety of organizational documents, including a stock certificate. The petitioner also asserts that it is, and has been, "doing business" in the United States.

On April 12, 2006, the director requested additional evidence. The director requested, *inter alia*, copies of the petitioner's most recent income tax returns, bank statements for the past year, and the petitioner's lease agreement for its business premises. The director also requested a copy of the petitioner's California "Notice of Transaction Pursuant to Corporations Code Section 25102(f)."

In response, the petitioner failed to provide any of the requested documents, and the director denied the petition on August 18, 2006. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign entity because the petitioner failed to establish that it is doing business by failing to submit the requested documentation.

On appeal, counsel submits a copy of the petitioner's tax return dated February 18, 2006, copies of bank statements, and a copy of a lease. Counsel did not submit a copy of the petitioner's California "Notice of Transaction Pursuant to Corporations Code Section 25102(f)."

Upon review, the AAO concurs with the director's decision.

As indicated above, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In this matter, the petitioner failed to submit a copy of its most recent tax return, its bank statements for the past year, and its lease agreement for its business

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people employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if it were binding or analogous.

premises, even though this evidence was specifically requested by the director. The petitioner's failure to submit this evidence upon request precluded a material line of inquiry regarding whether the petitioner is and was doing business in a regular, systematic, and continuous manner. Therefore, the director properly denied the petition.

Furthermore, as explained above, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the tax return, bank statements, and lease to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and will not, consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director. Accordingly, the petitioner has not established that it and the foreign entity are still qualifying organizations, and the petition may not be approved for this additional reason.

Moreover, the petitioner failed to submit a copy of its California "Notice of Transaction Pursuant to Corporations Code Section 25102(f)" even though this was also requested by the director. The petitioner's failure to submit this evidence upon request precluded a material line of inquiry regarding the petitioner's ownership and control as a California corporation. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Accordingly, the petitioner has not established that it and the foreign entity are still qualifying organizations, and the petition may not be approved for this additional reason. 8 C.F.R. § 103.2(b)(14).

Beyond the decision of the director and for the same reasons explained above, the petitioner has also failed to establish that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Accordingly, the petition will be denied for this additional reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be 100% owned and controlled by the beneficiary. As a purported owner of the petitioner, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act, 8 U.S.C. § 1361.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.