

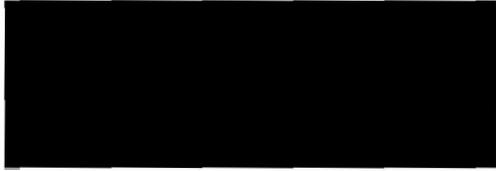


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File: SRC 04 170 50300 Office: TEXAS SERVICE CENTER Date: SEP 05 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

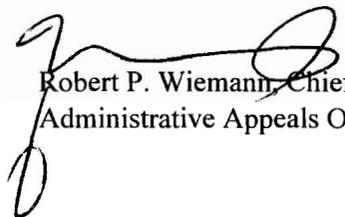
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Texas 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 petition seeking to extend the employment of its president 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 Florida corporation, operates a gas station with a convenience store and automobile repair shop. The petitioner states that it is a subsidiary of [REDACTED], located in Peru. 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 status for one additional year.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the U.S. company in denying the petition. Counsel contends that the beneficiary manages professionals and directs the marketing, personnel, policy, finance and contract negotiation components of the company, while the petitioner's employees and contractors relieve him from performing the day-to-day operations of the business. Finally, counsel asserts the beneficiary has recently signed contracts for a "major business deal," and had been working with three attorneys for this purpose in his role as president of the company. Counsel submits a brief and additional evidence in support of the appeal.

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 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 nonimmigrant visa petition was filed on June 1, 2004. The petitioner indicated on Form I-129 that the U.S. company has six employees, and seeks to continue to employ the beneficiary as its president. The petitioner stated that the beneficiary's duties are as follows: "To be in charge of supervising the overall business, entering contracts with suppliers, hiring and dismissing employees." In a cover letter dated May 26, 2004, counsel for the petitioner stated that the beneficiary "is presently in charge of all operations and holds the position of President. In general he carries out the same duties as abroad." Counsel referenced an attached letter of experience from the foreign company, but upon careful review of the record, the letter is not included among the documents submitted.

The director issued a request for evidence on September 11, 2004, instructing the petitioner as follows:

Submit a statement describing the staffing of the U.S. company. This statement should clearly indicate the number of employees, the position and job duties of each employee, specific date each employee began employment with the company, and should be accompanied by evidence of wages paid to the employees. Submit the Employer's Quarterly State Tax Report for the 1st and 2nd quarters of 2004 Submit a work schedule for all employees. Also, submit evidence of any contract employees such as 1099 MISC and contracts. If you have any contract employees, submit a statement describing how often the US business uses their services ex. weekly/monthly and number of hours.

In a response dated December 8, 2004, counsel for the petitioner noted that "[t]here is no rule or regulation concerning how many employees a company has for an L1-A executive visa renewal to be approved." Counsel indicated that the beneficiary supervises four employees, including one professional, one contractor and two subcontractors. The petitioner submitted the following position descriptions for its employees:

[The beneficiary] – General Manager since February 27, 2003, in charge of supervising and oversees the work of the C-Store’s Manager and Auto Center’s Operator, negotiate and sign contracts, he supervises and approves quotes, he makes decision regarding the investment of equipment, inventory and improvements, he performs all types of banking, financial, credit and commercial operations with bank entities, he presents and gives input on investment projects for the expansion of the business, he reports to the shareholders of the business, he assesses the finance and promotes publicity and marketing of the business.

[REDACTED] – Convenience Store’s Manager since October 14, 2003. She supervises the correct supply of products, the correct stock of the products, supervises and controls the work of the cashiers; she is in charge of making the corresponding payments to the various suppliers and employees.

Cashier, working as a cashier since May 3, 2003. Her duties include the use of the cash registers, customer service and assess the stock on a daily basis and places orders.

Cashier, working since December 19, 2003. Her duties include the use of the cash register, sale of products and customer service.

Cashier, working since October 4, 2004. Her duties include the use of the cash register, sale of products and customer service.

Contract Employees

[REDACTED] He started in July 2003 as the manager of the auto center but later on for the best company’s interest, he turns into an operator for the auto center (August 20, 2003). Today his duty is to operate the Auto Center, overseeing the work of his mechanics and give the instruction for the job. Customer Service. Working Orders. 50 hours per week.

[REDACTED] currently employs two mechanics

- [REDACTED] – Mechanic
- [REDACTED] Mechanic

[REDACTED] – Maintenance and repair. Since September 2003...every two weeks totaling 10 to 15 hours per month in a regular month. . .

[REDACTED] . – [The petitioner’s] Accountant. Since June 24, 2003. 5 Hours per month.

The petitioner further indicated that it had utilized the services of three different attorneys in succession since November 2002, for the purpose of reviewing agreements, negotiations and legal assistance, for approximately 10 hours per month.

The petitioner submitted a work schedule for all employees working in the gas station/convenience store which shows the operations manager working six five-hour shifts per week, and each cashier working five five-hour shifts, while the beneficiary works weekdays from 9:00 a.m. until 5:00 p.m. The petitioner’s

business operates seven days per week from 7:00 a.m. until 10:00 p.m. daily and the schedule shows that there is no overlap in the shifts of the lower-level employees. The petitioner submitted its Florida Forms UCT-6, Employer's Quarterly Wage Report, for the second and third quarters of 2004 confirming the employment of the beneficiary, the operations manager, and two cashiers.

The petitioner also submitted a copy of the "operator agreement" between the U.S. company and [REDACTED], which gives the latter the responsibility of operating the petitioner's auto service center in exchange for 50 percent of gross sales. The agreement indicates that the operator is responsible for taxes associated with the operation of the auto center and well as payment of any other employees required to operate the business. The petitioner submitted evidence of payments to [REDACTED] as well as payments to the attorneys, accountant, and maintenance service provider included in the list of contractors.

The director denied the petition on February 15, 2005 concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director discussed the petitioner's staffing levels and the nature of the petitioner's business, and concluded, that "due to the hours of operation and the job duties to be performed, three employees and the listed contract workers will not relieve the beneficiary of the day-to-day non-executive duties of the business." The director noted that the petitioner had failed to provide Forms 1099 for its contract employees, and noted that one of the cashiers was not hired until after the petition was filed. The director determined that the U.S. company had not expanded to the point where the services of a full-time president would be required.

On appeal, counsel for the petitioner cites an unpublished decision in support of the proposition that the size of the petitioner cannot be the sole basis for denying a petition, and asserts that Citizenship and Immigration Services (CIS), nevertheless "does exactly that in its decision." Counsel recites the statutory definition of "executive capacity" at section 101(a)(44)(B) of the Act and states:

As this applicant both manages professionals and directs the marketing, personnel, policy, finance and negotiation components, it is submitted that he satisfies both alternatives in (1), above, and that the materials submitted previously established his qualification under parts (2), (3) and (4) as well.

In this case, the beneficiary supervise 4 other persons one of whom is a professional, and is responsible for choosing and assessing the work of independent professionals such as accountants and lawyers, as well as two other independent contractors (mechanics) who carry out the bulk of the day-to-day operations of the petitioner. . . . 9 Foreign Affairs Manual 41.52 N8.2-1a states that independent contractors are to be counted in determining executive status.

Counsel emphasizes that the record contains sufficient evidence to establish the employment of the auto center operator and mechanics, even if the petitioner did not provide copies of Form 1099. Counsel asserts that the gas station and convenience store operated in its first year "was only the beginning investment." Counsel states that "contracts for a major business deal were signed after the application for renewal was submitted . . . it was for this reason that the applicant had 3 other attorneys that the company has been working with."

Counsel further contends that “if 3 independent contractors handle the mechanic/gas station aspect of the business and 3 cashiers (and a manager) handle the mini mart aspect it is clear that beneficiary is relieved” from performing the day-to-day operations of the business. Finally, counsel objects to the director’s conclusion that the company has not expanded to the point where it requires a full-time president, contending that such a statement “begs the question as to who is going to run the company, much less expand it to handle new projects.”

Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a 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 either in an executive or managerial capacity. *Id.* Counsel states that the beneficiary will be performing primarily executive duties under section 101(a)(44)(B) of the Act, but also references job duties, such as hiring and firing employees and supervising professionals and managers, which would appear to fall within the definition of managerial capacity. **A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions.** The petitioner must demonstrate that the beneficiary’s responsibilities will meet the requirements of one or the other capacity.

Further, the definitions of executive and managerial capacity 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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position.

The petitioner has submitted only a brief job description for the beneficiary’s position which suggests that a significant portion of his time is allocated to the non-executive, non-managerial functions of the business. For example, the petitioner indicated that the beneficiary “negotiates and signs contracts,” “supervises and approves quotes,” “makes decision regarding the investment of equipment and inventory,” “performs all types of banking, financial, credit and commercial operations with bank entities,” and “assesses the finance and promotes publicity and marketing of the business.” Based on these vague statements, and given the nature of the petitioner’s business, it appears that the beneficiary is involved in day-to-day operations of the business including purchasing inventory, marketing the petitioner’s business, and routine day-to-day banking and finance duties. The petitioner did not describe the nature of the contracts negotiated by the beneficiary, or the types of quotes “supervised and approved.” While all of these tasks are essential to the operation of the petitioner’s business, the petitioner has not established that these duties rise to the level of managerial or executive capacity as contemplated by the statutory definitions.

The petitioner also stated that the beneficiary supervises the manager of the convenience store and the operator of the auto center, “presents and gives input on investment projects for the expansion of the

business,” and “reports to shareholders on the status of the business.” While these statements suggest that the beneficiary exercises a certain level of authority over the business, the petitioner has failed to identify any specific “investment projects,” describe what specific tasks the beneficiary performs in relation to these projects, or indicate how much time he devotes to such activities. 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 job description for the beneficiary failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Performing non-qualifying tasks necessary to produce a product or service, or other non-managerial and non-executive duties, will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties. 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. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Here, the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial or executive duties as defined in the statute. However, based on the job description provided and as discussed further below, it is reasonable to assume, and has not been shown otherwise, that the beneficiary primarily performs purchasing, bookkeeping and first-line supervisory tasks that prevent him from serving in a “primarily” managerial or executive capacity.

The petitioner's response to the director's request for additional information regarding the petitioner's staffing levels and each employee's job duties supports a conclusion that the beneficiary would perform a combination of **managerial duties and non-qualifying first-line supervisory and operational duties**. 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. Furthermore, when examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's claimed subordinate, the convenience store manager, is employed in a supervisory position. Instead, the record

indicates that the “store manager” performs the actual day-to-day tasks of operating the petitioner’s retail store. As noted by the director, according to the work schedule submitted by the petitioner, the “store manager” never works in the store at the same time as her claimed subordinates and thus it is not clear how she supervises the claimed employees and activities. 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). Based on the evidence submitted, it is reasonable to assume that the “store manager” performs the duties of a cashier, as she is the only employee in the store, other than the beneficiary, during the 30 hours she works each week.

Although the “store manager” apparently has a bachelor’s degree, 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 a subordinate employee. The possession of a bachelor’s degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a baccalaureate degree is actually necessary to perform the duties of this position. Thus, the petitioner has not established that this employee could be classified as a professional. Although the petitioner has submitted evidence that the company utilizes the services of an accountant and an attorney for a total of approximately 15 hours per month, these contractors, while professionals, have been retained to provide specific limited services, and cannot be considered to work under the beneficiary’s supervision in the daily operation of the petitioner’s business.

Finally, the AAO acknowledges the petitioner’s claim that the beneficiary will supervise the automobile repair shop operator, who in turn hires sub-contracted mechanics. However, the petitioner has not provided evidence of payments to the mechanics, and thus has not established that the repair shop operator is employed in a supervisory capacity. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner suggests on appeal that the director placed undue emphasis on the petitioner’s personnel size in determining that the beneficiary would not be employed in a primarily managerial or executive capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a “new office” petition and require CIS 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 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.

The petitioner operates a gasoline station and convenience store that is open for business for 105 hours per week, as well as an automobile repair shop that is operated by an independent contractor. At the time of filing, the petitioner employed one president, one part-time store manager, and two-part time cashiers who worked a total of 80 hours per week in the convenience store. The petitioner has a reasonable need for one or more employees in the store to perform all of the day-to-day functions of ordering merchandise and supplies, arranging and stocking merchandise displays, cleaning the store, processing customer purchases, receiving deliveries, reconciling daily cash register receipts and many other routine duties. Contrary to counsel's assertion on appeal, it is not clear that the beneficiary is relieved from performing these duties. Rather, it is reasonable to assume, and has not been shown otherwise, that the beneficiary would be required to perform these duties during the 25 hours per week when no other employee was available to work in the store. In addition, as discussed above, the beneficiary's job description suggests that he performs non-qualifying duties related to the purchasing, inventory, marketing, administration and finance functions. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel cites to the statutory definition of "executive capacity," and asserts that the beneficiary satisfies each of the criteria for this classification. 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, 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-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.*

The petitioner has not demonstrated the beneficiary occupies an elevated position within a complex organizational hierarchy, other than in position title, nor does the record show that the beneficiary is primarily focused on the broad policies and goals of the organization. Rather, as discussed above, it is evident that the beneficiary is engaged in supervising lower-level employees and performing the day-to-day operations of the company.

In this matter, although the beneficiary evidently exercises discretion over the day-to-day operation of the business, the beneficiary has not been shown to primarily perform duties associated with the high-level responsibilities identified in the statutory definitions. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The fact that the beneficiary manages a business, regardless of its size, 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 (Feb. 26, 1987). The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization.

The AAO acknowledges the petitioner's claim that an additional part-time cashier was hired in October 2004, two months subsequent to the filing of this petition. Counsel also claims that the petitioner recently concluded a "major business deal" and suggests that the company is in the process of expanding to other investments or pursuits. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record as presently constituted does not contain evidence that the petitioner and the foreign entity maintain a qualifying relationship, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). To establish eligibility, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same entity or are related as a "parent and subsidiary" or "affiliates." The petitioner claims to be a subsidiary of [REDACTED], located in Peru, but has provided no documentary evidence of the ownership and control of either entity. The record is also devoid of evidence of the financial status of the U.S. company, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). Because the director failed to request this required initial evidence in the request for evidence, the AAO notes these deficiencies for the record and notes that the petition cannot be approved without such evidence.

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. 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.