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File: EAC 07 077 50383 Office: VERMONT SERVICE CENTER Date: DEC 21 2007

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, Director
Administrative Appeals Office

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

The petitioner filed this nonimmigrant 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, a Texas limited liability company, states that it operates a gas station and convenience store. The petitioner claims that it is the subsidiary of Regent Trade Links, located in India. The beneficiary was initially granted one year in L-1A status to open a new office in the United States and the petitioner now seeks to extend his stay for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity under the extended petition.

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 erroneously determined that the beneficiary will not serve in a managerial or executive capacity. Counsel reiterates the previously-provided job description for the beneficiary and contends that the director unreasonably assumed that the beneficiary's subordinates would not be professional-level employees. Counsel submits a brief 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 sole issue addressed by the director 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 petition was filed on January 24, 2007. The petitioner indicated on Form I-129 that the beneficiary would continue to serve as president and general manager of the six-person U.S. company. In a letter dated January 2, 2007, the petitioner described the beneficiary's position as follows:

[The beneficiary] is employed at the highest position within the US Company and supervises employees who manage day-to-day operations. In sum, [the beneficiary] has the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, supervising all financial aspects of the company and developing policies and objectives for the company.

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[The beneficiary] will have overall executive responsibility for developing, organizing, and establishing the purchase, sale, and marketing of merchandise for sale in the U.S. market. His other duties will include: (i) identifying, recruiting, and building a management team and staff with background and experience in management and sales in the U.S. market; (ii) negotiating and supervising the drafting of purchase agreements; (iii) marketing products to consumers according to [the foreign entity's] guidelines; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by [the foreign entity]; (vi) developing and implementing plans to ensure [the petitioner's] profitable operation; and (vii) negotiating prices and sales terms, developing pricing policies and advertising techniques.

Percentage of time spent on each duty:

Management Decisions	40%
Company Representation	15%
Financial Decisions	10%

Supervision of day-to-day company functions	10%
Business Negotiations	15%
Organizational Development of Company	10%

The petitioner provided an organizational chart for the U.S. company which identified the beneficiary's immediate subordinates as an operations manager and a purchase and record keeping employee. The chart depicts a store manager and two sales and stocking employees subordinate to the operations manager. The petitioner did not identify any employees by name on the organizational chart. The petitioner provided a copy of its Texas Form UCT-6, Employer's Quarterly Report, for the third quarter of 2006, which confirmed the employment of six employees, including the beneficiary, as of September 2006. Four of the employees earned total wages of less than \$400 during the three-month period.

On February 28, 2007, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director instructed the petitioner to provide: (1) a comprehensive description of the beneficiary's duties with an explanation as to how the duties will be managerial or executive in nature; (2) a list of all United States employees by name and position title; (3) a complete position description for all employees, including a breakdown of the number of hours devoted to each employee's job duties on a weekly basis; (4) copies of educational credentials for the beneficiary's subordinates; (5) copies of payroll records for all employees for the months of December 2006 and January 2007; (6) a copy of IRS Form 941, Employer's Quarterly Tax Return, for the fourth quarter of 2006; and (7) copies of all IRS Forms W-2, Wage and Tax Statement, issued in 2006.

In a response dated May 22, 2007, counsel for the petitioner further described the beneficiary's duties as follows:

[The beneficiary] is employed at an executive position within the U.S. company, and supervises employees who manage the day-to-day operations. [The beneficiary] plans and directs the management of the Petitioner through its own employees, as well as outside contract employees who perform the legal and accounting duties. The beneficiary is the individual responsible for establishing goals and policies and exercising wide latitude in discretionary decisions making duties, which includes supervising managerial level employees. Majority of [the beneficiary's] time is spent [on] business development, sales and income growth, and staff development.

Counsel emphasized that the beneficiary is responsible for all of the U.S. company's "planning, expansion, banking, budgeting, and marketing," and that he has "complete authority to establish goals and policies and exercises discretionary decision-making authority." Counsel stated that the beneficiary has "multiple business interests" and spends the majority of his time on "other business interests."

Counsel further provided the following breakdown of the beneficiary's duties:

30% - Management of the retail operations (meet with staff to implement policy, advise staff of new products of [sic] services, encourage team building, and obtain licenses related to the business);

- 15% - Administrative functions, including recruiting, hiring and training of staff;
- 15% - Planning, budgeting, banking, finance and accounting, review of financial statements, meeting with bank officials, arranging loans, and providing prospectuses to banks;
- 40% - Searching for, reviewing and analyzing potential new investments, analyzing zoning and legal issues, negotiating acquisitions and meeting with potential partners, co-investors, sellers, brokers, and preparing due diligence, meetings with sellers, brokers, reviewing contracts, and review contracts with attorney.

Counsel indicated that the petitioner employed nine employees as of May 2007, pays salaries of approximately \$7,500 per month, and employs managers and professionals who work under the beneficiary's supervision. Counsel stated that the petitioner was submitting an "organization chart and positions for the U.S. company," but upon careful review of the attached exhibits, no organizational chart or position descriptions for the beneficiary's subordinates can be found in the record of proceeding.

The petitioner did provide the requested IRS Forms W-2 and W-3 for 2006, which show that the petitioner paid a total of \$48,119.50 to ten employees in 2006. Four of the employees received less than \$600, one employee earned \$1,364, three employees earned salaries in the \$3,200 to \$4,200 range, one employee received approximately \$11,500, and the beneficiary earned \$12,000. However, with the exception of the beneficiary and one other employee, none of the employees who received wages in 2006 were employed by the company as of January 2007 when the petition was filed.

According to the petitioner's Texas Form UCT-6 for the first quarter of 2007, only the beneficiary earned a salary commensurate with full-time employment. The petitioner claimed six employees in January 2007, four employees in February 2007, and five employees in March 2007, and paid a total of nine employees during the quarter. It is not possible to determine which employees, other than the beneficiary, were employed at the time of filing. One employee earned \$1,008 during the quarter, while the remaining seven employees earned between \$180 and \$462. Notwithstanding counsel's claim that the company pays salaries of \$7,500 per month, the petitioner paid only \$9,000 in salaries during the quarter in which the petition was filed, \$6,000 of which was paid to the beneficiary.

The director denied the petition on July 12, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that the petitioner had failed to define the job titles and job duties of the beneficiary's subordinate employees, and noted that the wages paid to the beneficiary's subordinates were not commensurate with full-time employment. The director also noted the petitioner's failure to provide the requested educational credentials for its employees, but found that, due to the nature of the business, the employees would likely not be required to have college degrees.

The director further noted that the description of the beneficiary's duties did not specify what he would be doing as a manager or executive in the context of the petitioner's current staffing structure. The director observed the lack of full-time employees to provide the sales and services of the company, and concluded that the beneficiary would reasonably be required to primarily engage in non-qualifying tasks.

On appeal, counsel for the petitioner asserts that the Immigration Act of 1990 changed the definitions of executive and manager to include individuals who do not have supervisory responsibilities, but who manage and direct a major function of the organization. Counsel asserts that the beneficiary will be employed in an executive capacity and provides a slightly revised description of the beneficiary's duties, which includes:

- (i) identifying, recruiting and building a management team and staff with background and experience in the U.S. market;
- (ii) Hiring, discharging, and transferring employees according to work performance and production needs;
- (iii) Leading equipment and retail service facilities;
- (iv) Negotiating and supervising the drafting of service agreements;
- (v) Overseeing the legal and financial due diligence process and resolving any related issues;
- (vi) Developing trade and consumer market strategies based on guidelines formulated by shareholders and directors;
- (vii) Preparing and analyzing reports on labor cost and production operations to determine whether operating cost standards are being met; and
- (viii) Developing and implementing plans to ensure [the petitioner's] profitable operation.

Counsel suggests that the director placed undue emphasis on the number of employees supervised by the beneficiary without considering the reasonable needs of the organization in light of its overall purpose and stage of development. Counsel asserts that the beneficiary is employed at the highest level within the company and will supervise and control the work of supervisory, managerial, or professional employees. Counsel contends that the director unreasonably assumed that the positions of operations manager, purchase manager and retail store manager are not professional-level employees and claims that the petitioner provided detailed position descriptions for each employee.

Counsel states that the petitioner currently employs six employees and anticipates employing 12 full-time workers in the future as it seeks to achieve the corporate objective of becoming "one of the leading wireless companies."

Counsel's assertions are not persuasive. Upon review, and for the reasons discussed herein, 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.*

In the instant matter, counsel and the petitioner have repeatedly described the beneficiary's proposed position in very broad terms, noting his "complete authority to establish goals and policies," his "discretionary decision-making authority," and his "overall responsibility of planning and developing the U.S. investment." These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the

Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Similarly, although the petitioner provided a breakdown of how the beneficiary's time would be allocated among his various responsibilities in its initial letter dated January 2, 2007, this description was even more vague, indicating that the beneficiary would devote his time to "management decisions," "company representation," "financial decisions," "business negotiations," "organizational development," and "supervision of day-to-day operations." The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner also addresses the beneficiary's responsibility for "developing, organizing, and establishing the purchase, sale, and marketing of merchandise" and notes that the beneficiary will be involved in negotiating and supervising the drafting of purchase agreements, "marketing products to consumers," "developing trade and market strategies," negotiating prices and sales terms, overseeing financial issues and "developing pricing policies and advertising techniques." The petitioner's description does not clearly identify the managerial or executive duties to be performed with respect to the purchase, marketing, sales, finance and advertising functions of the petitioner's gas station and convenience store. 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 has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In response to the director's request for a comprehensive description of the beneficiary's duties, the petitioner submitted a substantially different breakdown of the beneficiary's duties, noting that he has "other business interests" separate from the operation of the retail store, and spends 40 percent of his time researching potential new investments and negotiating for acquisitions. The petitioner offered no explanation as to why no reference was made to the beneficiary's investment activities at the time of filing. Further, the petitioner did not identify what specific duties are entailed by this responsibility. Regardless, the record does not substantiate that locating additional investment opportunities is the beneficiary's primary responsibility. There is no documentary evidence in the record of such activities, notwithstanding the petitioner's claim that the beneficiary is engaged in contract negotiations. 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 (Reg. Comm. 1972)).

Based on the limited explanation and documentary evidence provided, it cannot be concluded that the beneficiary devotes a substantial amount of time to investment and expansion activities, or that these activities are primarily managerial or executive in nature. As discussed further below, the petitioner's claim that the

beneficiary devotes only 30 percent of his time to actively managing the retail operations is also not supported by the documentary evidence.

Finally, the AAO notes that counsel has provided yet another position description on appeal which refers to negotiating service agreements, preparing reports on production operations, and leasing "retail service facilities." Since the petitioner does not claim to provide services or have a production department, these duties are not credible. Counsel's reference to the petitioner's objective of becoming "one of the leading wireless companies" is also inconsistent with all other claims and evidence in the record indicating that the petitioner operates a gas station and convenience store. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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).

Overall, the petitioner has failed to provide a detailed, consistent and credible account of the beneficiary's duties as president and general manager of the company. The petitioner's descriptions of the beneficiary's duties do not allow the AAO to determine the actual duties performed by the beneficiary, such that they can be classified as managerial or executive, nor does the described breakdown of the beneficiary's time seem plausible within the context of the petitioner's organization.

The AAO does not doubt that the beneficiary will exercise discretion over the petitioner's business as its president and only full-time employee. However, the definitions of executive and managerial capacity have two separate requirements. 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 ensures 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 non-managerial and non-executive duties. While several of the duties described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual responsibilities.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. A review of the record with respect to the petitioner's staffing levels undermines the petitioner's claim that the beneficiary primarily performs managerial or executive-level duties associated with the company's investment and expansion efforts and overall management.

Although requested by the director, the petitioner has failed to clearly identify the job titles, duties, and educational backgrounds of its employees. Any 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). The organizational chart submitted with the petition identified three tiers of management to oversee two sales employees, as well as a

purchasing and record keeping employee. While the petitioner does appear to have employed a total of six employees during the month in which the petition was filed, the petitioner has not established that any of the beneficiary's employees were employed in managerial, supervisory, or professional positions. 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). Although counsel objects to the director's "assumption" that the store manager, operations manager and "purchase manager," would not be professionals, the petitioner has not in fact established that these positions were filled as of the date of filing, nor has it provided the requested position descriptions for these positions. USCIS will not conclude that the beneficiary manages supervisory or professional employees based on an uncorroborated organizational chart that fails to identify any employees by name. 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.

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, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. See *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003).

At the time of filing, the petitioner was operating a gas station and convenience store that is open for business for 84 hours per week, based on the petitioner's representations. During the quarter in which the petition was filed, the company paid \$6,000 to the beneficiary and a total of \$3,019 to nine other employees. Since it cannot be determined which employees worked in January 2007, the AAO notes that the average number of hours worked by all of the beneficiary's subordinates together on a weekly basis during the quarter is approximately 45 hours.¹ Given the minimal number of hours worked by the subordinates, the record does not support the petitioner's claim that it employs an operations manager, a store manager, and a purchasing manager, as well as lower-level personnel, who relieve the beneficiary from primarily working in the company's store. The petitioner has not even established that it has employees to staff the store during its operating hours.² Counsel's claim that the petitioner regularly pays \$7,500 per month in salaries is directly contradicted by every relevant piece of documentary evidence submitted by the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec.

¹ To derive this figure, the AAO divided the amount paid to all subordinate employees (\$3,019) by the number of weeks in the quarter (13), and divided the result by 5.15, the minimum wage in Texas at the time the petition was filed.

² It would cost the petitioner \$5,623.80 per quarter to maintain a staff of one minimum wage employee in its store for 84 hours per week.

533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on the totality of the record, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary is primarily engaged in the day-to-day tasks associated with operating a retail store, rather than performing the claimed managerial or executive duties.

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). As discussed above, the petitioner has not established this essential element of eligibility due to its failure to provide a detailed, consistent description of the beneficiary's duties.

Although the director clearly noted the lack of employees to relieve the beneficiary from performing non-qualifying duties, counsel does not address the director's findings on appeal or otherwise attempt to clarify who would relieve the beneficiary from performing these tasks. Instead, counsel insists that the undocumented "managers and supervisors" and other employees perform all the non-qualifying duties of the company. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Despite the changes made by the Immigration Act of 1990 referenced by counsel, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel's unsupported assertions are not persuasive on this point.

Collectively, the lack of specifics in the beneficiary's job description and the absence of subordinates to perform many of the duties that are reasonably required in the daily operation of this type of business raises questions as to how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner indicates that it plans to hire up to twelve full-time employees in the future. However, 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. 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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.