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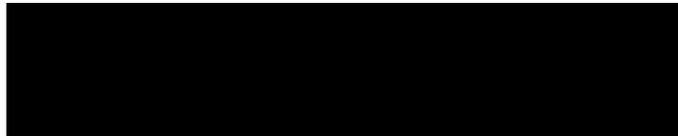
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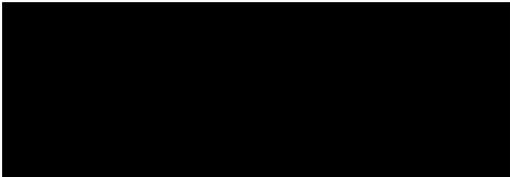
File: SRC 06 081 50845 Office: TEXAS SERVICE CENTER Date: JUN 04 2007

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)

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/executive 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 Florida corporation, states that it is a sales, distribution and export company. The petitioner claims to be an affiliate of Andamios del Sur, C.A., located in Venezuela. The beneficiary was granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend her status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would 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's decision contains erroneous conclusions of law and fact. Counsel contends that the beneficiary will be employed in a managerial and an executive capacity. Counsel provides a detailed brief and documentary 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 sole issue addressed by the director is whether the petitioner established that the beneficiary would 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 17, 2006. On Form I-129, the petitioner indicated that the beneficiary would continue to be employed as president/executive manager of the five-person company. In a letter dated January 10, 2006, the petitioner described the beneficiary's duties as follows:

[The beneficiary's] responsibilities will include the authority to control the work of other supervisory employees including the power to hire and fire or recommend those actions as well as other personnel actions and the broad exercise of discretionary authority over day-to-day operations. Among her primary responsibilities will be:

1. To plan[,] develop and establish policies and objectives in accordance with corporation charter;
2. To establish, equip and staff our new office;
3. To direct and supervise personnel responsible for our existing client base by facilitating and expediting their needs;
4. To supervise the expansion of our client and sales base by promoting services and products to potential new clientele;
5. To expand and develop sales by identifying new markets for penetration;
6. To develop a marketing strategy to reach these new markets and assure that they are accessed[;]
7. To oversee and supervise personnel[;]
8. To monitor client satisfaction with products and services offered, keep with [sic] market and product trends;
9. To monitor performances of all subordinate employees and make appropriate hiring and firing decisions[;]

10. To supervise the procurement and installation of computer hardware and software necessary for the proper performance and functions.

The petitioner stated that the U.S. company has been engaged in selling, importing and providing services in the field of professional esthetics and cosmetics products and machines. The petitioner further provided evidence that it is a representative of Biogenie International S.A.R.L., a French company, with exclusive right to resell Biogenie professional esthetics, cosmetic products and machines throughout the State of Florida.

In addition to its contract with Biogenie, the petitioner submitted an agreement between "Studio Styles" and the petitioner, for a two-year period beginning on March 15, 2005. Pursuant to the terms of the agreement, the parties would select a fixed physical area within the Studio Styles location, where the petitioner would provide "treatment services" and exhibit and sell products. Services and products sold by the petitioner would be paid through the administrative and accounting systems of Studio Stylez, which would withhold ten percent of bi-weekly sales. Accordingly to the agreement, the petitioner is required to "select competent personnel for the development and the running of the basis at and within the premises of its commercial location," and Studio Styles must approve all employees hired to work for the petitioner on its premises. The petitioner submitted copies of monthly invoices submitted by the petitioner to Studio Styles and another business, Armandeus International, for products and services provided by the U.S. company.

In support of the petition, the petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, and Florida Form UCT-6, Employer's Quarterly Report, for the fourth quarter of 2005, which indicate that the petitioner has five employees. The petitioner also submitted an agency retainer agreement between the U.S. company and Altius Group, an advertising and marketing firm, dated June 13, 2005, and indicating an initial payment for services of \$1,275. The petitioner submitted a "Creative Brief/Strategic Development" plan prepared by Altius for the petitioner on July 5, 2005. The petitioner also provided a copy of a risk analysis study dated February 28, 2005, prepared for the company by [REDACTED] for the purpose of allowing the petitioner "to evaluate which is the best negotiation route with the owner of the cabins and with the employees."

The director issued a request for additional evidence on February 22, 2006. The director instructed the petitioner to provide copies of the U.S. company's quarterly wage reports for the last two quarters, and a detailed organizational chart that shows the names and job titles of all employees. The director also requested position descriptions, position requirements, the qualifications of individuals filling the positions, and the duration of employment for each worker employed by the petitioning company.

In a response dated May 16, 2006, the petitioner submitted an organizational chart for the U.S. entity, which depicted the beneficiary as general manager, supervising a bookkeeper, a sales manager and an aesthetician. The chart shows that the sales manager supervises a secretary. In addition, the chart shows that the beneficiary supervises contracted employees including a business consultant, a marketing strategy consulting firm, and tax accountants.

The petitioner indicated that its sales manager is responsible for: field product sales to prospective and established customers; discussing technical problems and issues with customers; analyzing sales territories

and setting sales quotas; preparing sales and inventory reports for management and budget departments; stocking and reordering inventory; taking customer orders; directing and supervising employees engaged in sales, inventory-taking, reconciling cash receipts, or performing specific services such as pumping gas for customers; hiring, training and evaluating sales personnel; providing sales planning, facilitating cost estimating reports and informing the company of any necessary design changes or modifications; and monitoring staff performance.

The petitioner indicated that its aesthetician is responsible for administering body conditioning treatments using Biogenie beauty concept protocols and advising clients on recommended treatments. The petitioner also provided job descriptions for the bookkeeper and secretary, who are described as performing general bookkeeping, administrative and clerical functions. Finally, the petitioner provided copies of its IRS Forms 941 for the last two quarters of 2005, which were previously submitted, and evidence of the qualifications of the petitioner's employees.

The director denied the petition on June 15, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director found insufficient evidence to establish that the beneficiary regularly supervises the consultants identified as independent contractors on the organizational chart, and determined that they would not be considered among the beneficiary's subordinates. The director acknowledged that the beneficiary would supervise a bookkeeper, sales manager, aesthetician and secretary, but noted that the petitioner had not established that any of the employees is employed in a professional, supervisory or managerial capacity. The director concluded that based on a review of the totality of the evidence the beneficiary appears to function "as a first line supervisor in a small and narrowly focused organization."

On appeal, counsel objects to the director's dismissal of the beneficiary's utilization of independent contractors to perform risk analysis and marketing/advertising consulting services, noting that her use of such consultants is indicative of her "business savvy and sophistication." Counsel asserts that, contrary to the director's determination, the petitioner's sales manager is employed in a professional position. Counsel asserts that according to the U.S. Department of Labor's Occupational Information Network (O\*Net), sales manager positions require "several years of work-related experience, on-the-job training, and/or vocational training," and often require a bachelor's degree. Counsel further asserts that the sales manager is employed in a supervisory capacity, as he supervises a secretary and will supervise a sales staff "once the sales territories inside and outside the South Florida market are established." Counsel emphasizes that it is important for USCIS to consider the overall purpose and stage of development of the organization.

Further, counsel asserts that even if the beneficiary is not found to meet the definition of employment in a managerial capacity, her position meets the definition of executive capacity. Counsel claims that the job duties described for the beneficiary establish that she directs the management of the organization, establishes the company's goals and policies, and exercises wide latitude in discretionary decision-making. The evidence submitted on appeal also includes a letter from the petitioner which includes much of the same information included in counsel's brief, and additional photographs depicting the petitioner's physical premises.

Upon review, counsel's assertions are not persuasive. 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.*

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 performance of non-managerial or non-executive duties.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the petitioning company as its president, the petitioner has failed to show that the beneficiary's actual duties will be primarily managerial or executive in nature.

The petitioner's description of the beneficiary's duties is overly broad and fails to specify the managerial or executive duties she will perform on a daily basis as the president of the company. The petitioner indicates that the beneficiary will "plan, develop and establish policies and objectives," "control the work of other supervisory employees including the power to hire and fire," and exercise "discretionary authority over day-to-day operations." These duties merely paraphrase the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A) and (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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Further, several of the beneficiary's duties are related to sales, marketing and customer service functions and are not clearly managerial in nature. For example, the petitioner indicates that the beneficiary will "supervise the expansion of our client and sales base by promoting services and products to potential new clientele," "expand and develop sales by identifying new markets for penetration," "develop a marketing strategy to reach new markets," "monitor client satisfaction with products and services offered," and "keep with market and product trends." Although the petitioner employs one sales employee who would relieve the beneficiary from performing some direct sales work, these duties suggest that the beneficiary devotes some portion of her time to market and product research, promotion, sales and customer follow-up, and the AAO notes that the petitioner's invoices refer all customer inquiries to the beneficiary. The job description does not sufficiently describe the beneficiary's duties with relation to the sales and marketing functions. 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.

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The record shows that the petitioner employs a sales manager, an aesthetician, a bookkeeper and a secretary. The petitioner also claims that the petitioner utilizes the services of professional consultants, including an accounting firm, a marketing firm, and a business engineer. While it appears that the petitioner regularly utilizes the services of an accountant to prepare state and federal tax filings, the record does not document the petitioner's ongoing use of or the beneficiary's regular supervision of the marketing firm or business engineer. The record shows that the business engineer prepared a risk analysis study for the petitioner in February 2005, while the marketing firm prepared a "marketing strategy" document in July 2005, seven months before the instant petition was filed. Absent evidence of ongoing payments to these consultants as of February 2006, and a more detailed description of the services they provide and how the beneficiary supervises their work, the petitioner has not established that these consultants should be considered among the beneficiary's subordinates for the purpose of this analysis. 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)).

While the record establishes that the beneficiary has the authority to hire and fire employees, the petitioner has not demonstrated that the beneficiary's subordinates are professionals. 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. The petitioner has not established that any of the beneficiary's subordinates possess a bachelor's degree or that such a degree is required to perform the duties of a sales manager, secretary, bookkeeper or aesthetician.

Of these employees, the petitioner indicates that the sales manager is employed in a professional capacity. However, the petitioner's job description for the sales manager is not entirely credible, as it references his supervision of employees engaged in "sales, inventory-taking, reconciling cash receipts, or performing specific services such as pumping gasoline," and informing the company of "any necessary design changes or modifications." The petitioner does not operate a gas station, nor does it design products. 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). Although the petitioner indicates that the sales manager is also employed in a supervisory and managerial capacity, the record as a whole suggests that he functions mainly as a sales representative, given his status as the only employee of the company, other than the beneficiary, who is claimed to be responsible for sales duties. Although the petitioner indicates that the additional sales staff will be recruited in the future and would work under the sales manager's supervision, 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). 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 claims that even if it is determined that the beneficiary will not be employed in a managerial capacity, the record demonstrates that she will be employed in an executive capacity as president of the U.S. company. 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-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.* Here, the petitioner has failed to establish that the beneficiary is primarily focused on the broad policies and goals of the organization, or that she otherwise performs primarily executive-level duties.

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). In the present matter, however, the regulations

provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

At the time of filing, the petitioner was a one-year-old company that claims to be engaged in sales, distribution and export activities. The record shows that the company employed the beneficiary as president/executive manager, plus a sales manager, secretary, bookkeeper and one aesthetician. The petitioner is a distributor of spa products and equipment for a French company, and claims that it markets its products to spa operators, beauty parlors, beauty schools and retailers. The petitioner notes that it provides its services "as part of packages contracted with beauty providers," rather than to individual clients. The petitioner notes that the aesthetician works in the petitioner's sales/demonstration office to demonstrate the quality of the petitioner's products and equipment, application techniques, and other instructions on the use of the products and equipment. However, the evidence submitted suggests that the petitioner's employees provide beauty treatments and sell products on the premises of two Florida spas or salons, as indicated by the contract between the petitioner and Studio Styles, and by numerous invoices for services submitted to this and one other business. The petitioner has not established how a single aesthetician is able to work in the petitioner's "sales/demonstration" office while also providing spa treatment services at two different salons. Further, as discussed above, while the petitioner appears to employ a bookkeeper and secretary to handle administrative, clerical and routine financial functions, the record does not clearly demonstrate that all other sales, marketing, promotion and customer service tasks could reasonably be performed by a single sales employee. As noted above, the record suggests that the beneficiary directly performs some of these functions, rather than supervising their performance by subordinate employees.

Overall, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a president/general manager who performs primarily managerial or executive duties, one sales employee, one aesthetician, a bookkeeper and a secretary. When examining the managerial or executive capacity of a beneficiary, 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. Here, the totality of the record does not support a conclusion that the petitioner has a reasonable need for the beneficiary to perform primarily managerial or executive duties. Instead, the record indicates that the beneficiary would be required to perform a combination of managerial, first-line supervisory and operational duties necessary to operate the business on a day-to-day basis. 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). Here, the petitioner has not grown to the point that it can employ the beneficiary 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.