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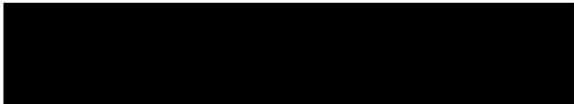
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FILE: EAC 03 165 50593 Office: VERMONT SERVICE CENTER Date: MAY 17 2007

IN RE: Petitioner:
Beneficiary:



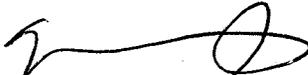
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal based on counsel's failure to submit a brief or evidence in support of the appeal. The matter is now before the AAO on a motion to reopen, with evidence that counsel timely submitted a brief in support of the appeal. The AAO will grant the petitioner's motion and affirm its previous decision.¹

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice-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 is a corporation organized in the State of New Jersey that claims to be a wholesaler and dealer of general merchandise. The petitioner claims that it is a subsidiary of M.R. Utensils, located in Ahmedabad, India. The beneficiary was initially granted L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition on February 24, 2004, concluding that the beneficiary would not be employed by the petitioner in a managerial or executive capacity.

The petitioner subsequently filed an appeal on March 25, 2004 and indicated on the Form I-290B, Notice of Appeal, that a brief and/or evidence were being submitted in support of the appeal. As no brief or evidence had been incorporated into the record at the time the appeal was reviewed, the AAO considered the record complete and summarily dismissed the appeal in a decision dated February 1, 2006.

The petitioner timely filed the instant motion to reopen and reconsider on February 28, 2006, with evidence that a brief was submitted to the Vermont Service Center on or about May 4, 2006, within the requested 90 day time period. The AAO notes that pursuant to 8 C.F.R. § 103.3(a)(2)(viii), where additional time to submit a supporting brief is requested, the affected party shall submit the brief directly to the AAO. However, the AAO will reopen the matter in order to consider the brief, which was not matched to the record of proceeding prior to the AAO's previous decision.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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:

¹ The regulation at 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented "by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter." In this case, the person listed on the G-28, is a foreign attorney licensed to practice law in India, and is an unauthorized representative.

- (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 in the present matter is whether the petitioner established that 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 fire 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 the higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant petition on May 8, 2003. In a letter dated April 13, 2003, the petitioner described the beneficiary's proposed duties as vice-president of the U.S. company as follows:

Corporate Planning:

[The beneficiary] will review and analyze the company Business plan. [The beneficiary] will prepare comparative analysis of the operating programs. With this exercise [the beneficiary] will evaluate the strengths & weaknesses of the company and forecast the plan for business activity of the company, laying down the path of progress for the company['s] forthcoming year/s. [The beneficiary's] responsibilities include making recommendations to management with regards to economic objectives and policy for the company.

General Administration:

[The beneficiary] directs the overall business operations of the organization. [The beneficiary] will analyze the operating procedures and devise most efficient methods to accomplish the task/work. [The beneficiary] is responsible to manage the affairs of the

company in a manner to conduct the same in an orderly manner ensuring due compliance with statutory requirements and to achieve smooth and efficient operations overall.

Finance & Account

[The beneficiary] will control matters related to finance. The job functions also cover Budget control, inventory control, Financial statements, MIS reports for management, internal Audit, statutory Audit, Tax planning, Asset/Risk management, arrangements for long term funds and working capital requirement & other related matters. [The beneficiary] will be assisted by an Accountant and his team for due performance of the job functions in this area of operation.

Marketing-Sales:

[The beneficiary] directs the marketing policy of the company. [The beneficiary] will review the market trends and analyze the same to determine the consumer needs, evaluate the market potential in terms of volume at various geographical locations as also within specific buyer groups. [The beneficiary] prices the products geared to attract the potential buyers as also to retain the regular clientele for the products of the company. [The beneficiary] will assess the competition and develop overall marketing strategy to organize effective sales of the companies [sic] products. [The beneficiary] will be assisted by marketing manager and his sales team in these effort [sic].

Business Development:

[The beneficiary] is responsible for business development, including market research, promotion of business and sales, which will account for 100% incoming revenue of the company. As such [the beneficiary] will look for new business opportunities, new products, new markets. The aim and purpose of this exercise is to secure progressive development of business and thereby the increase in the revenues of the company. In order to achieve this goal, [the beneficiary] may resort to promotional activities so as to promote the sales of the company even in the face of competition. Marketing Manager will assist [the beneficiary] in this matter.

Purchase & Contracts:

[The beneficiary is responsible for purchase. [The beneficiary] is required to ensure regular and continued flow of materials, suppliers and services for the operations of the company. [The beneficiary] compares catalogue listings, examine samples, attend demonstration of products, conventions, [etc.] [The beneficiary] will review competitive offers from alternate sources and will negotiate contract terms and finalize the same. [The beneficiary's] responsibilities also include contract administration.

Personnel:

[The beneficiary], with the control of General administration, will also have the charge of personnel department. [The beneficiary] will have the authority to hire and fire staff. [The beneficiary] will review the performance of the staff. [The beneficiary] will observe the employees['] attitude towards job functions and will evaluate their motivation and overall efficiency to perform vis-à-vis their job related skills inter personnel attitude, intellectual

capabilities to deal with situations on the spot. [The beneficiary] will review other factors. . . for on going and periodical rating of the employees. With this exercise [the beneficiary] will decide about their remuneration and rewards. [The beneficiary] will establish and follow procedures and policy to continually boost the morale of the staff.

The petitioner submitted a "company tree" for the organization, which indicates that the beneficiary will serve as the vice-president and report to the company president. The chart shows five areas under the beneficiary's supervision, including general administration, finance, sales/marketing and business development, contracts/purchase, and personnel. The specific positions identified are a general administration secretary, an accountant and staff, a sales manager and salesmen, contracts/purchase staff, and a personnel secretary. The beneficiary and the company president are the only employees named on the chart, and there is no indication that the other positions were filled as of the date of filing.

The petitioner's representative also submitted a 29-page letter in support of the petition, which included an expanded description of the beneficiary's job duties as vice-president. As the job description is part of the record, it will not be repeated here. The petitioner's representative noted that the beneficiary manages the essential function within the organization, namely, "marketing sales and Business development," and is assisted by the Sales Manager and his sales personnel.

The job description included in the representative's letter also provided more detail regarding the beneficiary's role in the purchasing and contract activities of the company:

[The beneficiary reviews catalogue listings, invites bids, examines samples, attends demonstration of products and conventions and calls for quotations. [The beneficiary] compares offers from alternative sources, review[s] bids, negotiates contract terms, determine acceptable terms and will finalize the same and enter into suitable contracts. . . .

[The beneficiary] avails Professional services of Chartered Accountant, Attorney, ancillary services for operations, such as forwarding, clearing, warehousing, packing, despatch [sic] and other, under contract

The beneficiary has established inventory control with an emphasis on procurement strategies and reduction of inventory. [The beneficiary] has established process of procurement and flow of merchandise vis-à-vis incoming orders and appropriate assessment of the market share and growth.

The petitioner's representative stated that the beneficiary "is assisted by staff to attend to secretarial functions and other routine matters, for due performance of his job." The petitioner's representative concluded:

[The beneficiary] with the overall charge of the entire operations of the Company inter-alia controls and manage the essential function within the organization viz. Marketing, Sales and Business development, which accounts for 100% incoming revenue of the Company. [The beneficiary] operates with the authority to hire and fire personnel of the Company. The beneficiary has the discretionary powers to deal with and decide the day-to-day operations of

the Company. The job positions covering control of the essential function within the organization as indicated herein have been defined as managerial vide regulation 8 C.F.R. 214.2(l)(1)(ii)(B). The service has also approved similar jobs with responsibilities of marketing as managerial for the purpose of eligibility for NIV L-1 classification.

The petitioner did not further describe its organizational structure or provide evidence of wages paid to employees and contractors. The petitioner did submit financial statements prepared by an accountant, for the eleven-month period ended on March 31, 2003. The statement shows that the petitioner paid \$52,276 in salaries, and \$1,045 in legal and professional fees, but does not indicate any additional expenses related to payment of employees or contractors.

The director issued a request for evidence on August 12, 2003, in part, instructing the petitioner to submit: (1) an organizational chart for the U.S. entity; and (2) a complete position description for and educational credentials of all of the beneficiary's subordinates including a breakdown of the number of hours devoted to the employees' job duties on a weekly basis. The director noted that the petitioner must demonstrate that the beneficiary will function at a senior level within an organizational hierarchy, and, if applicable, substantiate that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing non-qualifying duties.

In a response dated October 31, 2003, the petitioner reiterated the beneficiary's previously-stated job duties and asserted that the beneficiary is assisted by two supervisory personnel, a manager and a marketing manager. The petitioner also asserted that the beneficiary "is assisted by staff to attend to secretarial functions and other routine matters," and noted that he "appointed additional staff for the operations of various departments and related functions assigned."

The petitioner submitted an updated organizational chart for the U.S. entity which indicates that the beneficiary supervises one manager in the general administration department and a marketing manager. The general administration manager is depicted as supervising a "staff" person, while the marketing manager has a proposed "salesman" position as a subordinate. The chart does not indicate any staff in the areas of finance, contract administration, purchasing or personnel. The petitioner indicated that the manager has a master of arts in English, the marketing manager has a diploma in engineering, and the staff member has a "B.A.M.S." The petitioner submitted an undated statement from each employee, stating that they work for the U.S. company. The statements do not indicate when the employees were hired or what positions the individuals hold. The petitioner did not submit the detailed job descriptions for the beneficiary's subordinates as requested by the director.

The director denied the petition on February 24, 2004, 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 acknowledged the detailed job description noting that according to the description, the beneficiary will include corporate planning, general administration, finance and accounting, marketing and sales, business development, purchase and contracts and personnel activities and that it appeared that she would be performing duties associated with these functions rather than primarily managing essential functions as claimed by the petitioner. The director concluded that the beneficiary "is actually performing the basic tasks associated with running a company of three employees" and is "primarily engaged in performing all the

duties of running a small business." The director did acknowledge that some of the beneficiary's duties "might be considered managerial if performed within a large organization."

The director acknowledged that the beneficiary's claimed subordinates may perform a portion of the marketing and general administration tasks of the company, but again noted that the actual duties of the beneficiary's subordinates had not been established. The director observed that the evidence of record failed to establish who would perform the day-to-day administrative and clerical duties, or the duties of the finance, contracts, purchasing and personnel departments depicted on the organizational chart. The director also noted the petitioner's failure to submit documentary evidence to corroborate its contention that the U.S. company utilizes independent contractors for certain functions.

As noted above, the petitioner appealed the director's decision on March 25, 2004, and the AAO summarily dismissed the appeal based on the petitioner's failure to submit a brief in support of the appeal. The petitioner has not provided a copy of the brief that was submitted in May 2004 and not previously incorporated into the record.

In response to the director's decision, the petitioner submits a 25 page brief, the majority of which re-states portions of the beneficiary's job description already provided in support of the petition and in response to the director's request for evidence. The petitioner states that the beneficiary was initially supported by a secretarial staff and subsequently appointed staff to support the operations, including professional accountants, a manager, and contract staff, leaving the beneficiary to devote "100% of time to attend to the managerial functions of the business." The petitioner contends that the beneficiary is not required to supervise staff in order to establish eligibility for L-1A classification, but she nevertheless was assisted by "Administrative and other staff."

The petitioner again asserts that the beneficiary utilizes the services of professional accountants, Mirani & Associates, LLC, "for maintenance of proper books of accounts and preparation of Financial Statements, including Profit and Loss and Balance Sheet, conduct statutory Audit, and coordinates with them in the matter."

In addition, the petitioner objects to the director's emphasis on the size of the U.S. company and objects to the director's statement that some of the beneficiary's duties would be managerial "if performed within a large organization." The petitioner states that "what is considered as managerial function in a large organization is by its very nature managerial for a small organization and can by no means or measures be considered otherwise that is non-managerial." The petitioner asserts that changes implemented by the Immigration Act of 1990 made the size of the petitioning organization irrelevant as a basis for determining a beneficiary's employment in a managerial or executive capacity.

The petitioner further disputes the director's statement that, in order to establish that the beneficiary is a function manager, the petitioner must clearly demonstrate that the manager does not directly perform the function. The petitioner emphasizes that the petitioner has only been in operation for ten months, and states that "it has been accepted principle that the beneficiary may be required to perform some functions which are not managerial in the initial period." The petitioner re-submits the organizational chart submitted in response to the request for evidence, and asserts that the beneficiary supervises a marketing manager and a manager,

both of whom possess at least a bachelor's degree. The petitioner also includes brief job descriptions for the marketing manager, manager and office staff. The petitioner asserts that these employees should be considered managers and professionals.

The petitioner nevertheless states that the regulations do not require the beneficiary to supervise staff, so such a determination is irrelevant, since the beneficiary functions at a senior level within the organizational hierarchy. The petitioner emphasizes the beneficiary's "highly visible position as a Vice President, in the second level of the management hierarchy."

The petitioner'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 primarily managerial or executive position 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.* Here, the beneficiary's position description, when considered within the context of the totality of the record, does not sufficiently demonstrate that the beneficiary's tasks will be the high-level responsibilities that are specified in the definition of managerial capacity or executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

The petitioner describes the beneficiary as being responsible for managing the areas of corporate planning, general administration, finance, marketing/sales/business development, purchasing and contracts, and personnel within the petitioning company; however, the record fails to establish that the beneficiary's actual duties with relation to these various functions would be primarily managerial or executive. While the beneficiary may exercise authority over the day-to-day operations of the company as its vice president, a careful review of the lengthy position description provided reveals many duties that are not managerial or executive in nature. As noted by the director, the petitioner indicated that the beneficiary engages in promotional activities, purchases and procures merchandise required for sales/contracts, is responsible for material logistics and inventory, carries out feasibility studies for "new business opportunities, compares catalog listings, examines products samples, attending product demonstrations and conventions, looks for new products and business opportunities, monitors the financial status of the company and performs budgeting, and is responsible for all aspects of business development, including market research, promotion of business and sales. The petitioner has not explained how any these duties fall under the statutory definitions of managerial or executive capacity. Rather, it appears that he beneficiary is responsible for the day-to-day operational and administrative tasks associated with the various departments and activities he is claimed to manage.

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 prove 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). Therefore, 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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, other than stating on appeal that 100 percent of the beneficiary's time is devoted to managerial duties. As outlined above, this assertion is not supported by the record. 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 a significant number of the beneficiary's daily tasks, such as described above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See, e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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. The record does not demonstrate that the petitioner has any employees to relieve the beneficiary from performing the day-to-day duties of the various departments and functions he is claimed to manage.

The record contains conflicting, unsupported claims regarding the petitioner's staffing levels, and no documentary evidence which would support any of the petitioner's assertions that subordinate employees and contractors relieve the beneficiary from performing the non-managerial aspects of the petitioner's business. The petitioner failed to indicate on Form I-129 the number of employees working for the petitioner as of the date of filing. The organizational chart submitted in support of the initial petition did not identify any employees other than the beneficiary and his supervisor, the company president, while the beneficiary's job description indicates that he was initially supported by secretarial staff, contracted professional accountants, attorneys and "ancillary services for operations, such as forwarding, clearing, warehousing, [and] packing." The petitioner further indicated that the beneficiary "appointed additional staff to assist in the operations of various departments and functions assigned." The petitioner did not identify these "other staff," provide evidence of employment of payroll employees or contract workers, or otherwise describe the number and types of employees working for the company as of the date of filing. Finally, the petitioner referenced a "sales manager" and his personnel. The AAO notes that the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) requires that the petitioner submit 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. The petitioner's initial submission clearly did not meet the minimal evidentiary requirements mandated by the regulations.

Accordingly, the director requested that the petitioner submit additional evidence, including a comprehensive organizational chart, and evidence clearly depicting the number of employees supervised by the beneficiary, the positions they hold, the duties they perform, and their educational credentials. While the petitioner offered a new organizational chart indicating that the petitioner employs a manager, a marketing manager and a "staff" employee, the petitioner did not provide the request for detailed position descriptions for the beneficiary's subordinates. These position descriptions are now offered on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12).

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Furthermore, although the director referred to the petitioner as a three-person company, the AAO notes that the petitioner has submitted no documentary evidence to corroborate its employment of the marketing manager, manager, staff member, or the many claimed contract employees referenced in the beneficiary's position description. 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)). Even if the petitioner does employ the claimed employees, it appears that they were likely hired subsequent to the filing of the petition, given that the petitioner initially identified the beneficiary and the company president on the initial organizational chart. 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 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). Here, while the petitioner claims that the beneficiary has the authority to hire and fire employees, and supervises managerial and professional employees, the record as presently constituted fails to establish that the beneficiary had actually hired employees or was responsible for supervising managerial or professional employees at the time the petition was filed. Accordingly, the record does not establish the beneficiary's employment as a "personnel manager."

The petitioner claims that regardless of the petitioner's staffing levels, the beneficiary will manage the "sales, marketing and business development function" of the petition company. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description that defines the duties to be performed in managing the essential function, identifies the function with specificity, articulates the essential nature of the function, and

establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Again, beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary.

The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish managerial capacity. Despite the changes made by the Immigration Act of 1990, 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 or other non-managerial, non-executive duties, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

Moreover, federal courts continue to give deference to CIS's interpretation of the Immigration Act of 1990 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305(Table), 1995 WL 576839 at *5 (9th Cir. 1995 (unpublished)(citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991).

As discussed above, the petitioner has provided a job description that includes a number of non-managerial duties, including operational tasks specifically related to the sales, marketing and business development functions, as well as non-qualifying tasks associated with virtually every aspect of the company's day-to-day operations. The petitioner in this matter has not adequately documented the existence of any employees or contract staff who would relieve the beneficiary from performing all the day-to-day operational duties associated with the various functions he is claimed to manage. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The fact that the beneficiary is the only employee within the petitioning organization responsible for all of its various departments and functions is insufficient to elevate his position to that of a function manager. Even if the petitioner were able to establish that the beneficiary did in fact manage staff in the marketing/sales and administration departments as of the date of filing, the record shows that the beneficiary is solely responsible for purchasing, contracts and finance functions, including all non-managerial tasks associated with these departments within the petitioning company.

For these reasons, the AAO concurs with the director's conclusion that the record does not establish the petitioner's need for the beneficiary's services in a managerial capacity. Although counsel contends that the director failed to take into account the petitioner's current stage of development, and placed undue emphasis on the size of the petitioning organization, it is the petitioner's burden to establish that the beneficiary will be performing primarily managerial duties as of the date the petition is filed. 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 CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Furthermore, in the present matter, 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. 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 the reasons discussed above, the record does not establish that a majority of the beneficiary's duties will be managing an essential function of the petitioning organization. The record indicates that a preponderance of the beneficiary's duties will, at least initially, be operational duties related to the petitioner's finance, purchasing, contract administration, sales, marketing and business development 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). Although the petitioner claims that the petitioner will be fully staffed in the future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on the evidence furnished, it cannot be found that the beneficiary will 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, the petitioner has not met this burden. Accordingly, the prior decisions of the director and the AAO will be affirmed.

ORDER: The decision of the AAO, dated February 1, 2006, is affirmed. The petition is denied.