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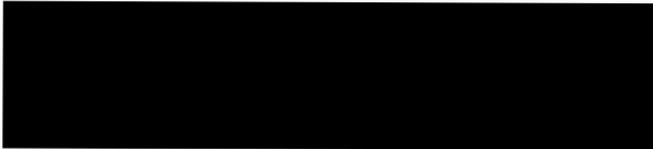
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U.S. Citizenship
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Services

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File: EAC 07 010 51002 Office: VERMONT SERVICE CENTER Date: **FEB 08 2008**

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 employ the beneficiary in the position of sales and marketing manager to open a new office in the United States 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 limited liability company organized under the laws of the State of Georgia, is allegedly a "textile import/export agency."

The director denied the petition concluding that the petitioner failed to establish (1) that sufficient physical premises to house the new office have been secured; or (2) that the beneficiary was employed abroad in a 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, the petitioner asserts that the home of the beneficiary will sufficiently house the new office. The petitioner also asserts that the beneficiary was employed in a managerial and executive capacity abroad. In support, the petitioner submits additional evidence, including a description of a typical workweek of the beneficiary abroad.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in this matter is whether the petitioner has established that it has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioning organization indicates that it plans to house the "new office" in the home of the beneficiary and his spouse. The foreign entity described these physical premises in the letter dated October 2, 2006 as follows:

The business office of [the petitioner] will be established at [REDACTED] Macon GA 31211. The office will be set up in accordance with the Home Occupation Permit authorised by the Jones County [Georgia] Planning and Zoning Department. These premises are adequate for the short and medium term objectives of [the petitioner] and in accordance with the terms and conditions of the Home Occupation Permit there is scope for accommodating additional employees as the business develops.

The petitioner submitted a document titled "Contract of Intent" in which the beneficiary agrees to lease space in his home located at [REDACTED] to the petitioner. The "Contract of Intent" does not specifically describe the space to be leased in [REDACTED] nor does it specify a commencement date for occupancy by the petitioner other than "in accordance with the receipt of visa authorisation."

The petitioner also submitted a document titled "Business Plan." The plan generally describes the petitioning operation as a supplier of dance related fabrics and accessories. While stressing that the petitioner plans to serve customers throughout the United States and projecting \$100,000.00 in first-year product purchase costs, the plan does not address the importation, storage, and distribution of its products in the United States. Also, while the petitioner indicates that it plans to hire one additional employee by the beginning of its second year in operation, the petitioner does not address whether this additional employee will work at the office in the beneficiary's home.

On October 25, 2006, the director requested additional evidence. The director requested, *inter alia*, evidence that the petitioner's office will be set up in accordance with a home occupation permit, evidence that [REDACTED] is zoned for commercial use, and photographs of the interior and exterior of the physical premises.

In response, the petitioner submitted a home occupation permit dated October 31, 2006 for [REDACTED] for 326 square feet for an office. The petitioner also submitted photographs of the home. However, the petitioner does not indicate which of these photographs, if any, depict the 326 square feet to be occupied by the petitioner.

On December 21, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that sufficient physical premises to house the new office have been secured.

On appeal, the petitioner asserts that the home office described in the record will be sufficient to house the new office. The petitioner asserts that it will not need public visibility until "the company is established and [is] more familiar with the US market." The petitioner further asserts that, while it will likely never need a "showroom" in the United States, it may need a commercial property for "product distribution" in the future.

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

In this matter, the petitioner has failed to establish that it has secured sufficient physical premises to house the new office. First, the record does not establish that, at the time the petition was filed, the petitioner had either a valid lease agreement with the beneficiary or official permission to conduct business in the beneficiary's home at [REDACTED]. As indicated above, the "Contract of Intent" makes the commencement of the petitioner's occupancy, and the corresponding rental obligation, contingent upon the approval of the instant petition. Therefore, as of the day the petition was filed, the petitioner had not secured a physical premises. 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). Furthermore, the "home occupation permit" purporting to authorize the conduct of business at [REDACTED] is dated after the

filing of the instant petition. Therefore, as of the day the petition was filed, the petitioner was not permitted to conduct business in the beneficiary's home. Again, 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. 248.¹

Second, the petitioner failed to establish that the space supposedly secured will be sufficient to house the new office. The "Contract of Intent" and the photographs fail to specifically identify the location, dimensions, or size of the space to be occupied by the petitioner. Absent a specific description of the leased premises, it is impossible for Citizenship and Immigration Services (CIS) to discern whether the premises will be sufficient to house the new office. Furthermore, the home occupation ordinance of Jones County, Georgia, will not permit the enterprise to grow to the point that the beneficiary will perform primarily qualifying duties after one year in operation. For example, section 95.12 prohibits anyone other than the "members of the family residing on the premises" to operate the business. Given this restriction, it is unclear how the petitioner's occupancy of the home could lead to the beneficiary being relieved of the need to perform non-qualifying duties after one year. Therefore, the premises secured do not appear to be sufficient. Finally, the petitioner has not established how 326 square feet of the beneficiary's home will accommodate the storage and distribution of goods or the employment of additional workers. 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)).

Accordingly, the petitioner has failed to establish that it has secured sufficient physical premises to house the new office, and the petition may not be approved for this reason.

The second issue in the present matter is whether the petitioner established that the beneficiary was employed abroad in an executive or managerial 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

¹It is further noted that, even if the "home occupation permit" dated October 31, 2006 was relevant to these proceedings, it is doubtful that this permit could be used to allow a business which is not owned by the permit applicant to operate out of the beneficiary's home. In this matter, the petitioner asserts that it is 100% owned by a third party in the United Kingdom. The beneficiary is merely an employee of the petitioner tasked with opening a new office in the United States. The petitioner asserts that it intends to rent space in the beneficiary's residence and operate out of that residence under a "home occupation permit" secured by the beneficiary. This appears inconsistent with both the letter and the spirit of the Jones County, Georgia, ordinance governing "home occupations." See Jones County Zoning Ordin. (Georgia) § 95.1.

employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

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

The foreign entity asserts in the letter dated October 2, 2006 that the beneficiary "has been working with [the foreign employer] as a Sales and Marketing Manager since May 2005, managing a team of five professionals that include a sales executive, a marketing assistant, a sales assistant and two administrative assistants." The petitioner also submitted an organizational chart which indicates that the beneficiary supervised a "sales executive" who, in turn, directly supervised the four subordinate workers identified above.

On October 25, 2006, the director requested additional evidence. The director requested, *inter alia*, a detailed description of the beneficiary's job duties abroad, including a description of a typical workweek with a

breakdown of the number of hours devoted to each duty. The director also requested complete position descriptions for all of the foreign employer's employees.

In response, the foreign employer described the beneficiary's duties abroad in a letter dated November 9, 2006 as follows:

- Managing the sales and marketing teams in accordance with the philosophy and values of the business so as to meet the strategic corporate objectives.
- Development and implementation of the business strategy that will realize a growth in the UK market in particular.
- Appointing and training sales and administrative staff.
- Ensuring that the team delivers services meeting all the requirements of the client contracts, within agreed budgets, and supporting and securing new business while continuously improving customer service and corporate image.
- Developing close professional relationships with key clients.
- Contributing to, and participating in, the formation of corporate vision and strategy.
- Defining product and service solutions that meet clients' needs.
- Working to ensure organizational understanding of product strategy and needs, including overseeing of the development of tailor-made discount schemes and other offers for clients.
- Identifying key business opportunities that align with the company's policies.
- Ensuring that the sales and marketing team's time and resources are spent on initiatives with highest probability of significant benefit for the company.
- Identifying appropriate exhibitions, trade shows and other promotional events to attend in the U.K. and to managing [sic] all aspects of running those events, including all marketing and budgetary details.
- Attending and managing such exhibitions, with specific responsibility for promoting the reputation of [the foreign employer.]
- Making policy and organizational suggestions to the General Manager for any improvements designed to enhance customer service.

The petitioner also describes the beneficiary as being responsible for planning and managing the foreign employer's preparedness during peak periods of customer demand and as managing a "marketing strategy" team. Finally, the petitioner asserts that the beneficiary "has used his contacts to generate business" and describes his typical workweek as follows:

In a typical work week, [the beneficiary] spends most of his time in managing the sales and marketing activities of the company. He manages a team of five professionals that include a sales executive, a marketing assistant, a sales assistant and two administrative assistants. Approximate percentages of time spent on each of his duties during a typical work week are listed below:

Managerial Functions & Responsibilities	Percent Time Spent
Marketing & Sales Management	75.0%
Development of Marketing Collateral	05.0%
Development and implementation of the business strategy	20.0%
Training, Management and Motivation of staff	10.0%
Sales Closure Activities	10.0%
Budgeting and resource planning	10.0%
Identify trade shows & exhibitions and manage marketing functions	20.0%
Strategic Alliances/New Business Opportunities	25.0%
Evolving Strategy & identifying new business opportunities	15.0%
Forging Business Alliances/Partnerships	10.0%

Finally, the petitioner submitted job descriptions for the beneficiary's claimed subordinates. The subordinate supervisor, the "sales executive," is described as follows:

- To assist the [beneficiary] to meet the strategic corporate objectives of [the foreign employer].
- To assist the [beneficiary] to appoint and train sales and administrative staff.
- To proactively network with clients and potential customers to publicise the company and its products.
- To help define product and service solutions that meet clients' needs.
- To ensure the correct implementation of the Company's discount policy.
- To assist the [beneficiary] in ensuring that the sales and marketing team's time and resources are spent on initiatives with highest probability of significant benefit for the company.

- When required, to attend in a sales capacity, any event at which the company is exhibiting, at all times helping to promote the reputation of [the foreign employer].
- To make organizational suggestions to the [beneficiary] for any improvements designed to enhance customer service.
- To undertake any other duties which reasonably fall within the purview of the post, and which may be allocated after consultation with the postholder.

The other subordinate workers are described as performing the tasks necessary to produce a product or to provide a service, i.e., sales and marketing tasks.

On December 21, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary was employed in a managerial and executive capacity abroad. In support, the petitioner submits additional evidence, including a description of a typical workweek of the beneficiary abroad.

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

As a threshold issue, the petitioner's attempt to supplement the record on appeal with a description of a typical workweek of the beneficiary abroad was inappropriate and will not be considered by the AAO. As indicated above, the director specifically requested this description in the Request for Evidence, and the petitioner chose not to submit it for the record. The petitioner now submits this description for the first time on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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 performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.* As explained above, the petitioner may not claim that the beneficiary was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties failed to establish that the beneficiary acted in a "managerial" or "executive" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis other than perform sales and marketing tasks and serve as a first-line supervisor of non-professional sales and marketing employees. For example, the petitioner states that the beneficiary developed and implemented the foreign employer's "business strategy," contributed to "the formation of corporate vision and strategy," and forged business alliances and partnerships. However, the petitioner does not specifically

define these visions and strategies and does not explain what, exactly, the beneficiary did to forge business alliances and partnerships. The fact that the petitioning organization gave the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary actually performed managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees. As explained above, the petitioner asserts that the beneficiary supervised a "sales executive" who, in turn, supervised a marketing assistant, a sales assistant, and two administrative assistants. However, the petitioner has not established that the "sales executive" was truly a supervisory, managerial, or professional employee. To the contrary, the job description indicates that this employee primarily performed sales and marketing tasks alongside the other marketing and sales workers. An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. Therefore, it appears that the beneficiary was a first-line supervisor of five workers rather than a manager of a subordinate tier of one or more supervisors. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Finally, as the petitioner has failed to describe the skills necessary to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary managed professional employees.²

Overall, the record indicates that the beneficiary primarily performed non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. The beneficiary is described as primarily performing marketing related tasks or serving as a first-line supervisor of non-

²In 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).

professional marketing and sales workers, e.g., closing sales; budgeting; identifying trade shows and exhibitions; identifying business opportunities; implementing business strategies; and forging business partnerships. However, sales and marketing tasks and working as a first-line supervisor of a non-professional staff are not qualifying managerial or executive duties. An employee who “primarily” performed the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.³

Similarly, the petitioner has failed to establish that the beneficiary acted in an “executive” capacity. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.* For the same reasons indicated above, the petitioner has failed to

³The petitioner also has not established that the beneficiary managed an essential function of the organization. The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act. The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(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 tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. The petitioner’s vague job description fails to document what proportion of the beneficiary’s duties were managerial functions, if any, and what proportion were non-managerial. All that is presented is the petitioner’s claim that the beneficiary possibly spends up to 20% of his time managing marketing functions. However, as explained above, the record establishes that the beneficiary primarily performed the non-qualifying operational or administrative tasks related to the “function” and/or served as a first-line supervisor. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties were managerial, nor can it deduce whether the beneficiary was primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

establish that the beneficiary acted primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary primarily performed the tasks necessary to produce a product or to provide a service and/or served as first-line supervisor. Finally, as the beneficiary reported to a both a director and general manager, it appears that any realistic authority to direct the organization was vested in these individuals and not in the beneficiary. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary was employed abroad in an executive or managerial capacity, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner in this matter has failed to establish that the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner's description of its staffing after the first year in operation is not persuasive in establishing that the beneficiary will be performing qualifying duties by that time. In the business plan, the petitioner indicates that, initially, it plans to employ the beneficiary and his spouse and, by the beginning of its second year in operation, it plans to employ one additional "sales assistant." In view of this hiring projection, it is not likely that the United States operation will have an organizational complexity requiring the employment of a manager or an executive. To the contrary, it is more likely than not that both the beneficiary and his staff will primarily perform non-qualifying sales, marketing, or administrative tasks after the petitioner's first year in operation. Federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

Moreover, the petitioner has not established that an investment has been made in the United States operation as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). While the foreign employer states in the letter dated October

2, 2006 that the "start-up costs of the U.S. entity are estimated to be \$20,000 which will be financed by the affiliate company in the U.K.," the record is devoid of evidence that this investment was ever made. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. 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. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Accordingly, the petitioner failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, and the petition may not be approved for this additional reason.

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

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

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.