

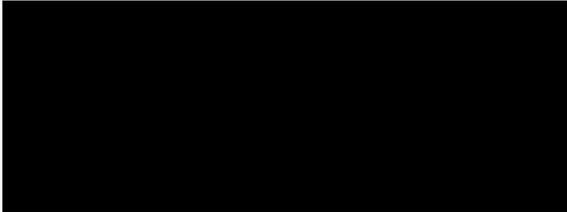
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



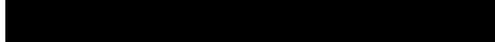
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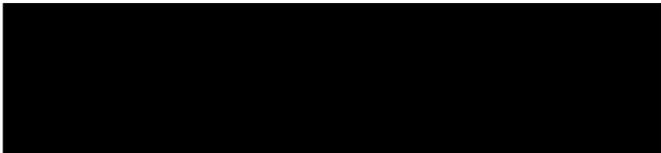


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File: WAC 09 024 51583 Office: CALIFORNIA SERVICE CENTER Date: **MAY 14 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the nonimmigrant visa petition and 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 employ the beneficiary 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 California corporation, is an in-flight entertainment services company. It claims to be a subsidiary of [REDACTED], located in Australia. The petitioner seeks to employ the beneficiary in the position of content manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petition asserts that the director mischaracterized the job description submitted for the beneficiary as "broad and general." Counsel contends that the beneficiary will be employed as a function manager and as an executive. Counsel submits a brief and additional 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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 4, 2008. The petitioner stated on Form I-129 that the U.S. company was established in 2006 and currently has two employees. In a letter dated October 28, 2008, the petitioner explained that its corporate group is the longest established in-flight

entertainment (IFE) service provider in the world, providing film and television programming, audio programming, video production, graphic design, print solutions and digital content encoding services to major international airlines. The petitioner stated that the beneficiary will perform the following duties for the U.S. company:

[The beneficiary] will represent [the petitioner] in his capacity as Content Manager in forming and maintaining relationships with outside U.S. vendors. He will liaise with film and TV distributors, integrators and labs regarding edits, language, and encode/recall availability. [The beneficiary] will be actively involved in the IFE community, particularly in the North and South America region. In order to achieve this, he will represent [the petitioner] and attend relevant Film and TV market events.

Furthermore, because [the beneficiary] will head the U.S. office, he will be tasked with the general management of [the petitioner's] office. . . . [H]e will be responsible for ensuring that budgetary resolutions are adhered to, as well as implementing any variances to the budget that is approved by our Australian executive board. [The beneficiary] will oversee the staff and head the human resources administration.

In his capacity as Content Manager, [the beneficiary] will perform his duties with minimal supervision. In his discretion, [the beneficiary] will be responsible for leading [the petitioner] ... to expand [the company's] relationship with the IFE community as a whole while focusing on the North and South American sector.

The petitioner submitted an organizational chart for its corporate group, which shows the beneficiary as the content manager, based in the United States, supervising a U.S.-based account manager, and reporting to an Australia-based general manager. The chart indicates that the beneficiary will also directly supervise two "Audio/Music Programmers" based in Australia.

The director issued a request for additional evidence (RFE) on November 13, 2008, in which he instructed the petitioner to submit: (1) a more detailed description of the beneficiary's proposed duties, including the percentage of time the beneficiary will spend in each of the listed duties; (2) an organizational chart for the U.S. company which clearly describes its managerial hierarchy and staffing levels, and clearly identifies the beneficiary's position and all employees under his supervision; and (3) a brief description of job duties, educational level and annual salaries/wages for the beneficiary's subordinates.

In response, the petitioner submitted a signed employment agreement between the company and the beneficiary which states that, as content manager, the beneficiary will "manage all audio and film programming for [the petitioner's] clients," and "liaise with entertainment industry to ensure programming." The agreement further indicates that the beneficiary will "expand [the petitioner's] relationship with the in[-]flight entertainment community as a whole" and "be actively involved in the in[-]flight entertainment community" in the region. The employment agreement describes the beneficiary's specific responsibilities as the following:

40% 1. Manage the day-to-day operations of the office

- Ensure that all fiscal budgets, approved by the Executive Chairman and/or General Manager, are adhered to by the staff.
 - Supervise the human resources administration.
 - Regulate all shipping costs.
 - Monitor all staff travel expenses.
 - Oversee general staff expenses and reimbursements sought.
 - All other general office management responsibilities as necessary.
- 25% 2. Manage the content of television and film programs
- Pre-screen all film material. Prepare an edit list while screening or use distributor edit notes to check for suitability of content.
 - Oversee staff who will provide updates on languages, edits availability, edit notes and encode version for every release for all airline clients.
 - Work with staff to track the in-flight entertainment ratings and provide inputs, formulate plans and new concepts for improvement.
- 15% 3. Represent [the petitioner] in official capacity
- Negotiate agreements and book US feature films with US distributors for [the petitioner's] clients.
 - *Continually assess [the petitioner's] client's programming needs and negotiate best possible deals for short feature on their behalf.*
 - Attend relevant film and television forums.
 - Create and maintain relationship with film and television distributors, integrators, and labs.
 - Liaise with film and television distributors regarding edits, language, and encode/recall availability.
- 10% 4. Create informative spreadsheets
- Report monthly to Group Accountant of all leave liabilities.
 - Maintain spreadsheet with all current pricing and deals with each distributor. Forward to Head Office (Sydney) monthly.
 - Conduct research and bi-monthly updates on *inflight entertainment (IFE) trends* from contents perspective. Coordinate with respective Airline Accounts Manager to update the IFE benchmarking.
- 5% 5. Client Services
- Responsible for the completion of orders placed for films from US distributors and labs
 - Ensure that staff has responded to all queries on client orders from distributors, integrators, and labs.
 - Source, screen and book all short feature and foreign film entertainment for [the petitioner's] clients.

5% 6. Other duties as necessary or as assigned.

In a letter dated November 26, 2008, the petitioner explained that its Los Angeles office was previously run by a general manager and an entertainment content manager, who are no longer with the company. The petitioner noted that the company has been remotely run by the beneficiary from Australia, with one remaining U.S.-based employee, an account manager.

The petitioner stated that the U.S. office will operate with two employees, the beneficiary and the account manager. The petitioner stated that the account manager, [REDACTED], performs the following duties:

[REDACTED] is tasked with negotiating agreements with third-party vendors in order to purchase television and film rights for our clients. She is further responsible for assisting [the beneficiary] in the development of [the petitioner's] presence in the North American market and in acquiring U.S. clientele.

The petitioner indicated that the beneficiary will also continue to oversee two Audio/Music Programmers based in Australia, whose main duties include "the programming of audio channels for our clients." The petitioner stated that one of the programmers also liaises with record labels to book celebrity guests for functions, while the other programmer maintains relationships with record labels and promotion groups, writes monthly feature articles in publications distributed to the company's clients, updates and maintains the audio server and physical library, and produces, manages and supervises the company's shows.

The director denied the petition on December 16, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director found that the petitioner's description of the beneficiary's duties was too general and vague to convey any understanding of what the beneficiary would be doing, and was insufficient to establish that he would not be primarily involved in performing the day-to-day functions of the petitioning entity.

On appeal, counsel for the petitioner contends that the director did not acknowledge the detailed job description submitted in response to the request for evidence, which lists 26 specific tasks to be performed by the beneficiary as the petitioner's Content Manager. Counsel asserts that such description was not broad or general, but rather "concise, detailed and sufficient in description."

Counsel further asserts that the beneficiary qualifies for the benefit sought as the manager of an essential function of the petitioning company, noting that the petitioner's business "is based on its capability to provide audio, film and radio in[-]flight programs." Counsel emphasizes that the beneficiary "is responsible for the management of all audio, film and radio programming for [the petitioner's] clients," and "will oversee a staff who, in turn, will carry out all necessary steps in order to ensure that the programs are suitable of content."

In addition, counsel asserts that the beneficiary's duties are in an executive capacity, due to the fact that he will exercise wide latitude in discretionary decision-making and will be working with minimal supervision from higher-level staff in managing the U.S. office. Counsel notes that the beneficiary also serves at a senior level within the petitioning group's organizational hierarchy, with only two executives holding more senior positions.

Finally, the petitioner submits copies of letters of acceptance for the three employees the beneficiary will supervise in his capacity as content manager. Counsel asserts that the letters clearly describe the duties performed by the subordinates, and establish that "the duties that are tasked to these individuals do not overlap with those responsibilities that must be carried out by the beneficiary." Specifically, counsel claims that "only the Content Manager will perform tasks that include supervision of the human resources administration, the monitoring of travel expenses, the negotiation of agreements on [the petitioner's] behalf, and other duties that are managerial and executive in capacity."

The AAO notes that, according to the employment agreements submitted on appeal, the job titles of the beneficiary's Australian-based subordinates are "music assistant," and "assistant producer and copywriter," rather than "music/audio programmer." The job duties of the U.S.-based account manager, who commenced employment with the petitioner on October 20, 2008, two weeks before the instant petition was filed, include, among other duties, the following:

- Pre-screen all film material, Hollywood, Classics and foreign. Prepare an edit list whilst screening or use distributors edit notes to check for suitability of content. Provide updates on languages, edits availability, edit notes and encode version for every release for all airline clients. . . .
- Work closely with respective MH Airline Accounts Manager to track the Airlines IFE ratings and provide creative input; formulate plans and new concepts for improvement.
- Conduct research and provide bi-monthly updates commencing October 08 on IFE trends from contends perspective. Coordinate with respective Airline Accounts Manager to update the IFE benchmarking.
- Source, screen and book all short feature and foreign film entertainment for airline clients.
- Liaise with film and TV distributors regarding edits, language, and encode/recall availability prior to sending approval to client. . . .
- Obtain travel permission from Chairman and attend relevant Film and TV Markets.
- Ultimately responsible for all queries on client orders from distributors, integrators and labs.
- Ensure all budgets are adhered to. Any variances to budget must be approved by Executive Chairman and General Manager.
 - Control all shipping costs
 - Control all staff and travel expenses
 - Monitor Staff expenses and seek reimbursement for personal use
- Responsible for HR administration and general office management. Report monthly to Group Accountant on all leave liabilities.
- Be actively involved in the IFE community, particularly in the North/South American region. . . .
- Expand [the petitioner's] relationship with the IFE community as a whole. . . .

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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 each 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 AAO agrees with counsel's contention that the director erred by disregarding the beneficiary's job description as excessively "general and vague." The petitioner did provide a list of 26 duties to be performed by the beneficiary which describes the proposed position in sufficient detail. However, the AAO cannot conclude based on the job description provided and upon review of the totality of the evidence in the record that the beneficiary would exercise the requisite level of authority over the U.S. company or an essential function of the company, or that he would be performing primarily managerial or executive duties.

The petitioner indicates that the beneficiary will allocate 40 percent of his time to "managing the day-to-day operations of the office," including supervising human resource administration, regulating costs and expenses, ensuring adherence to budgets set by upper management and performing "general office management responsibilities." Many of these responsibilities appear to be administrative, rather than managerial in nature. Furthermore, the exact same responsibilities have been assigned to the U.S. office's account manager, the only other employee working at the Los Angeles location. Counsel's assertion that "only the Content Manager" will manage the day-to-day office operation is contradicted by evidence in the record, specifically, the job description for the account manager position. While the AAO acknowledges that the employment offer letter setting forth the account manager's duties indicates that she will report to the beneficiary, the petitioner has not explained why it would require both employees in its two-person office to manage its "day-to-day operations" and to perform the exact same administrative, human resources and budget/finance-related duties. The petitioner has not established that the beneficiary's duties in this regard would be primarily managerial in nature.

The petitioner indicates that the beneficiary's primary functional role is to manage the content of film and television programming for the petitioner's clients. These duties include pre-screening all film material, determining which content to edit, tracking ratings and providing inputs, and formulating plans and new concepts for improvement. The AAO does not doubt that screening and editing content are essential functions of the petitioner's business, but the petitioner has not established how screening and editing film and television shows rises to the level of managerial or executive capacity. Moreover, based on the evidence submitted, the beneficiary and the account manager would perform identical duties with respect to content

management, which prohibits a finding that the beneficiary would actually supervise or manage these activities. The account manager appears to have the same level of authority to recommend and edit content.

Similarly, the beneficiary's claimed subordinate would share his responsibility to attend relevant film and television market forums as the petitioner's representative, to liaise and maintain relationships with film and television distributors, to source, screen and book short feature and foreign film entertainment, to be responsible for queries on client orders, to research and report on trends in IFE, to "be actively involved in the IFE community," and to expand the petitioner's relationships within the North American IFE community. Again, while the AAO does not discount the importance of such responsibilities in procuring entertainment content and developing the petitioner's business in the United States, the AAO cannot find that the beneficiary manages such activities as one of two people in a two-person office who share the same responsibilities. The petitioner indicates that the U.S. office is "primarily involved in the purchase of film and television content." Based on the job descriptions provided for the beneficiary and his subordinate, both of them would be directly performing this function and related functions, rather than managing this function directly or indirectly through lower-level staff. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The 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 petitioner indicates that the beneficiary will supervise one account manager, and two "music/audio programmers," who are based in Australia. As discussed above, the beneficiary and the account manager, based on the job descriptions provided, would perform essentially the same duties and the beneficiary's supervisory authority over this employee has not been established. The duties performed by the "music/audio programmers," whose job titles are elsewhere shown as "music assistant" and "assistant producer and copywriter," appear to be primarily unrelated to the objectives of the U.S. office. The beneficiary's U.S. job description makes no reference to music content management, or any reference to his supervision of the Australian-based music assistant. The assistant producer and copywriter appears to perform a broad range of duties related to audio copywriting, film copywriting, and video production, only some of which appear to be tangentially related to the activities carried out by the U.S. office. The beneficiary's job description does not set forth any responsibilities for overseeing copywriting or production activities. Regardless, in order to qualify as a personnel manager, the beneficiary must have the authority to hire and fire subordinate employees or to recommend these and other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). The only stated personnel authority stated in the beneficiary's job description is to monitor general and travel staff expenses. Therefore, the petitioner has not established that the beneficiary qualifies as a "personnel manager."

On appeal, counsel claims that the beneficiary will be responsible for management of audio, film and television programming for the U.S. 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 description of 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 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. 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).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Beyond the required description of the job duties, USCIS 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.

While the beneficiary in this matter occupies a relatively senior position within the petitioning group's overall organizational hierarchy, his responsibilities and authority within the two-person United States office will be shared almost entirely with his claimed subordinate and will involve performing the tasks necessary to select and secure film and television content, rather than managing such activities. As discussed above, the petitioner has not established that the beneficiary's claimed Australia-based subordinates would relieve him from performing non-qualifying duties associated with the film and television content management function. Therefore, the AAO acknowledges that the beneficiary performs critical duties, but cannot find that his duties rise to the level of a function manager.

Counsel also asserts that the beneficiary qualifies for the benefit sought as an executive because he will perform his duties with minimal supervision and exercise discretion "for leading [the petitioner] through change, evolution and sustained growth." 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.* The petitioner has not established that the beneficiary will be employed in an executive capacity. The record shows that the beneficiary and the account manager will together perform the day-to-day operations of the petitioner's Los Angeles office. While it appears that they will do so without extensive supervision from the petitioner's parent company, there is nothing in the beneficiary's job description to suggest that his primary focus will be on the broad goals and policies of the organization, or that he has any authority to set organizational policies and objectives. Rather, the beneficiary would be very much involved in carrying out the day-to-day functions of the U.S. office, such as screening and booking films and liaising with film and television distributors, and performing various operational, administrative, procurement and marketing tasks. The fact that the beneficiary is technically the senior employee in the petitioner's two-person office does not elevate his role to that of an executive, particularly in light of the fact that many of his duties are shared with the U.S.-based account manager.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in the United States 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.