

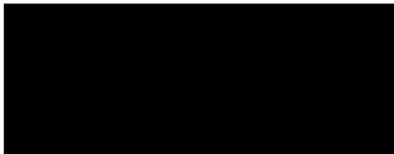
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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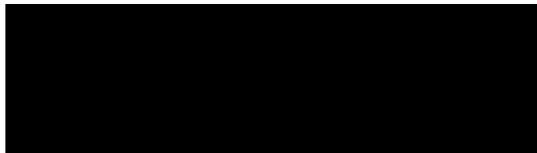
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DATE: **MAY 22 2012** Office: VERMONT SERVICE CENTER FILE:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as an 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 [REDACTED], states that it operates a flower import and distribution business known as [REDACTED]. It claims to be an affiliate of [REDACTED], located in Mexico. The beneficiary was previously granted L-1A status for a period of one year to open a new office in the United States, and the petitioner now seeks to extend his status for three additional years so that he may continue to serve in the position of chief executive officer.

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. Specifically, the director determined that the petitioner failed to establish that the new U.S. office, which claimed two employees at the time of filing, had grown to the point where it can support a managerial or executive position.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner's current employee, prior employees and independent contractors have in fact relieved the beneficiary from performing non-managerial tasks and from primarily performing the functions of the company. The petitioner asserts that the beneficiary qualifies as both an executive and a manager pursuant to the definitions at section 101(a)(44) of the Act. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. The Issue on Appeal

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.

A. Facts and Procedural History

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129), on December 22, 2009. The petitioner indicated that it is engaged in importing and selling roses and has two employees.

In a letter dated December 21, 2009, the petitioner described the beneficiary's duties as Chief Executive Officer as follows:

He is the highest-ranked officer in the company. [The beneficiary's] responsibilities as CEO are to set the internal policies of the company and direct the overall operations, as well as act as the primary decision-maker in the hiring and firing of the personnel. Specifically, he directly manages [REDACTED] . . . [The beneficiary] oversees the marketing of our product, the sales, logistics of importing the product, accounting, overseeing the development of our website and customer relationship management. [The beneficiary] has also hired and appointed department managers for Marketing, Sales, Logistics, Accounting and Informational Technology, and delegated responsibilities to each department manager and supervise their activities as well as their subordinates. . . . [The beneficiary] is responsible of negotiating contracts with the corresponding state and federal agencies for the

importation of roses; negotiate contracts the rose farms (suppliers), and adequate distributors and distributing locations, making sure they have the proper equipment and storage facilities to ensure the quality and freshness of the roses. [The beneficiary] has been overseeing the development of the product and monitoring market trends to make proper adjustment on the product and services.

In a separate document labeled "[The beneficiary's] responsibilities in USA" the petitioner further described the beneficiary's duties as the following:

- Plan, implement and supervise the day to day operations of the companies [REDACTED] in all administrative aspects:
 - Purchases;
 - Invoicing;
 - Financing;
 - Human Resources;
 - Creation of company culture;
 - Information technology;
 - Compliance with city, state and federal laws.
- Design and implement marketing and sales strategies
- Negotiate the co-branding strategies with "AAA" business.
- Develop the national strategies of the initial operations in Texas and Florida and the upcoming operations nationwide.
- Coordinate the sales forces of:
 - Short term: San Antonio, Austin and Houston.
 - Medium term: Dallas, Phoenix, San Diego.
 - Long term: Nationwide.
- Develop new operations (franchise-style like) in the main cities throughout the most interesting states.

The petitioner submitted an organizational chart for the U.S. company which depicts the beneficiary as holding the positions of CEO and as wholesale sales representative for the San Antonio and Valley area. The only other employee identified on the chart is [REDACTED] of operations. The organizational chart reflects vacancies in the positions of chief of administration, sales and marketing manager, wholesale sales representatives for the Austin, Houston and Dallas areas, logistics, direct sales, and a driver. Although the petitioner stated that the beneficiary appointed subordinate department managers for "Marketing, Sales, Logistics, Accounting and Informational Technology," there are no subordinate managers identified on the chart.

The petitioner indicated that it has employed three different workers in the position of chief of administration, during the first year of operations, although the first employee resigned and the latter two employees were fired. The petitioner also stated that [REDACTED], with a claimed hire date of December 15, 2009, was the third individual to hold the position of chief of operations. Finally, the petitioner indicated that it previously

employed a sales representative for the Austin area, but that the employee resigned after two weeks to pursue another job offer. The petitioner stated that "all other jobs will be fulfilled gradually during the first quarter of 2010."

The petitioner provided a job description for the "chief of operations" position, noting that this individual is responsible for: (1) security and maintenance of the warehouse, including cleanliness of the area and quality of products and raw materials; (2) control and administration, including tracking inventory items and maintaining files for each import lot; (3) imports, including coordination with logistics/transport companies, receipt of the products, delivery of products to the warehouse, processing each lot of flowers, and cutting, packing and preparing each product for delivery or supervising warehouse associates in these duties; and (4) coordinating with UPS and the internal driver for delivery to customers.

The petitioner provided evidence of wages paid to some of its former workers, but did not provide evidence related to [REDACTED] the only other employee claimed to be working for the company at the time the petition was filed.

On January 20, 2010, the director issued a request for additional evidence (RFE), in which he requested the following: (1) additional evidence of the duties the beneficiary performed in the past year and the duties he will perform if the petition is extended; (2) evidence of the staffing of the U.S. organization, including the number of employees, the duties they perform, and the personnel structure of the company; and (3) if the company uses contractors rather than employees to perform functions, evidence of the contracts and information regarding the duties performed by each contractor.

In a response dated March 5, 2010, counsel for the petitioner asserted that the beneficiary "directs the overall operations of the company such as the Logistics, Marketing, Sales to Wholesalers, Administration and Special Projects." Counsel noted that "the beneficiary oversees the work of the custom brokers, transporter, negotiates contracts, directs the policies of the company, and directly manages a professional employee." In addition, counsel emphasized that the U.S. company "is in the stage of developing new business opportunities such as importing wine under the name [REDACTED] and importing high end leather under the name of [REDACTED]." Counsel indicated that the beneficiary would be responsible for directing these projects.

The petitioner provided a description of the beneficiary's duties in each area of responsibility. The petitioner indicated that the beneficiary's "wholesale division duties" would include the following:

- He visits personally, on a biweekly base [sic], the flower shops both in the San Antonio Area and the surrounding towns . . . :
 - In order to understand client needs;
 - To negotiate each month and/or season "standing" orders (fixed weekly orders);
 - To promote new products, as for example the tropical exotic flowers being imported from Costa Rica;
 - To plan and develop special promotional events oriented to the final consumer.

- [The beneficiary] promotes, negotiates and coordinates with wedding planners, where our flowers are going to be used, for each event to be as successful as possible.

The petitioner described the beneficiary's "consumer division duties" as follows:

- In order to promote the flowers with the final consumer, [the beneficiary] organizes and participates in different promotional events throughout the year, as for example:
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]

The petitioner described the beneficiary's marketing and promotional duties as follows:

- New campaign photographs - [the beneficiary] plans, hires and coordinates all necessary elements for promotional material production (photographer, models, locations, CD production, catalog printing)
- Coordination, implementation and follow up of promotional projects such as coupon codes and promotional cards.
- Development of new business opportunities such as [REDACTED]

The petitioner indicated that the new business opportunities "are under research and will be in the USA market depending its feasibility."

The petitioner also provided a "responsibilities chart" for the company, which identifies the beneficiary as "owner/president" responsible for the following:

- Sales to wholesalers – present products, negotiate orders, coordinate events.
- Special projects – non-profit organizations, hotels/restaurants, events (weddings, baptisms, etc.)
- Promotional material – vendors negotiations (photographer, models, site, printer)
- Logistics – UPS for national deliveries, ActFast for local deliveries

The responsibility chart identifies [REDACTED] in the position of Vice President, Administration and indicates that his responsibilities include "external CPA, acquisitions, production." Counsel indicated that [REDACTED] has been replaced by [REDACTED], who has taken over his duties," and referred the director to review the position description for the Chief of Operations position. The petitioner submitted [REDACTED] resume, but did not provide evidence of any payments made to him.

The director denied the petition on April 16, 2010, concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive position under the extended petition. In denying the petition, the director questioned whether the beneficiary's sole subordinate relieves the

beneficiary from performing primarily non-qualifying duties associated with operating the flower import, sales and distribution business. The director noted that, in addition to supervising the vice president, it appears that the beneficiary is personally performing several major functions of the company, rather than performing primarily managerial or executive duties.

The director acknowledged the petitioner's claim that it had employed various workers throughout the first year of operations, but noted that employees who are no longer with the company cannot relieve the beneficiary from performing non-qualifying duties. The director found that the high turnover rate "does not speak favorably regarding the petitioner's stability." The director's comments regarding the petitioner's "stability" and the "unsatisfactory performance" of its former employees are inappropriate and will be withdrawn. The director should not hold a petitioner to an undefined and unsupported view of what constitutes a "stable" business. It is appropriate for the director to base his determination on the staffing of the company as of the date of filing; however, the director need not and should not make judgments about the performance of the petitioner's former employees. The petitioner provided an explanation for the departure of each former employee.

On appeal, counsel for the petitioner asserts that the beneficiary is relieved from performing non-managerial duties. In this regard, counsel asserts that [REDACTED] the vice president of administration has a Bachelor of Science degree in engineering, is a certified sales professional, and has over 25 years of managerial experience, thus making him "a professional performing work at a professional level." Counsel further asserts that [REDACTED] the chief of operations at the time the petition was filed, was also a professional. Counsel contends that the job description provided for the position of chief of operations/vice president of administration demonstrates that the position "effectively relieved the beneficiary of non-managerial tasks." Counsel maintains that having [REDACTED] perform professional duties allows the beneficiary to "focus on negotiating orders, promote products, develop promotional events, and research other business opportunities, such as importation of wine."

Counsel further contends that "the Service implied that the petitioner needed a larger staff than what it currently has." Counsel cites an unpublished AAO decision to stand for the proposition that the size of the company does not preclude the beneficiary from qualifying as an L-1A nonimmigrant. In this regard, the petitioner asserts that the petitioner's "organization and stage of development requires the use of independent contractors." Counsel states that independent contractors "handle different areas of the company such as import logistics, U.S. logistics for product shipping, delivery to customers, customer care, marketing and legal services." Counsel asserts that the beneficiary "has clearly relieved himself from performing the non-managerial tasks that the company requires through the supervision of independent contractors." Counsel, citing *National Hand Tools Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988) states that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises.

Specifically, counsel claims that the beneficiary "manages an operations administrator, who is a professional, and thirteen different independent contractors to ensure the company is functioning properly," and, as such, "receives sufficient assistance between employees and independent contractors to relieve himself from the non-managerial tasks." Counsel contends that the beneficiary "does not directly perform or produce the main product or service that the petitioner sells," noting that he "does not actually fly the plane to import the roses, act as the custom broker, deliver the product to the clients himself, does not perform the marketing, does not

take photographs for catalogue, does not print the catalogue." Counsel maintains that the beneficiary "creates the strategies/policies and directs those activities at an executive level."

In support of the appeal, the petitioner submits a list of independent contractors and states that the beneficiary "is in charge of directing the operations and performance" of each outsourced company, including forwarding companies, import brokers, UPS, ActFast (local delivery provider), a logo design company, a marketing company responsible for internet production, a web designer, a photographer, and corporate attorneys.

The petitioner also provides an updated list of employees who have worked for the company during its course of operations. With respect to [REDACTED] former chief of operations, the petitioner states that "because the low activity generated by the economical crisis, actually he is working with us in a by-need basis." The petitioner indicates that it will re-hire him full time "as soon as sales pick up."

The petitioner submits long-term goals for its [REDACTED] business and a business plan for [REDACTED] a project the petitioner describes as "moving on the right track." Finally, the petitioner submits a copy of its company operating and quality manuals created in April and May 2009. The AAO notes that these manuals set forth responsibilities for company positions such as Plant Managers, Marketing Department Head, Production Manager, a Purchasing Department, a Quality Assurance Department, Logistics Associates, and Warehouse Associates, none of which were filled at the time the petition was filed.

B. Discussion

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a 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 petitioner's descriptions of the beneficiary's duties fail to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. While several of the duties the beneficiary would perform may require the beneficiary to exercise a managerial or executive level of authority, the petitioner has not submitted a consistent or credible breakdown of how the beneficiary will allocate his time among his various responsibilities. At the time of filing the petition, the petitioner indicated that the beneficiary would "supervise the day to day operations" of both the petitioner and another company, "[REDACTED]" including responsibility for purchasing, invoicing, financing, human resources, and information technology; design and implement sales and marketing strategies, coordinate a sales force, and develop new operations throughout the United States. This description of the beneficiary's duties offered little

insight into what he was actually doing on a day-to-day basis at the end of the first year of operations. The petitioner did not claim to have a sales force at the time of filing the petition and in fact identified the beneficiary as the company's sales representative for the San Antonio area on the organizational chart submitted at the time of filing, thus suggesting that he was actually performing the sales activities, rather than supervising a sales force and implementing sales strategies at a management level as claimed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner also provided no explanation regarding its reference to a second company [REDACTED] or its relationship to the petitioning company. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

When the director requested clarification with respect to the beneficiary's duties, the petitioner introduced a new set of responsibilities, and suggested that the beneficiary is primarily responsible for oversight of the company and management of the logistics and marketing functions, notwithstanding the fact that the beneficiary's initial position description indicated that he had appointed subordinate department managers for both of these functions, a claim which is not supported by the record. Furthermore, the logistics responsibilities that the petitioner attributed to the beneficiary are also included in the position description for the "chief of operations" position. The petitioner claims that this position was filled at the time of filing the petition and does not explain why a company with two employees would require both of them to perform the same duties with respect to a single company function when all other departments of the company remain unstaffed.

The petitioner's responsibilities, as stated in the record, include visiting customers on a regular basis to negotiate orders and promote new products, promoting products to wedding planners, arranging and coordinating other promotional events and campaigns, and researching business opportunities. While the AAO acknowledges that the beneficiary does not actually create marketing materials, the evidence of record indicates that he is essentially solely responsible for all other aspects of the company's sales, marketing and promotional activities, as well as performing market research duties related to the development of new business opportunities such as the proposed wine and leather import businesses.

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 or executive functions and what proportion would be non-managerial. 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 several of the beneficiary's daily tasks, such as those noted above, do not fall directly under traditional managerial or executive duties as defined in the statute. Again, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioning company as its chief executive officer and apparently its only full-time employee, the petitioner has failed to demonstrate that his actual day-to-day duties as of the date of filing would be primarily managerial or executive. 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).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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.

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 claims that the beneficiary was managing a professional employee, [REDACTED] chief of operations, at the time of filing, and that [REDACTED] has been replaced by [REDACTED], who serves as vice president of administration, but performs the duties of the chief of operations position. All other positions identified in the petitioner's organizational chart, are vacant, as are all positions mentioned in the petitioner's operating manual. The petitioner's organizational chart also clearly shows "chief of administration" and "chief of operations" as two different positions, so it is unclear why [REDACTED] is deemed to be a "replacement" for [REDACTED]. Furthermore, the petitioner suggests on appeal that [REDACTED] is no longer with the company because it could not afford to maintain him as a full-time employee, which raises questions as to why another employee would have been hired to fulfill his duties. Nevertheless, the record is devoid of any evidence of salaries or wages paid to either of these individuals. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) specifically requires that the petitioner provide such evidence at the end of the first year of operations. As the petitioner indicates that all other employees left the company prior to the date of filing the petition, and has not documented its employment of either [REDACTED] the petitioner has not established that the beneficiary was primarily responsible for supervising any employees, much less supervising a subordinate staff comprised of supervisory, professional or managerial employees.

The AAO acknowledges the petitioner's claim that the vacant positions on its organizational chart would be filled during the first quarter of 2010. However, 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'r 1978). Furthermore, while the petitioner claims on appeal that it always intended to operate the company primarily through the use of independent contractors, the AAO cannot discount the petitioner's earlier claim that it had immediate plans to directly hire sales, administrative and logistics employees as of the date of filing. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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 explains the duties to be performed in managing the essential function, i.e. 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.

As discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial in nature and therefore it has not established that he is primarily responsible for managing an essential function of the business. The evidence of record indicates that the petitioner contemplates employing one or more logistics associates and a chief of operations to perform duties related to the logistics function, and also has a number of vacancies in its proposed sales and marketing department. The fact that the beneficiary is currently the sole employee responsible for coordinating these functions does not elevate his role to that of a function manager. This same reasoning also applies to the beneficiary's responsibility for managing the company's sales and marketing activities. While the AAO acknowledges that outside companies perform some duties related to the logistics and marketing functions, the petitioner has not established that the beneficiary is primarily responsible for performing managerial duties related to these functions. Additionally, the petitioner has not explained how the services of these outsourced service providers obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

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, as the sole documented employee of the U.S. company, is primarily focused on the company's broad policies and goals, or that he is removed from participation in the day-to-day operations of the enterprise.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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

At the time of filing, the petitioner was a two-year old company established for the purpose of importing, selling and distributing roses and other flowers. The beneficiary is the sole documented employee working for the U.S. company, and is shown as performing a dual role as chief executive officer and regional sales representative. Thus, it is reasonable to conclude, and has not been shown otherwise, that he performs many of the day-to-day non-managerial administrative and operational tasks associated with the operation of an import and distribution business. The petitioner has not established that it had a reasonable need for the beneficiary to perform primarily managerial or executive tasks as of the date of filing.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his time on non-qualifying duties. 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'r. 1988).

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of

the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to Mars Jewelers, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. Consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

The petitioner indicates that it plans to hire additional managers and employees in the future, and that it intends to expand its business to include the import and distribution of wine and leather products. 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'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971).

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.