



U.S. Citizenship
and Immigration
Services

D7

[REDACTED]

DATE: NOV 29 2012 Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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 in accordance with the instructions on 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,

Ron Rosenberg
Acting 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 to classify the beneficiary as an L-1A 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 New York corporation, states that it operates a trading company. It claims to be a subsidiary of [REDACTED], located in Shanghai, China. The beneficiary was previously granted L-1A classification in order to open a new office in the United States as the petitioner's Chairman. The petitioner now seeks to extend his status for two additional years.

The director denied the petition on September 13, 2010, concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a managerial or executive capacity; and (2) that it maintains sufficient physical premises to house the U.S. business.

The petitioner subsequently filed an appeal.¹ On appeal, counsel for the petitioner asserts that the petitioner does in fact have sufficient employees to relieve the beneficiary from performing the day-to-day tasks of operating the business, and has sufficient physical premises to house the business. Counsel further contends that the director misunderstood the petitioner's physical space requirements and the number of employees working for the company. The petitioner submits a brief and additional documentary 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:

¹ The petitioner filed its appeal of the director's decision on October 18, 2010. On November 22, 2010, the director rejected the appeal on the basis that it was untimely filed, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1). The director's decision dated November 22, 2010 is hereby withdrawn, as the director does not have appellate jurisdiction over this matter. Upon receipt of an untimely appeal, the director may treat late appeal as a motion to reopen or reconsider, or, if it does not meet the requirements of a motion, forward the late appeal to the AAO. See 8 C.F.R. § 103.3(a)(2)(v)(B)(2). Further, upon review, the AAO notes that the petitioner's appeal was in fact timely filed.

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

The primary issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

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;
- (ii) exercises wide latitude in discretionary decision-making; and
- (iii) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

I. EMPLOYMENT CAPACITY IN THE UNITED STATES

The first issue to be addressed is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

A. Facts and Procedural History

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129) on April 12, 2010. The petitioner indicated on the Form I-129 that the U.S. company has two employees and gross annual income of approximately \$481,000.

With respect to the beneficiary's job duties, the petitioner stated: "He is the Chairman of the company and is in charge of the operations and management of the entire company." The petitioner did not submit a supporting letter or separate statement of the beneficiary's job duties.

The regulations require the petitioner to submit a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. Further, the petitioner is required to submit a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees. See 8 C.F.R. §§ 214.2(l)(14)(ii)(C) and (D). The petitioner did not submit this required initial evidence.

Accordingly, on May 20, 2010, the director issued a request for additional evidence (RFE), in which he instructed the petitioner to provide: (1) a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; (2) a list of U.S. employees that identifies each employee by name and position title; (3) a complete position description for all U.S. employees; (4) a detailed description of the nature of the petitioner's business including the type and location of its customers/clients and the products and services it provides; (4) a complete copy of the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of calendar year 2010.

The petitioner submitted a response to the RFE on August 16, 2010. Its response included the following description of the beneficiary's job duties:

<u>Hours</u>	<u>Duties</u>
4	meeting with [REDACTED]
6	searching aluminum suppliers such as [REDACTED] [REDACTED] etc.
4	planning, directing and coordinating company's operations
6	supervising the employees in New York and in China
5	Reviewing financial statements, sales and activity reports, etc. to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement
3	Establishing and implementing departmental policies, goals, objectives, and procedures
1	evaluating the employees by reviewing the employee's education, experience, background, performance, sales, cost saving, work efficiency, work attitude, leadership, team work, initiatives, creativity, problem solving ability, judgment and decision making abilities, and contribution on a quarterly and annually [sic] bases
3	Determining hiring, firing, promoting, demoting, assigning bonuses, and suspending of appropriate employees
3	Directing and coordinating the Company's financial and budget activities to fund operations, maximize investments, and increase efficiency.

The petitioner also submitted a position description for [REDACTED] a shareholder of the U.S. company who signed an accompanying letter in the capacity of [REDACTED]. The petitioner indicated that [REDACTED] spends 4 hours per week meeting with the beneficiary, 6 hours researching and holding discussions with other

suppliers of aluminum, 8 hours monitoring production, 7 hours in financial negotiations, 5 hours confirming orders and handling bank letters of credit, 1 hour per week meeting with [REDACTED] and 4 hours in miscellaneous meetings.

The petitioner stated that the company, as of July 2010, has four employees, however, the petitioner did not identify any employees other than the beneficiary and [REDACTED]

In a letter dated July 5, 2010, the petitioner provided additional information regarding the nature of the U.S. and foreign entity's business operations. The petitioner explained that its foreign parent company supplies aluminum alloy plate materials used to manufacture coal railway cars for [REDACTED]. The petitioner indicated that the U.S. company was established in order to ensure the continued quantity and quality of supply of aluminum alloy materials. The petitioner noted that, before the U.S. subsidiary was established, the foreign entity had to import from [REDACTED] in Hong Kong through an affiliate company. The petitioning company "has been tasked to identify more qualified aluminum suppliers in the United States in order for [the group] to sell more products to the buyers in China."

The petitioner further explained that the U.S. company has initially taken over all orders from [REDACTED] in Hong Kong, and then passes shipments to the company's Chinese affiliate. The petitioner emphasized that the U.S. company, unlike the Chinese affiliate, is empowered to import and export any products from and to China without restrictions imposed by the Chinese government. In summary, the petitioner stated that the purpose of the U.S. company "is to identify, target, explore, locate, and set up the business relationship with a few more aluminum suppliers in the U.S." Further, the petitioner indicated that it is more efficient for its Chinese affiliate, [REDACTED], to import directly from a related company.

The petitioner submitted a copy of its agency contract with [REDACTED] appointing the Chinese company as the sole agent to supply "the plates of C80 double bathtub aluminum alloy coal gondola in the territory of China," and to four Chinese locomotive manufacturing companies in particular. The agreement specifies that the U.S. company "does not have the qualification of directly operating the import and export business in China."

The petitioner provided the requested copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first two quarters of 2010. The petitioner reported that it paid one employee \$13,050 in salaries and wages in the first quarter and four employees total salaries and wages of \$16,650 in the second quarter.

The director denied the petition on September 13, 2010, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director noted that the petitioner submitted inconsistent information regarding the number of employees, and, while it claimed four employees, it identified and provided position descriptions for only two workers in response to the RFE. The director determined that the petitioner failed to establish that the company had grown to the point where it could support a primarily managerial or executive position.

On appeal, the petitioner submits evidence intended to establish that the company has four employees, including an employment agreement for an individual hired as a secretary on May 28, 2010, and an individual hired to serve in a sales position on June 1, 2010. The petitioner also provides a position description for each worker, noting that the sales employee is responsible for researching aluminum suppliers, purchasing aluminum sheets, providing feedback regarding the price and quantity ordered to the beneficiary and [REDACTED] [REDACTED] arranging for shipment, and traveling to meet with suppliers. The petitioner states that the secretary enters purchase records, records time of shipment and arrival, records financial expenditures, confirms orders and handles letters of credit, arranges travel, organizing files, and reviews finances with management. The petitioner submitted copies of recent salary checks issued to its employees.

The petitioner also provides the following revised position description for the beneficiary:

- 4 hours Meeting with [REDACTED]
- 4 hours Planning, directing and coordinating company operations
- 6 hours Supervising the employees in New York and in China
- 5 hours Establishing and implementing departmental policies, goals, objectives and procedures
- 8 hours Directing and coordinating the Company's financial and budget activities to fund operations, maximize investments, and increase efficiency
- 5 hours Determining hiring, firing, promoting, demoting, assigning bonuses, and suspending of appropriate employees
- 3 hours Evaluating the employees by reviewing the employee's education, experience, Background, performance, sales, cost saving, work attitude. . . .etc.

Finally, the petitioner submits evidence that the company acquired an existing nail salon business located in New York as of October 31, 2010 in exchange for \$12,000. Counsel asserts that "this is the evidence that the petitioner is expanding its business in addition to its current business operation."

B. Analysis

Upon review, 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 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 petitioner submitted a vague and non-specific description of the beneficiary's duties which fails to establish the nature of the tasks he is required to perform on a day-to-day basis. For example, the petitioner stated that the beneficiary is responsible for establishing and implementing departmental policies, goals, objectives and procedures, coordinating financial and budget activities, "meeting with [REDACTED] and "planning, directing and coordinating company's operations." These duties, which account for more than one-

third of the beneficiary's work hours on a weekly basis, are poorly defined and provide little insight into the beneficiary's typical routine. Specifics are clearly an important indication of whether a beneficiary's duties are 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).

The petitioner indicated that the beneficiary allocates an additional ten hours to personnel-related duties including employee supervision, making hiring, firing and promotion decisions, and evaluating employees. However, as discussed further below, the evidence of record supports a finding that the company had only one or two employees as of April 2010 when the petition was filed. Although the petitioner stated that the beneficiary supervises employees "in China," the petitioner provided no additional explanation or evidence related to such employees. 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)). The petitioner failed to support its statements that the beneficiary allocates the stated number of hours to personnel supervision.

Finally, the petitioner indicated that the beneficiary is responsible for "searching aluminum suppliers," but failed to explain how this duty qualifies as managerial or executive in nature, as opposed to an operational task necessary for the provision of the company's products and services.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the AAO does not doubt that the beneficiary possesses the appropriate level of authority over the U.S. operation, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity.

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 only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(i)(14)(ii).

The petitioner stated on the Form I-129 that it had two employees. While the petitioner claimed four employees in response to the request for evidence, the record indicates that the company had, at most, two employees as of the date of filing. The evidence submitted on appeal confirms that the petitioner's sales employee and secretary were hired approximately six weeks after the petition was filed. The critical facts to

be examined are those that existed at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. 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); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Therefore, the AAO will not consider the hiring of these employees, as they were not available to relieve the beneficiary from performing non-qualifying duties as of the date of filing. Similarly, the petitioner's acquisition of a nail salon more than six months after the petition was filed is not relevant for the purposes of establishing that the company was able to support a managerial or executive position as of the date of filing.

The petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, indicates that the U.S. company had one employee as of the date of filing, presumably the beneficiary, as the petitioner has submitted copies of paychecks issued to him dating back to 2009. The evidence of record indicates that [REDACTED] is a shareholder of the U.S. company, but the petitioner has not provided evidence of any payments made to him prior to July 2010 and the AAO cannot determine whether he was a full-time employee at the time of filing. 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)).

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).

In the present matter, the totality of the record does not support a conclusion that the beneficiary is primarily supervising subordinates who are supervisors, managers, or professionals. Rather, as the beneficiary was either the sole employee or one of two employees at the time of filing, the petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a qualifying "personnel manager" position.

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 clearly describe 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. In this matter, the petitioner has neither claimed nor provided evidence that the beneficiary manages an essential function. Further, as the petitioner has not submitted a sufficiently detailed description of the beneficiary's duties, the record does not support a finding that the beneficiary's actual duties are primarily managerial in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner claims that the beneficiary will be the chairman and president of the U.S. office. 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.* While the petitioner states that the beneficiary will be responsible for establishing the goals and policies of the U.S. operation, the petitioner has not demonstrated that he would be relieved from involvement in the day-to-day operations of the enterprise in light of the company's staffing levels at the time of filing. The evidence of record fails to demonstrate that the beneficiary would be employed in an executive capacity other than in position title.

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. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "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)). Furthermore, 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., *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial

position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

At the time of filing, the petitioner was a two-year-old trading company that claimed to have a gross annual income of \$480,000. The firm employed the beneficiary as president and chairman, and may have also employed a vice president. The AAO notes that both employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and perhaps one additional manager. Further, the petitioner filled the positions of secretary and sales representative approximately six weeks after the petition was filed, which further supports a finding that the beneficiary and his alleged subordinate were likely performing the non-managerial duties later assigned to the new full-time employees.

The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his 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 or her time on non-qualifying duties. 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 *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

Based on the foregoing, the petitioner has failed to establish that the beneficiary will perform primarily managerial or executive duties under the extended petition. As discussed above, the AAO cannot consider hiring or business acquisitions that occurred subsequent to the filing of the petition. 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).

The petitioner has not submitted additional evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

II. PHYSICAL PREMISES

The remaining issue in this matter is whether the petitioner maintains physical premises to house the U.S. business.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires that a petitioner seeking to open a new office in the United States submit evidence that it has secured sufficient physical premises to house the new office. The AAO observes that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business will immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). A petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

The petitioner stated on the Form I-129 that the beneficiary's worksite is located at [REDACTED] in Hillcrest, New York. At the time of filing, the petitioner submitted a "Renewal Lease Form" dated November 1, 2008, advising the petitioner that the lease would expire on "1/31/03." The petitioner, as tenant, agreed to a one-year renewal of its lease. The lease renewal form was signed and dated by the petitioner on November 1, 2008 and by the owner of the property on October 31, 2009.

In the RFE issued on May 20, 2010, the director advised the petitioner as follows:

Review of the lease has many errors listed on the first page. The lease is dated November 1, 2008, yet it says it expired on January 31, 2003. Further the lines at the bottom of the page are different by one year. One person signed on November 1, 2008 and the other person signed on October 31, 2009.

The director requested that the petitioner provide additional evidence to establish that the petitioner has secured sufficient premises to house the office, including photographs of the interior and exterior of all premises secured for the entity.

In response, the petitioner submitted a letter dated July 5, 2010. The petitioner explained that the lease renewal form was signed on November 1, 2008, while the termination date was October 31, 2009. The petitioner stated that the expiration date of January 31, 2003 was "an unfortunate typo." The petitioner submitted a copy of a two-year lease agreement dated October 17, 2009 for a two-year term commencing on November 1, 2009.

The petitioner also submitted photographs depicting a company sign on the exterior of a building with the address "81-38" and interior photographs depicting an office with three desks and standard office equipment and furnishings.

In denying the petition, the director stated:

Review of the photographs show that this is a building with a sign attached to the outside. The inside photographs show a very small office space that is not sufficient to house your business and the products you wish to import/export. Further, a search in Google shows that

the building is located in a residential area. USCIS is not persuaded that you have secured sufficient physical premises to house the office in the United States.

On appeal, counsel asserts that the director erred by relying on the results of an Internet search and failed to identify any authorities prohibiting against an office set up in a residential area. Counsel emphasizes that the petitioner has no need to house the products it will export because it arranges for shipments from "warehouse to warehouse." The petitioner submits additional photographs of the leased premises to establish that it has sufficient physical space for its current staff of four employees. The new photographs depict one additional computer workstation.

Upon review, counsel's assertions are persuasive. The petitioner had only two employees as of the date of filing and has established that its business model does not require it to maintain a warehouse or other storage space. As such, a small office with standard office equipment appears to be sufficient to meet its physical premises requirements. While the petitioner's office may be in a residential area, the petitioner has not submitted a residential lease, and it has provided corroborating evidence of rent payments made from the company's bank account and reported these rent payments on its 2009 corporate tax return.

Accordingly, the director's determination with respect to this issue only will be withdrawn.

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.