



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: FEB 19 2014 Office: VERMONT SERVICE CENTER

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

PETITION: Petition for a Nonimmigrant Worker under 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner filed this nonimmigrant visa petition seeking to extend the beneficiary's employment as an L-1A intracompany transferee employed 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, an organic frozen yogurt store, seeks to extend the beneficiary's employment as an executive for an additional three years. The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity, noting specifically that the record failed to demonstrate that he would be relieved from performing non-qualifying duties.

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 evidence of record establishes that the beneficiary will function in a qualifying capacity, and contends that the denial was based on an erroneous interpretation of facts by the director. 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.

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), provides:

The term "executive capacity" means 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.

## II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. The petitioner has consistently stated that the beneficiary will be employed in an executive capacity.

In the instant Form I-129, Petition for a Nonimmigrant Worker, the petitioner indicated that it operates an organic frozen yogurt store with seven employees. The petitioner's business plan submitted in support of the petition verified that it acquired a frozen yogurt store in May 2012. The business plan further stated that in addition to its frozen yogurt business, the petitioner ultimately plans to provide services in the following areas:

- Sport motivation support/Coaching
- Professional Tours/Tournament Entry
- Professional Athlete Management
- Sponsorship
- Transfer Settlement
- Consulting
- Healthy Nutrition

It is noted that the foreign parent company, [REDACTED] is currently engaged in the provision of similar services.

In a letter submitted in support of the initial petition, counsel for the petitioner further explained that the goal of the U.S. company is to introduce new approaches to lifestyle management, and that it offers a variety of services focused on an organic and healthy lifestyle. Counsel also claimed that the U.S. company will focus on consulting services, as well as development and education of professional athletes and youth soccer talent.

Regarding the beneficiary, counsel claimed that he has assumed the title and duties of "a chief executive, presidential position." Counsel stated that the beneficiary's duties were as follows:

Specifically, he is responsible for a thorough assessment of the state of the current business activities and overseeing further market studies, negotiating new lease arrangements and product representation, investigating growth opportunities and managing all activities to plan and implement corporate expansion within the United States. He reports directly to the shareholders and is responsible for establishing the new goals and specific objectives and methodologies of the U.S. business operations.

The petitioner also submitted numerous other documents in support of the petition, including a commercial lease agreement, tax records, payroll records, invoices, bank statements, and an organizational chart demonstrating the current structure within the U.S. entity.

The director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit evidence establishing that the beneficiary met the regulatory definition of either a manager or executive, as defined in the Act. Specifically, the director requested more details regarding the beneficiary's supervisory duties as well as details regarding the educational backgrounds of his subordinates. In addition, he requested additional details regarding the level of discretionary authority exercised by the beneficiary as well as a general overview of the beneficiary's actual duties.

Counsel for the petitioner submitted a letter in response to the director's request. Counsel specifically states that the beneficiary is employed in an executive capacity, noting that he directs the management of the company, is responsible for its goals and policies, and makes all of the company's decisions. In support of this assertion, a detailed overview of his duties, as well as the duties of the other staff members, was provided in a separate document. Specifically, his duties were described as follows:

Currently, [the beneficiary] has one supervisor and one professional manager under his management and several other support staff and contractors to manage.

[The beneficiary] also directs the Company's financial and budget activities to fund operations, maximize investment and to increase efficiency, he also analyzes operations of the US business to evaluate performance of the Company, directs the activities of the business, negotiates contracts and agreements and meets with potential clients, reviews documents for further evaluation, explores new business opportunities, and conducts other executive duties as needed. [The beneficiary] evaluates business issues and problems and develops business solutions. [The beneficiary] serves in the position of President and Chief Executive Officer and directs the management of the company. [The beneficiary] is a necessary person for this position as he is especially and uniquely qualified due to his experience with the foreign company, his education, business contacts and experience.

[The beneficiary] has a wide discretion in his decisions and receives only minimal supervision from the Czech Republic. [The beneficiary] directs the management activities of

the Company and is fully responsible for the goals and policies and will make all decisions for the Company. He will further coordinate and organize projects, and will be directly responsible to oversee the progress of each project.

[The beneficiary] allots approximately 50% of his time to executive and managerial duties, 40% of his time for business-related duties, and 10% of his time for administrative duties. Please see the following description of time and duties:

Percentage of time spent on each duty:

50% for executive and managerial duties such as:

- \* Responsible to direct the day-to-day operations;
- \* Establish relations with suppliers and manufacturers;
- \* Plan sales initiatives and discuss with potential Sales director;
- \* Prepare marketing meetings with potential customers;
- \* Conduct financial operations and work with banks.

40% for business-related duties such as:

- \* Oversee the development of new investments for the company in the future;
- \* Negotiate new contracts;
- \* Analyze cost and determine pricing and profit margins;
- \* Determine the price/quality ratio of all products;
- \* Track incoming funds and receivables;
- \* Set all business policies and practices;
- \* Manage regulatory issues . . . such as permits, legal affairs, contracts, safety regulations.

10% for Administrative duties such as:

- \* Hire and fire employees;
- \* Supervise legal, regulatory and tax compliance.

The petitioner also explained that the beneficiary oversaw six employees, specifically one office manager and five store clerks.

The petitioner also submitted a letter from its corporate attorney/authorized attorney, in response to the RFE. The attorney provided additional details with regard to the beneficiary's current duties, and explained as follows:

[The beneficiary] meets with sport and athletic facilities in the area to provide and offer his organic healthy snacks to their members. [The beneficiary] negotiates with these sport facilities on sponsorship of their events. He meets with the sport managers to offer and

advertise his services in their catalogs. He is currently negotiating with the [REDACTED] [REDACTED] the introduction of his product to their facility and to sell his product in their club house as a healthy option snack. He is also negotiating in providing healthy smoothies products to athletes and club members with discounts to promote his services in the area.

For instance, [the beneficiary] is negotiating a contract for the [REDACTED] to offer his services during the event. He is negotiating the terms of renting a space during the event and the possibility of sponsorship to appear in all provided catalogs and website advertisement. In addition, he has special events conducted in his sport for fitness clubs and he conducts shows and seminars on healthy diet supported by professional athletes and trainers. He is in charge of organizing [these] events and seminars to ensure that public is notified, managers of fitness centers participate in this event by providing discount coupons for membership. [These] business related activities take approximately 40% of his time to ensure continuing and growing business.

The petitioner also submitted resumes for all of its employees as well as applicable payroll records.

The director denied the petition finding that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. The director noted that although the description of duties indicated that the beneficiary would be performing executive duties, it also indicated that he would simultaneously be responsible for performing a large amount of non-executive duties. The director also found that the beneficiary would not be employed in a primarily managerial capacity, noting that the beneficiary would be acting as a first-line supervisor of non-professional employees.

On appeal, counsel asserts that the beneficiary's position is primarily executive in nature. In addition, counsel asserts that first-line supervisors qualify as managers, specifically noting that the type of business operated by the petitioner relies on "sales personnel" and "front store clerks" rather than subordinate managers. Counsel cites to three non-precedent AAO decisions in support of the assertion that the nature of the business activities, and not the size of the company or staffing levels, is the factor to be considered. Furthermore, counsel provides an updated breakdown of the percentage of time the beneficiary devotes to each duty, claiming that he will devote 40% of his time to executive duties, 40% of his time to business-related duties, and 20% of his time to administrative duties.

### III. ANALYSIS

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.

As a preliminary matter, counsel refers to three unpublished decisions in which, according to counsel, the AAO determined that the beneficiary met the requirements for L-1A classification because he was involved in very specialized business functions which required a high degree of sophistication. Counsel, however, has furnished no evidence to establish that the facts of the instant petition are analogous to those in the

unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship & Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

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 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 fact that the beneficiary manages a business or a component of a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 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").

The beneficiary's job descriptions submitted in the initial petition and in response to the RFE are insufficient to establish that the beneficiary will be primarily performing managerial duties. Specifically, the beneficiary appears to be performing the tasks necessary to provide the services of the organization. The petitioner indicates that the beneficiary's duties will include negotiating new contracts, oversee the development of new investments, and tracking incoming funds and receivables. In addition, the petitioner claimed that the beneficiary would establish relationships with suppliers and manufacturers, prepare marketing meetings with potential customers, and conduct financial business with banks.

The beneficiary's duties, as stated by the petitioner, appear to encompass many marketing-related duties intended to assist the petitioner's parent company in the expansion of its business into numerous areas beyond simply that of an organic frozen yogurt store. The description of duties fails to sufficiently explain the nature of the beneficiary's role in the management and operation of the frozen yogurt store, which is currently the only business being operated by the petitioner. While the beneficiary may in fact be tasked with the ultimate expansion of the business into different areas, the petitioner has not provided evidence that such duties require the majority or a significant amount of his time. Rather, the evidence indicates that the beneficiary spends the majority of his time performing non-qualifying operational, administrative, financial and first-line supervisory duties associated with operating the retail frozen yogurt store. 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).

The petitioner states on appeal that the beneficiary will spend 40% of his time on "executive" duties, 40% of his time on "business-related" duties, and 20% of his time on administrative duties.<sup>1</sup> First, administrative

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<sup>1</sup> It is noted that, on appeal, counsel for the petitioner amends the percentages of time to 40%/40%/20%, whereas in response to the RFE the same duties were broken down as 50%/40%/10%. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to

duties are not considered managerial or executive in nature. In addition, the duties listed under the headings of "executive" and "business-related" duties also identify tasks not considered primarily managerial or executive in nature. The petitioner identifies a hybrid of duties that encompass elements of both managerial and executive capacity, and combines these duties with non-qualifying tasks. While performing non-qualifying tasks necessary to produce a product or provide service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9<sup>th</sup> Cir. 2008).

Although the petitioner repeatedly claims that the beneficiary is employed in an executive capacity, the description of duties, as noted above, contains a combination of both managerial and executive duties. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. The AAO will review the duties of the beneficiary under both definitions.

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). Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The petitioner's organizational chart shows the beneficiary directly supervising an office manager, [REDACTED], and four store clerks.<sup>2</sup> The job description for [REDACTED] indicated that she was a manager and supervisor with wide discretion in the day-to-day operations of the company. Specifically, her job description indicated that she would devote approximately 40% of her time to customer, vendor, and supplier communications, 30% of her time to employee management duties, and 30% of her time to administrative duties. According to the position description for the store clerks submitted in response to the RFE, they are

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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).

<sup>2</sup> It is noted that the first organizational chart submitted in support of the petition listed five store clerks, but the response to the RFE listed only four store clerks.

responsible for tasks such as waiting on customers, preparing smoothies and soft serve yogurt, keeping the store clean, and keeping the toppings display full.

As noted by the director, these job descriptions do not support a finding that the positions are of a professional level in nature. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In this matter, the petitioner indicated that the store clerk positions are entry-level positions, and the resumes of the sales clerks demonstrate that none of these staff members have attained a bachelor's degree. Moreover, while the petitioner does not outline specifically the educational requirements for the position of store manager, [REDACTED] resume indicates that she is currently pursuing an associate's degree, thus demonstrating that there is no requirement of a baccalaureate level of education for entry into that position. The beneficiary's subordinates do not possess bachelor's degrees, nor does the petitioner submit any evidence establishing that the store manager or store clerk positions require an individual with a bachelor's degree to perform such work. Consequently, the AAO concurs with the director's finding that the subordinate employees are not professionals.

Additionally, it has not been established that the beneficiary is supervising a managerial or supervisory employee. Although the organizational chart designates an "office manager" position subordinate to the beneficiary, the record fails to establish that the employee's duties correspond with the position's title. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)).

After reviewing the store manager's resume, which was submitted by the petitioner in response to the RFE, the AAO notes that her claimed duties as a manager include "working as a server in the store," "serving yogurt and smoothies to our customers," and "cleaning the yogurt machines." While she also claims to hire and fire employees and manage scheduling, there is no indication as to how much time is spent devoted to customer service tasks versus the claimed managerial tasks. Moreover, the letter from the petitioner's corporate attorney classifies her position as "administrative in nature," thereby undermining the claim that the office manager is truly a manager or supervisor as contemplated by the regulations. Finally, the AAO notes that many of the claimed duties of the beneficiary coincide with some of the claimed duties of the office

manager, thereby raising additional questions regarding whether the beneficiary's position in the organizational hierarchy is actually elevated above that of the "office manager."

The tasks identified on the resume demonstrate that the office manager takes an active role in producing the petitioner's products as opposed to focusing on primarily managerial or supervisory tasks. Overall, therefore, the evidence of record is insufficient to establish that the beneficiary primarily supervises and controls a subordinate staff comprised of managers, supervisors or professionals, and the petitioner has not established that he is employed as a "personnel manager."

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 job description that clearly 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). 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).

While the petitioner refers to the beneficiary as an "executive," the initial description of his duties and the updated versions submitted both in response to the RFE and on appeal, indicate that he performs a number of non-qualifying duties associated with sales and provision of the petitioner's services, rather than primarily managing a function. The petitioner must establish that the beneficiary primarily performs managerial duties. The petitioner has not done so in this case.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary will manage a function or manage subordinates who are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary and his subordinates will perform the actual day-to-day tasks of providing the petitioning company's retail frozen yogurt products. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

In addition, the petitioner consistently claims that the beneficiary will be acting in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. As explained above, the record indicates the beneficiary allocates a large amount of his time to non-managerial marketing and promotional duties, and is insufficient to establish that the beneficiary's responsibilities and duties are beyond those of a first-line supervisor. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity. While the petitioner indicates that the beneficiary currently performs duties that were performed abroad, the duties described do not fall within the statutory definition of "executive capacity," and do not reflect that the beneficiary allocates the majority of his time to focusing on the broad goals and policies of the petitioner.

Counsel for the petitioner correctly asserts 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). In reviewing the relevance of the number of employees a petitioner has, however, 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 (9<sup>th</sup> 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)).

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) 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). In *National Hand Tool Corp.*, the court 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. However, 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 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). For the reasons discussed above, the petitioner has not established that the beneficiary performs primarily managerial or executive duties in his role with the petitioner. This conclusion is based on the beneficiary's position description, the position descriptions of his subordinates, and the nature of the petitioner's business; it does not rest on the size of the petitioner or the number of employees the beneficiary claims to supervise. The petitioner has failed to establish that the beneficiary has been and will be primarily employed in a managerial or executive capacity with the petitioner.

In the present matter, however, 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. Although the petitioner indicates that it plans to expand its business into different areas in the future and ultimately hire additional managers and employees, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Accordingly, the appeal will be dismissed.

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

**FURTHER ORDERED:** The director shall review the subsequently-approved L-1A petition filed on behalf of the beneficiary [REDACTED] for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9)(iii)(A)(5)