



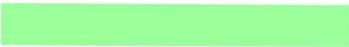
U.S. Citizenship
and Immigration
Services

(b)(6)

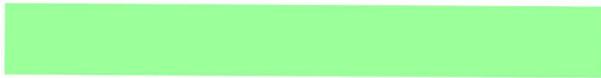


DATE: **JAN 16 2014**

OFFICE: VERMONT SERVICE CENTER



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 (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 Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company, states that it leases and distributes gaming machines. The petitioner claims to be an affiliate of [REDACTED] located in Argentina. The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his employment as its manager for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or an executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner states that "the petitioner disagrees with the director's conclusion that the beneficiary's job duties – specifically those listed in the denial – are inherently operational and not managerial or executive in nature." The petitioner does not submit any additional evidence on appeal.¹

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.

¹ The AAO notes that counsel marked the box at Part 2 of the Form I-290B, Notice of Appeal or Motion, indicating that a brief and/or additional evidence would be submitted to the AAO within 30 days. The AAO has not received any correspondence from counsel or the petitioner to date.

- (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), 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.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 9, 2013. The petitioner stated on the Form I-129 that the beneficiary will be employed as "manager" and indicated that the company had four employees and a gross annual income of \$130,000 as of the date of filing.

In its letter of support, the petitioner described the beneficiary's proposed duties as follows:

[The beneficiary] has been employed in the position of Manager of [the petitioner] since August 2012. His responsibilities are as follows:

- Establish new commercial relationships within the Florida Arcade Industry to ensure company's growth. Participate in trade shows, events, seminars to actively promote [REDACTED] [REDACTED] 15%
- Determine terms and prices of machine lease agreement after reviewing reports on competitor's analysis. Negotiate prices when necessary to ensure customer satisfaction. 15%
- Establish marketing and promotion strategies and allocate promotion staff in order to ensure market penetration and to demonstrate the superiority of the [REDACTED] in comparison to other gaming machines in the market. 10%
- Create public awareness of [REDACTED] innovative gaming machines as they are introduced to the American market and demonstrate its advantages in comparison with traditional gaming machines. 5%
- Manage technical staff to accomplish the prompt delivery and installation of machines to new customers, and arrange for training of customers' staff on how to properly use the machines. Ensure customers receive weekly visits for machine maintenance purposes. 15%
- Plan training sessions for new employees on how to assemble, install and provide maintenance to the gaming machines, including training on how to use the machines to better equip them to train customers' staff. 5%
- Review reports on the performance of the gaming machines to provide feedback to the foreign entity in regards to customer's receptivity and to make suggestions to improve their design and production. 10%
- Approve the financial transactions involved in the company's day-to-day activities. Establish schedule of weekly machine performance readings and collection of payments from customers. 10%
- Direct administrative operations by reviewing and modifying company's current policies if necessary, to improve procedures and maintain the foreign company's standards. 10%
- Establish goals at team meeting by reviewing results of operations. Confer with management team to improve procedures and make changes in future operations to further develop business. 5%

The petitioner submitted a document titled "Business Overview" which described the U.S. company's personnel plan as follows:

The company will be formed by a Manager, who will be responsible for establishing the commercial relationships withing [sic] the Florida Arcade Industry. Additionally, the Manager will be responsible for overseeing the day-to-day operations of the business.

The Manager will be supported by an Administrative Assistant, a Technical Supervisor, and Promoter Supervisor. The Technical Supervisor will be responsible for the technical staff that

will build, install, and maintain all gaming machines. The Promoter Supervisor will be responsible for coordinating the marketing strategies for the company's promoters.

The Manager job duties include, but are not limited to the following:

Establishing commercial relationships with area arcades and other potential customers in order to rent arcade machines

Managing the technical staff for the delivery and installation of machines to new customers, and arranging for the training of customers' staff in the proper use of machines

Establish marketing and promotion strategy and allocate promotion staff in order to ensure market penetration and the building of brand/game awareness.

Establishing and deploying weekly machine performance readings and collection of payments from customers

Financial management of the company and its day-to-day transactions

The petitioner submitted an organizational chart depicting the beneficiary as president, directly supervising an IT Director, [REDACTED] and a CPA. The IT Director supervises two IT Technicians, [REDACTED]

The petitioner submitted its Form UCT-6, Florida Department of Revenue Employer's Quarterly Report, for the first, second and third quarters of 2012, indicating that the petitioner had two employees and paid \$14,685.00 in the first quarter, two employees and paid \$14,565.00 in the second quarter and three employees and paid \$36,293.62 in the third quarter. The three employees listed for the third quarter of 2012 are [REDACTED], and the beneficiary.

The petitioner submitted resumes for each of the beneficiary's three subordinates listed on the organizational chart. The petitioner provided a copy of [REDACTED] systems engineering degree from Columbia and Mr. [REDACTED] states in his resume that he has a computer and systems engineering bachelor's degree.

On January 17, 2013, the director issued a request for additional evidence ("RFE") in which she instructed the petitioner to submit, among other items, evidence that the beneficiary is employed primarily in a managerial or executive position.

In response to the RFE, the petitioner submitted the same list of job duties with percentages previously submitted with the petition. The petitioner made only one change to the list of job duties: the petitioner changed the previous job duty of "[m]anage technical staff to accomplish the prompt delivery and installation of machines to new customers, and arrange for training of customers' staff on how to properly use the machines. Ensure customers receive weekly visits for machine maintenance purposes" to "[s]upervise the work of the IT Director who in turn supervises the technical staff to accomplish the prompt delivery and installation of machines to new customers, and arrange for training of customers' staff on how

to properly use the machines." The petitioner also provided a list of job duties for each of the beneficiary's subordinates and indicated the percentage of time each of them devotes to each duty.

The petitioner submitted 2012 IRS Forms W-2, Wage and Tax Statement, for the beneficiary showing \$34,686.15 in wages; for [REDACTED] showing \$42,802.92 in wages; for [REDACTED] showing \$5,615.56 in wages; and for [REDACTED] showing \$23,251.41 in wages, tips, and other compensation. The petitioner's 2012 IRS Form W-3 reflects that it paid a total of \$71,647.67 in wages to all employees.

The petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2012, indicating that it had four employees and paid \$40,812.42 in wages, tips, and other compensation. The petitioner also submitted its Form UCT-6 for the fourth quarter of 2012, indicating that it employed [REDACTED] and the beneficiary.

On April 1, 2013, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director found that the petitioner did not show that the beneficiary would function at a senior level within the organizational hierarchy other than in position title. The director observed that while some of the beneficiary's duties appear to be managerial in nature, given the structure and nature of the business, it is more likely than not that the beneficiary and his subordinate employees will all primarily perform the tasks necessary to operate the business.

On appeal, counsel for the petitioner contends that the petitioner provided sufficient evidence to establish that the beneficiary will be employed in a managerial capacity. Counsel asserts that "the evidence demonstrates that the beneficiary not only manages managerial/supervisory personnel but also manages a huge marketing function representing a significant portion of the petitioner's business." Counsel further states that the beneficiary is part of the senior management team of the U.S. company, including the IT Director and the CPA, and that he has the discretion to hire subordinate staff and independent contractors and to bind the petitioner contractually.

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or an executive capacity, or as a function manager.

As discussed above, the petitioner has requested the extension of a petition that involved a new office. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first

year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). In the instant matter, counsel for the petitioner contends that the U.S. company is still in a start-up phase and that the director placed an undue emphasis on the amount of time the beneficiary devotes to non-qualifying duties. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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.* 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 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 operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages 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").

In the instant matter, the petitioner characterized the beneficiary's role as "manager," noting he will devote 15% of his time to establishing new commercial relationships and participating in trade shows and events; 15% of his time to determining terms and prices of machine lease agreements; 10% of his time to establishing marketing and promotion strategies and allocating promotion staff; 5% of his time to creating public awareness of [redacted] innovative gaming machines; 15% of his time to managing technical staff; 5% of his time planning training sessions for new employees on how to assemble, install and provide maintenance

to the gaming machines; 10% of his time to directing administrative operations; and 5% of his time to establishing goals at team meetings. While these tasks are undoubtedly necessary in order to continue operations, the petitioner has not indicated how the majority of these duties qualify as managerial or executive in nature.

Further, the petitioner's initial business overview/plan indicates that the petitioner intended to employ a promoter supervisor, promotions staff, and an administrative assistant. These employees have not yet been hired, and the petitioner has not established that the beneficiary's current subordinates perform duties other than assembling, installing, and maintaining the company's gaming machines and other technical duties. As such, all administrative, sales, marketing and day-to-day invoicing, accounts and other financial tasks associated with operating the business would reasonably be under the beneficiary's area of responsibility.

Given the general descriptions of the beneficiary's duties, business plan, and current staffing structure of the company, the record reflects that the beneficiary would more likely than not allocate more than 50% of his time to duties that are non-qualifying. 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). 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 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.

Here, the petitioner indicates that one of the beneficiary's direct subordinates will be the IT Director. The description of the IT Director's duties indicates that he allocates some time to specific technical functions and some time to supervising the technical staff of two employees. Although the beneficiary is shown to have one subordinate with some supervisory duties, he has not been shown to *primarily* supervise and the control the work of other supervisory, professional, or managerial employees. The fact that one of his

subordinates may supervise lower-level employees is not sufficient to elevate the beneficiary to a position that is managerial in nature. The petitioner has failed to demonstrate that the beneficiary's duties will primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the petitioner. As noted above, all of the subordinate employees are charged with technical duties while the beneficiary would reasonably be responsible for all other aspects of the day-to-day operation of the company.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function 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 position description that describes 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.

Here, counsel for the petitioner contends for the first time on appeal that the beneficiary will be a function manager in his role as the petitioner's manager. Counsel states that the beneficiary manages the essential function of marketing, which represents a significant portion of the petitioner's business, but fails to articulate the beneficiary's duties as a function manager. It is not sufficient for counsel or the petitioner to merely state that the beneficiary will manage the marketing function of the business without specifically indicating what that entails. The beneficiary's job description states that he will devote approximately 30% of his time to marketing-related duties; however, the petitioner has not provided a consistent account of the beneficiary's current role at the U.S. company to demonstrate that he primarily devotes his time to managing this function, rather than performing the tasks required to carry-out the function. As discussed, according to the petitioner's business plan, the company intended to hire a promoter supervisor and lower-level promotions staff. Since it has yet to do so, all marketing and promotions duties, including non-managerial functions, would reasonably be assigned to the beneficiary. In the instant matter, it appears that the beneficiary will function as a first-line supervisor of non-professional employees and is directly involved in all functional areas of the business, as well as a number of administrative areas. Although the petitioner provided a very brief list of duties for each of the beneficiary's subordinates, it has not demonstrated that those subordinates will relieve the beneficiary from performing non-qualifying operational duties, such as sales, marketing, training and administrative tasks.

While performing non-qualifying tasks necessary to produce a product or 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. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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.* Here, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

The AAO notes 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, 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)). 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).

Further, 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. The petitioner's future hiring plans are not relevant to this determination. 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). Here, the petitioner indicates that the beneficiary has two direct subordinates and two indirect subordinates. However, the job duties provided for the beneficiary and for his subordinates demonstrate that the beneficiary's subordinates will not relieve him from performing non-qualifying administrative and operational duties.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or an executive capacity, or as a function manager, in the United States. Accordingly, the appeal will be dismissed.

IV. CONCLUSION

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.