

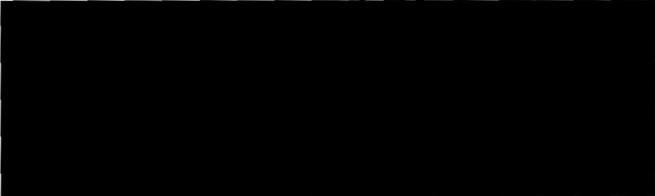


U.S. Citizenship
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Services

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File: EAC 04 242 53992 Office: VERMONT SERVICE CENTER Date: SEP 05 2006

IN RE: Petitioner:



Beneficiary:

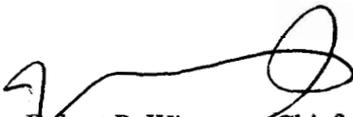
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, 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 seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a branch office of [REDACTED] an Australian public limited company authorized to do business in Massachusetts. It provides international educational services, including consulting and professional development courses. The petitioner seeks to employ the beneficiary as a senior consultant for its “First Steps” product range for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director failed to acknowledge that the beneficiary will manage a subdivision of the U.S. entity, an essential function of the organization, and a team of professional educational consultants. Counsel further clarifies that the beneficiary will be replacing the petitioner’s former senior consultant and undertaking her duties, rather than performing the same duties concurrently, as assumed by the director. Counsel submits a brief and additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial capacity. The petitioner does not claim that the beneficiary will be employed in an executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

The nonimmigrant petition was filed on August 25, 2004. In an appended letter dated August 17, 2004, the petitioner asserted that the beneficiary would serve in the position of "Senior Consultant – First Steps Product Range" with the following responsibilities:

- Directing and coordinating the liaison and negotiation with professionals and clients at the school and systems levels regarding the sale of professional development courses and curriculum resources.
- Coordinate the design, production and delivery of sales and marketing materials.
- Managing, monitoring and reporting course outcomes.
- Contribute to business and strategic planning as part of the Australian office Senior Management Group of the company.
- Participate in the management of the fiscal budget and human resources issues.

- Coordinate training and mentor new consultants.
- Contribute [to] a collaborative team environment.

The petitioner submitted an organizational chart for its group which depicts the U.S. office as having two contracted managers, a senior consultant for “First Steps Literacy” (FSL), an FSL consultant, an office manager, and one per-diem FSL consultant.

On September 3, 2004, the director requested additional evidence to establish that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity, including additional evidence showing the management structure and personnel structure of the office. Specifically, the director instructed the petitioner to answer the following questions:

- 1) How many subordinate supervisors are or will be under the beneficiary’s management?
- 2) What are the job titles and job duties of those employees?
- 3) What executive/managerial and technical skills are required to perform the duties in the United States?
- 4) How much of the time spent by the beneficiary is or will be allotted to executive/managerial duties and how much to other non-executive functions?
- 5) What degree of discretionary authority in day-to-day operations does or will the beneficiary have in the United States position?

The director also requested an organizational chart depicting the beneficiary’s proposed position in the U.S. entity’s hierarchy. In a response dated November 14, 2004, counsel for the petitioner provided the following information regarding the proposed position in the United States:

The US Branch, currently operates with six (6) employees and projects; upon [the beneficiary’s] L-1 US entry, the employment of six additional employees to head, implement and manage the professional development and consulting of the “First Steps” products. [The beneficiary] will initiate the hiring and screening for the permanent positions of the Consulting Team applicants.

* * *

The Consulting Team and International division of Consultants are fully trained professionals with specialized knowledge of the company’s products. The Consultant’s support and method of execution of the product, plays a very important role for classroom teachers to be properly training in each of the components through based courses.

[The beneficiary] will be responsible for the managing of the Consulting Team and Subdivision of the First Steps project at the US Branch. As a Senior Consultant – First Steps Product Range, she will serve under the same conditions as she currently serves in Australia, and her managerial duties will be very similar as those with the company in Australia. . . .

The petitioner attached an organizational chart for the U.S. branch office which depicts a manager and publisher who supervises an office manager and the beneficiary's proposed position. The chart shows that the beneficiary would supervise three teams of consultants, including: six regional consultants (two already hired and three "to be hired"); three national consultants (one of whom was already hired); and five "per diem consultants," including three employees who were already hired. One of the "per diem" consultants was previously identified as a manager. Three of the consultants identified on the organizational chart did not appear on the chart submitted with the initial filing. The petitioner submitted payroll records confirming the employment of a senior consultant, consultant, and office manager as of June 30, 2004.

In addition, the petitioner provided additional information requested regarding the beneficiary's foreign position, and noted that the U.S. position would be "very similar." The petitioner submitted detailed job descriptions for each position within the foreign office, including the consultant and senior consultant positions. The specific duties of the senior consultant are identified as:

- Co-ordinates and directs the negotiation of the location, cost and logistics of professional development courses and consultancy
- Facilitates professional development courses and consultancy
- Co-ordinates and directs responses to interest in the purchase of professional development courses and curriculum resources
- Co-ordinates and directs phone and e-mail support to agents delivering professional development on ECU RL's behalf
- Coordinates, directs the delivery of, and conducts information sessions regarding the nature of professionals development courses and curriculum resources
- Designs, writes or reviews and revises curriculum and professional development materials
- Designs, drafts and reviews sales and marketing materials, including advertisements, brochures, newsletters and journal articles
- Attends education conferences to present papers, seminars and workshops promoting the Product Range
- Records revenue, expenses and client feedback for each professional development course led
- Attends and contributes to . . .senior management group meetings on a fortnightly basis
- Responds promptly to circulated business planning meetings
- Assists the manager in developing an annual forecast
- Monitors and analyses trends in course and consultancy sales, royalty returns and strategic plan KPI data
- Co-ordinates and directs the training of new consultants
- Attends and contributes to team and monthly staff meetings
- Supports and assists other Consultants in course preparation and presentation
- Responds to requests for copyright permission promptly
- Complete administrative duties. . . as directed by the Manager.

The petitioner noted that the beneficiary's duties with the foreign entity are approximately 85 percent managerial and 15 percent technical or marketing-related. The petitioner noted that her managerial duties included contributing to the conceptualization, research and development and creation of texts and

professional development course material, coordinating and facilitating First Steps professional development, managing financial and project planning, and serving on the senior management team, while her technical duties included provision of customer service and ongoing support to new and existing customers, and training and mentoring consultants.

The director denied the petition on December 1, 2004, concluding that the beneficiary would not be employed in a primarily managerial or executive capacity. The director observed that it does not appear that the U.S. company employs a staff who would relieve the beneficiary from “performing the non-qualifying duties of the daily operation of the company.” The director further observed that the petitioner already employs a senior consultant and questioned the need for the beneficiary’s services in the same position. The director acknowledged that the petitioner intends to hire approximately six to seven additional employees in the future, but noted that it must be established that the beneficiary would be employed in a managerial or executive capacity immediately upon her transfer to the United States, not at a future date. The director found that the petitioner’s current staffing levels did not warrant the employment of the beneficiary in a managerial position.

The director also determined that the petitioner had failed to establish that the beneficiary would be supervising and controlling work of supervisory, professional or managerial employees on a full-time basis upon arriving in the United States, or that she would manage an essential function, department or subdivision of the organization.

On appeal, counsel for the petitioner asserts that the director “failed to understand the Petitioner’s organizational business plans and unique consulting business structure.” Counsel notes that while the director acknowledged the petitioner’s staffing levels, she failed to take into account that the employees are “educational consultants” and should be classified as professionals. Counsel contends that the beneficiary will manage a subdivision of the U.S. branch, a team of professional educational consultants, and an “essential function” of the organization, namely the “First Step consulting team subdivision of the US Branch.”

Counsel further contends that the beneficiary would be replacing the individual who was employed as the U.S. entity’s senior consultant as of the date of filing, rather than serving concurrently in the same position. The petitioner submits evidence that this employee, who held an H-1B visa valid until September 30, 2004, has returned to Australia to assume a position with the foreign entity.

Upon review, counsel’s assertions are not persuasive. 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(1)(3)(ii). The petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

Furthermore, 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 show that the beneficiary *primarily* performs these specified responsibilities and does not

spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position.

The job description submitted with the initial petition was too broad and nonspecific to convey an understanding of the beneficiary's proposed daily responsibilities, such that they could be classified as primarily managerial in nature. For instance, the petitioner indicated that the beneficiary would be "directing and coordinating the liaison and negotiation with professionals" regarding sales of the company's products and services, and coordinating "the design, production and delivery of sales and marketing materials." The petitioner did not, however, identify what specific tasks the beneficiary will perform to "coordinate" sales negotiations, identify who would actually provide the petitioner's sales services, or explain who is responsible for the actual design and production of sales and marketing materials. Without additional information, it is impossible to conclude that the beneficiary's role in sales and marketing of the petitioner's products is primarily managerial in nature. Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Similarly, the initial job description included vague duties such as "managing, monitoring and reporting course outcomes," "participat[ing] in" the management of the fiscal budget and human resources issues, coordinating training and mentoring new consultants, and contributing to "a collaborative team environment." Again, the petitioner failed to specify how the beneficiary would "manage" course outcomes, identify the scope of her contribution to human resources and budget issues, or explain how training consultants rises to the level of managerial capacity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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).

Upon review of the initial job description, the director instructed the petitioner to answer five specific questions regarding the beneficiary's U.S. proposed employment in a managerial or executive capacity, including the amount of time the beneficiary would allot to managerial versus non-managerial duties, and the job titles and job duties of the beneficiary's proposed subordinates. In response, the petitioner stated that the beneficiary would initiate the hiring of six new staff members upon her transfer to the United States and would be responsible for "managing . . . the Consulting Team and Subdivision of the First Steps product at the US branch." Other than stating that the beneficiary's responsibilities would be "very similar as those with the company in Australia," the petitioner did not elaborate upon the beneficiary's duties or otherwise respond to the director's specific inquiries regarding the beneficiary's proposed U.S. employment. 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. 1998) (citing *Matter of Treasure Craft of*

California, 14 I&N Dec. 190 (Reg. Comm. 1972)). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, the AAO notes that the initial description of the beneficiary's duties did not specifically indicate that she would be responsible for hiring or directly supervising consultants, a responsibility that the petitioner and counsel now emphasize as being among her primary responsibilities. In fact, the petitioner identified the beneficiary's current role in training and mentoring the foreign entity's consultants as "technical" rather than "managerial" in nature. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner's indication that the beneficiary's responsibilities will be "very similar" to her current responsibilities with the foreign entity is insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity with the U.S. entity. The U.S. entity, which appears to have commenced business operations in the beginning of 2003, is in an earlier stage of organizational development in terms of staffing and would not necessarily require the beneficiary to perform the same proportion of managerial versus non-managerial duties. For example, the company-wide organizational chart submitted with the petition showed one senior consultant, six consultants, and two "per diem" consultants working for the foreign entity, versus one senior consultant, one consultant and one "per diem" consultant working for the U.S. entity.

Further, the detailed job descriptions submitted for the beneficiary's foreign position, and those of the foreign entity's other employees, fail to establish that the position of senior consultant is primarily managerial in nature. The job descriptions submitted show considerable overlap between the duties of a consultant and senior consultant within the petitioner's international organization, suggesting that the latter is more akin to a "lead" position, as opposed to a supervisory or managerial position. For example, both positions are responsible for: designing, writing, reviewing and revising curriculum and professional development materials; recording revenue expenses and client feedback for professional development classes delivered; conducting information sessions regarding the company's products and services; "facilitating" professional development courses and consultancy; mentoring new consultants; drafting or contributing to the drafting of sales and marketing materials; attending conferences to present papers, seminars and workshops promoting the organization's products; supporting and assisting other consultants in course preparation and presentation; attending and contributing to weekly team meetings and monthly staff meetings and completing administrative duties assigned by the manager. None of these duties appear to be managerial or executive in nature. 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).

While the senior consultant position is assigned some duties not assigned to other consultants, the record fails to establish that these duties would be the beneficiary's primary responsibilities. For example, the senior consultant is responsible for attending management meetings twice monthly, participating in business planning meetings, assisting in the development of an annual forecast, and analyzing sales trends and key performance indicators to provide data used by the manager to make financial and human resources decisions. While these duties would be considered managerial in nature, the petitioner has not established that they

would require a significant portion of the beneficiary's time. The only other distinction made between the consultant and senior consultant position is that the latter "coordinates" negotiations with clients, responses to inquiries made by potential clients, and provision of support to "agents" delivering professional development, while the consultant is described as directly performing these duties. However, it is not clear how the senior consultant "coordinates" these sales and customer service activities or whether these duties would be **considered supervisory in nature**. In addition, the AAO notes that the petitioner conceded that the beneficiary's role in "providing customer service and ongoing support to new and existing customers" is "technical" rather than managerial in nature.

Overall, the petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Based on the foregoing discussion, it appears that the duties of a senior consultant, while professional and complex in nature, do not differ significantly from those of a consultant. The petitioner's assertion that the beneficiary currently devotes 85 percent of her time to management-level duties, and the implied suggestion that her time would be similarly allocated in the proposed U.S. position, is not supported by the evidence in the record. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of a detailed and credible breakdown of how the beneficiary's time would be allocated, the record does not demonstrate that the beneficiary will function primarily as a manager. Rather, it appears that the beneficiary would be directly performing tasks related to the petitioner's marketing, product and service development, service delivery and sales functions. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the beneficiary is not required to supervise personnel, if it is claimed that her 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 AAO acknowledges that the petitioner's consultants are employed in professional positions. However, as discussed above, the evidence of record does not establish that the beneficiary will be primarily supervising these employees, as the duties of the senior consultant and consultant are barely distinguishable. In addition, the position description for a "manager" within the petitioner's organization suggests that this position, rather than the senior consultant, is actually responsible for prioritizing the duties of the consultants and senior consultants, and conducting their performance reviews, which raises further questions regarding the level of authority the beneficiary would exercise over the petitioner's consultants.

Counsel correctly states on appeal that, pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a one- to two-year old company providing professional development and educational consulting services to the primary and secondary school market. The organizational chart

submitted with the initial petition stated that the company employed two managers on a contract basis, one senior consultant (to be replaced by the beneficiary), one office manager, one consultant, and one "per diem" consultant. The petitioner submitted payroll records confirming the employment of the office manager, senior consultant and consultant. While the AAO agrees that the petitioner has a reasonable need for the beneficiary's services to replace the departing senior consultant, it cannot be concluded that the petitioner employs sufficient employees to relieve the beneficiary from performing the day-to-day operational functions of the petitioner's service-oriented businesses. Regardless, 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). As discussed above, the petitioner has not established this essential element of eligibility.

Alternatively, counsel asserts that the beneficiary will be employed in a qualifying managerial capacity because she "will manage essential functions pertaining to the 'First Step' consulting team subdivision of the US Branch." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description that 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. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

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.

As discussed above, the petitioner fails to adequately document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because, as discussed above, it appears that a substantial portion of the beneficiary's duties are the same duties performed by the consultants she is claimed to supervise. These duties, which involve designing marketing and sales materials and participating in course delivery, do not fall directly under traditional managerial duties as defined in the statute. Again, absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The record does not establish that the beneficiary will primarily manage the

“consulting team subdivision,” rather than performing the same marketing, sales and services-oriented duties performed by the consultants.

The AAO acknowledges the petitioner’s assertion that it intends to expand its operations and hire additional consultants to staff its United States operations. However, the petitioner’s future staffing levels and business activities cannot be taken into account when determining whether the beneficiary will serve in a qualifying capacity. 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. 1978).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.