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FILE: LIN 06 039 52965 Office: NEBRASKA SERVICE CENTER Date: JAN 25 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



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, Nebraska Service Center, denied the petition for a nonimmigrant visa. 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 employ the beneficiary in the position of general manager 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, a Delaware corporation, authorized to do business in Michigan, states that it is engaged in the wholesale of textiles. The petitioner claims to be a wholly-owned subsidiary of [REDACTED] located in Germany. The petitioner seeks to employ the beneficiary for a period of one-year to open a new office in the United States.**

On December 15, 2005 the director denied the petition, concluding that the record contains insufficient evidence to demonstrate: (1) that sufficient physical premises to house the new office have been secured; and, (2) that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

On January 17, 2006, the petitioner's counsel timely filed the instant appeal. On appeal, counsel for the petitioner asserts that the petitioner has met the requirements for a "new office" petition. In particular, counsel asserts that the U.S. company is "committed to leasing office space," and is "reviewing various commercial office space and will make a decision concerning a new property within a matter of weeks." In addition, counsel states that the U.S. company will hire an administrative employee and the U.S. company is "in the process of contacting KPM Group, an employment agency, to initiate the hiring process." Counsel submits a brief, an email from the beneficiary indicating that he will contact an employment agency, and several listings of office space for rent.

On February 24, 2006, counsel for the petitioner submitted additional documentation to supplement the Notice of Appeal. Counsel submitted a resume for [REDACTED] and an offer of employment from the U.S. company addressed to the same individual. The offer of employment is for the position of sales manager at the U.S. entity beginning on February 6, 2006. In addition, counsel submitted an unsigned lease between Nemer Property Group and the U.S. entity for the lease of 1200 square feet of office space. The lease is valid from March 13, 2006 until June 30, 2009.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office in the United States as required under the regulations 8 C.F.R. § 214.2(l)(3)(v).

At the time of filing the original petition, the petitioner submitted a one-page document entitled "Lease agreement of office." The agreement states that the United States company will lease space from the beneficiary. The size of the leased space is "50 sqm consisting of office and stores." The lease indicates a term of three years, from September 1, 2005 until September 1, 2008. The lease agreement was signed

by the chief executive officer of the United States company, but is not signed by the owner of the space, the beneficiary.

On November 28, 2004, the director requested additional information regarding the submitted lease agreement. In particular, the director requested: (1) evidence that the beneficiary owns the property, or an explanation as to who the owner is of the leased property; (2) photographs of the interior and exterior of the office; (3) evidence that the property is zoned for commercial use; and, (4) an explanation as to where the new employees will work if the office space is in a private residence.

The petitioner submitted a response on December 8, 2005. In a letter dated December 7, 2005, the petitioner explained that the beneficiary entered into a lease agreement with [REDACTED] Company for the lease of an apartment. In addition, the petitioner stated that the United States company entered into a sublease agreement with the beneficiary for the lease of 50 square meters for office and storage space. The petitioner further stated that the leased space is located in a residential zoning district, however, a home business is permitted in that zoning district. The petitioner further stated that the lease agreement is temporary and the company plans to lease a "more suitable space for the future activities," and the new employees will work in the new location. The petitioner submitted the lease agreement made between [REDACTED] Company and the beneficiary for the lease of an apartment from August 26, 2005 until August 31, 2008. The petitioner also submitted evidence that the leased property is in a residential zoning district that permits home businesses. Finally, the petitioner submitted photographs of the exterior of a home and a picture of an empty room in the interior of the home.

In the denial decision dated December 15, 2005, the director noted that the submitted lease agreement specifically bars business activity on the leased property. The lease states that the apartment is to be used "exclusively as a private residence for the Residents." The director also noted that the signed lease agreement states that the beneficiary may not assign or sublet any part or his interest in the lease without first obtaining the written consent of the owner. The director stated that "since no evidence of this written consent is in the record, the evidence does not establish that the petitioner has validly secured any physical premises."

On appeal, counsel for the petitioner asserts that the petitioner is "reviewing various commercial office space and will make a decision concerning a new property within a matter of weeks." On February 27, 2006, counsel for the petitioner submitted supplemental information, including a new lease agreement between Nemer Property Group and the U.S. entity. The new lease is for an office space of 1200 square feet, and is valid from March 13, 2006 until June 30, 2009.

The petitioner did not submit a lease agreement for an office space until February 27, 2006, which commenced on March 13, 2006, nearly four months after the instant petition was filed. 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). Since the petitioner did not submit a lease agreement for a valid office space when the instant petition was filed, the appeal will be dismissed.

Moreover, the petitioner has not described its anticipated space requirements for the new business. The initial lease agreement submitted by the petitioner was for a space of 50 square meters, and the second

lease agreement is for an office space of 1200 square feet. Based on the insufficiency of the information furnished, and the unexplained existence of a lease agreement for a space that was for residential purposes only, it cannot be concluded that the petitioner had secured sufficient space to house the new office as of the date of filing. For this additional reason, the appeal will be dismissed.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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.

The nonimmigrant petition was filed on November 21, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of general manager and his responsibilities will include “coordinate and managing sales, production and finance activities in North America.” In the letter of support dated November 14, 2005, the petitioner described the duties to be performed by the beneficiary as the following:

[The beneficiary] will be transferred to the United States to work as the General Manager for [the U.S. company] and as General Director for [the foreign entity]. The Beneficiary’s main responsibility will be the overall management of the company. [The beneficiary] will be responsible for the development and implementation of the company’s policies, strategic planning, hiring new personnel, coordination and managing the sales, production and finance reporting.

More detailed, [the beneficiary’s] tasks will be as follows:

1. Development of strategies and budgets for [the U.S. company].....20%
2. Coordinating and manage sales and marketing.....30%
3. Hire, train and supervise new employees.....5%
4. Report to Parent Corporation.....10%
5. General management of the manufacturing plant in Mexico.....20%
6. Finance and economy management.....15%

The petitioner also submitted the following job description for the position of general manager at the United States company:

The General Manager has to run [the U.S. company] and MT, MX companies with full responsibilities of profitability and in accordance to the legal requirements in Mexico.

Main Tasks:

- Manage the company in accordance to the MT Group objectives
- Increase efficiency and productivity
- Follow the budgets set up in corporation with MT, Inc. and MT, GmbH
- Respect the local[,] legal and tax regulations
- Maintain and take care of the existing customers and markets
- Make sure that the customer requirements are achieved in the best possible way
- Prepare budget and reports to [the U.S. company] and the [foreign company]
- Visit the customers in a continuous manner
- Lead and guide the employees in the company
- Make sure that the company meets the quality requirement from our customers [REDACTED]
- Bank transfer
- Follow up on debtors and creditors
- Tax statements

The petitioner submitted an organizational chart for the United States company. The chart indicates that the beneficiary will fill the position of general manager and will supervise sales, phases, the production located in Mexico, and finance. The chart did not indicate specific job titles. In addition, the petitioner submitted a

business plan for 2005 -2008. According to the business plan, it appears that the only individual that will be employed by the U.S. company for 2005 -2006 will be the beneficiary. The business plan states that in 2006 -2007, the U.S. company will employ an "adm./backup person."

On November 28, 2005, the director requested additional evidence to establish that the intended U.S. operation, within one year of operation, will support an executive or managerial position. In part, the director requested: (1) a detailed description of the beneficiary's anticipated job duties at the end of 2006, and a report of the anticipated staffing by that date; (2) an explanation of who will actually perform the sales and marketing function in 2006; (3) an explanation of where will these individuals be located; and (4) if the petitioner plans to change the sales and marketing function in 2006, an explanation of the changes that will be implemented.

In the response, the petitioner submitted a letter dated December 7, 2005, and stated the following details of the beneficiary's position in the United States:

The General Manager will be responsible for the overall management of [the U.S. company]. This includes formulation of goals, development of business strategies, and negotiations with existing and potential customers. Currently, [the U.S. company] has some very important customers within the automotive industry. These are, [redacted], [redacted], and [redacted].

It is the responsibility of the General Manager to renegotiate contracts with these important clients and also locate new possible clients, analyze their needs, and negotiate contracts. It is anticipated that [the U.S. company] will hire an employee to perform administrative office tasks in the beginning of 2006, and to hire a marketing and sales person later in the spring of 2006. Thus, the anticipated staffing situation a year from now will be as follows:

- General Manager
- Sales and Marketing Associate
- Administrative Assistant

* * *

The General Manager will be responsible for market analysis, including analysis of competition in the market, adjustment of the company's products to meet industry demands, and research possibilities for new market segments. Goals and strategies will be developed by the General Manager based on these analyses. Additionally, the General Manager will be responsible for the production facility in Mexico, including general direction of employees, production capacity and facility, financial reporting and revenue.

* * *

Relative few but important clients characterize [the U.S. company] business activities in the US. The General Manager is given the responsibility for these very important accounts without supervision. The contracts here are often worth more than 1 million

US\$. He is also responsible for coordinating production capacity in the Mexico facility with demand, and for implementation of production for hiring additional personnel, and for economy and finance.

The General Manager is referring directly to [CEO, President of the foreign company], as the owner and President of [the U.S. company]. He is directly responsible for reporting to me regarding our American subsidiary.

The director denied the petition on December 15, 2005 stating that the submitted evidence is not persuasive in establishing that the beneficiary's proposed position is in a capacity that is managerial or executive in nature. The director noted several discrepancies in the record as to the time line for hiring additional employees. The director stated that the petitioner "does not have a firm plan in place to relieve the beneficiary from performing non-executive duties within one year of approval of the petition."

On appeal, counsel for the petitioner asserts that the U.S. company will hire an administrative employee and the U.S. company is "in the process of contacting KPM Group, an employment agency, to initiate the hiring process." In addition, on February 24, 2006, counsel for the petitioner submitted additional documentation to supplement the Notice of Appeal. Counsel submitted a resume for "Eric A Benninger," and an offer of employment from the U.S. company addressed to the same individual. The offer of employment is for the position of sales manager at the U.S. entity beginning on February 6, 2006.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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 either in an executive or managerial capacity. *Id.*

In addition, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his 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).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will spend on various duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicated in a support letter dated November 14, 2005, that the beneficiary will spend 20 percent of his time with the "development of strategies and budgets for [the U.S. company]." As noted above, the initial business plan submitted by the petitioner indicates that the U.S. company will hire an additional "adm./backup person" in 2006-2007. In the response to the request for evidence, the petitioner stated that the U.S. company will employ a person to perform "administrative office tasks in the beginning of

2006, and to hire a marketing and sales person later in the spring of 2006.” In the second business plan submitted by the petitioner, the plan indicated that the sales and marketing employee will be hired at the end of 2006, rather than the spring of 2006. It is unclear when the U.S. company will employ additional employees, however, it appears that an individual will be hired in 2006 to perform administrative tasks. Since the U.S. company plans to only hire an administrative assistant within the first year of operation, it can be reasonably assumed that the beneficiary will perform several non-qualifying duties such as negotiating contracts, contacting new clients, researching the potential market, and preparing the budget. In addition, without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine administrative tasks. These duties have not been shown to be managerial or executive in nature. 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)).

The petitioner further states that the beneficiary will spend 30 percent of his time “coordinating and manage sales and marketing.” According to the proposed business plan, it is unclear if the U.S. company plans to hire a sales manager in 2006 in order to develop and manage the sales and marketing operation. Thus, it appears that the beneficiary will be developing and implementing the sales functions, rather than supervising the work prepared by subordinate employees. The lack of employees for the beneficiary to direct and coordinate raises questions as to whether the beneficiary will be managing these activities or actually performing the petitioner’s sales and marketing duties. Thus, it appears the beneficiary will spend a majority of his time performing non-managerial duties associated with sales and marketing 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the petitioner stated that the beneficiary will spend 15 percent of his time to “finance and economy management.” According to the record, it is unclear if the U.S. company will hire an individual to perform the finance function for the company in the first year of operation. Thus, it can be reasonably assumed that the beneficiary will perform several non-qualifying duties such as payroll, preparing the budget, paying bills, and implementing financial growth. In addition, without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine administrative tasks. These duties have not been shown to be managerial or executive in nature. 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)).

The beneficiary’s position description is too general and broad to establish that the preponderance of his duties will be managerial or executive in nature. The beneficiary’s job description also includes vague duties such as the beneficiary will be responsible for the “overall management of [the U.S. company];” responsible for “formulation of goals, development of business strategies;” and responsible for “further business development, for hiring additional personnel, and for economy and finance.” 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will "negotiate contracts with these important client and also locate new possible clients, analyze their needs and negotiate contracts;" "responsible for market analysis, including analysis of competition in the market, adjustment of the company's product to meet industry demands, and research possibilities for new market segments;" and "coordinating and manage sales and marketing." It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. at 604.

On appeal, counsel for the petitioner submits an offer of employment for the position of sales manager which was accepted by the individual. The employment will commence on February 21, 2006. When the petition was filed, the petitioner did not submit any information that the U.S. company planned to hire a sales manager in 2006. 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).

In addition, as noted by the director, the record contains several inconsistencies regarding the proposed staffing of the U.S. entity. As noted above, the initial business plan submitted by the petitioner indicates that the U.S. company will hire an additional "adm./backup person" in 2006-2007. In the response to the request for evidence, the petitioner states that the U.S. company will employ a person to perform "administrative office tasks in the beginning of 2006, and to hire a marketing and sales person later in the spring of 2006." In the second business plan submitted by the petitioner, the plan indicates that the sales and marketing employee will be hired at the end of 2006, rather than the spring of 2006. It is unclear when the U.S. company will employ additional employees, however, it appears that one individual will be hired in 2006 to perform administrative tasks. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, 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.

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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the administrative functions of the administrative assistant, who will be the beneficiary's only subordinate employee during the first year of operations. Although the beneficiary maintains a managerial title, the petitioner has not submitted sufficient evidence to substantiate the claim that he is employed in a managerial or supervisory role over other managers, professionals or supervisors.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-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.* As discussed above, the beneficiary will supervise one administrative assistant and potentially one sales manager, and it has not been demonstrated that he would be relieved from performing the day-to-day operations of the business. Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity.

When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full

operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Finally, on review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has not demonstrated that the U.S. company will hire additional employees after one year of operation who would relieve the beneficiary from performing primarily non-qualifying duties associated with operating a business. 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. at 604. The regulations at 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. In the instant matter, the petitioner has not established that it will employ the beneficiary in a predominantly managerial or executive position after one year of operation. Accordingly, the appeal will be dismissed.

The petition will be denied and the appeal dismissed 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.