



U.S. Citizenship
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Services

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File: SRC 06 004 52334 Office: TEXAS SERVICE CENTER Date: **JUL 08 2008**

IN RE: Petitioner:



Beneficiary:

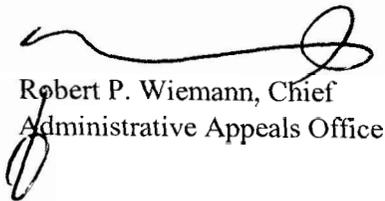
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Texas Service Center, denied the petition for a nonimmigrant visa and 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 extend the employment of its president 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 Florida corporation, operates a floral shop. The petitioner claims that it is a subsidiary of Heald Mellows Solicitors located in Bedford, United Kingdom. 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 status for two additional years.

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

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 beneficiary does in fact function in a primarily managerial and executive capacity as the president of the U.S. company. Counsel clarifies the petitioner's staffing levels, and asserts that the beneficiary's subordinate staff relieves him from performing the day-to-day operations of the U.S. business. Counsel submits a brief and additional documentary 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (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 October 6, 2005. The petitioner indicated on Form I-129 that the U.S. company was established in 2004 and has four employees. In a letter dated October 4, 2005, counsel for the petitioner indicated that the beneficiary has been performing managerial/executive duties as president of the petitioning company and would continue to perform the same duties under the extended petition. Although the petitioner referenced an accompanying employer letter on Form I-129, upon careful review, the employer letter cannot be located in the record of proceeding.

In support of the petition, the petitioner provided an organizational chart which depicts the beneficiary as "chief officer" with the following subordinate employees:

- ██████████ – Principal Floral Designer/Shop Manager
- ██████████ – Sales & Marketing Assistant/Deliveries
- ██████████ – Delivery/General help/cleaning

The petitioner provided a copy of its Florida Form UCT-6, Employer's Quarterly Report, which indicates that the petitioner employed one employee, ██████████, during the second quarter of 2005. The petitioner submitted copies of weekly time records for ██████████ and another employee, ██████████. The petitioner provided copies of employment applications completed by ██████████ and ██████████ Ms. ██████████ application bears with a handwritten notation indicating that she was hired on September 15, 2005 with a start date of September 21, 2005.

The director issued a request for additional evidence on October 14, 2005. The director instructed the petitioner to provide a more specific description of the beneficiary's day-to-day duties and the percentage of time he spends on each duty. The director also requested copies of the petitioner's state and federal quarterly wage reports for all employees from 2005.

In a response dated October 19, 2005, the petitioner indicated that the beneficiary performs the following "primary job functions":

Exercise overall executive and financial control for company's operations (15%)

[The beneficiary] exercises financial control over business operations by ensuring the timely payment of all bills and reviewing and analyzing bank statements, credit card statements and statements from merchant services utilized by the company. He reviews financial and accounting statements and discusses the company's financial position and tax obligations with the company accountant. He holds overall executive control for the company's operations and is the principal individual who negotiates and enters into contracts. For example, as chief executive, he negotiated and signed the company's existing contracts for Teleflora and Flower Shop networks and "After Hours" tuxedo rental services.

Set and monitor company strategies, goals, policies and procedures (20%)

[The beneficiary] sets the company's growth strategy and financial goals. He monitors and determines marketing strategies. For example, [the beneficiary] has researched and identified hotels and wedding venues as key target areas for business expansion through the provision of wedding florals. He sets marketing and sales goals and monitors the staff's progress in achieving these goals.

When the business was new, [the beneficiary] spent a substantial amount of time in analyzing and establishing business procedures, including the appropriate support systems to be utilized for the successful operations of the business. This included analyzing the business's IT, computer and telephone system needs and ensuring the appropriate selection of support systems. [The beneficiary] had to ensure that all systems would be compatible with Teleflora and the specific needs of a floral business

Set and monitor budgets and cash flow (10%)

Through review and analysis of the business's financial statements, [the beneficiary] determines the company's budgets and establishes policies to ensure a positive cash flow.

Represent company before financial entities (5%)

As President, [the beneficiary] represents the company before its bankers and cultivates a good business relationship with the financial institutions with whom the company is involved. He is the primary point of contact with bank representatives.

Exercise discretion over day-to-day operations of business (20%)

[The beneficiary] discusses marketing plans and operations with the Sales & Marketing Assistant and approves marketing activities. He reviews the daily Marketing efforts of the Sales & Marketing assistant and discusses her progress in achieving goals. He reviews and approves advertisements. He previously reviewed and approved the art work for delivery vehicle signage. [The beneficiary] supervises the work of the Shop Manager and discusses current orders, delivery issues, inventory needs and quality control issues with her. He holds

ultimate discretion and authority over all operations of the business. He is a hands-on executive, spending time each day at the business location, supervising and monitoring daily operations.

Research and implement new business opportunities (25%)

As the chief executive of the company, [the beneficiary] was primarily responsible for researching and negotiating the purchase of the current floral shop. He served as the company's representative with the selling agent. He also reviewed the financials produced by the seller, the lease, and the other documents relating to the transfer of the business. Since the current floral shop was purchased in spring 2005, he does not need to perform those exact same functions on a day-to-day basis. However, [the beneficiary] is still actively involved in researching new business opportunities, including the purchase of a second floral outlet. The company came very close previously to purchasing a second shop and [the beneficiary] spent many hours at that time visiting the prospective new location, conducting a detail analysis of the financial and management information and preparing cash flow projections and forecasts. This occupied a large percentage of his time. [The beneficiary] concluded that the second shop that had been identified would not be a good investment and the deal did not move forward. However, he will continue to liaise with brokers and selling agents and conduct due diligence for new business opportunities. On average, one day a week may now be [sic] spent on such activities, whereas the hours spent in the past on these functions was greater when the business was in serious negotiations for the second shop. As [the beneficiary] identifies the next prospective new business investment, the daily time he spends on financial analysis and purchase negotiation will increase.

[The beneficiary] has also researched new business opportunities that are available through the expansion and diversification of services and products currently offered by the floral shop. This includes the identification of Florida Lottery sales as a means to draw additional customers. [The beneficiary] is implementing this new business opportunity through negotiation of the contract for the Florida Lottery and discussions with the Landlord regarding additional signage and the placement of a satellite dish/pole at the business premises along with the supporting technology. He is also researching the possibility and feasibility of joining DUFRESH which will require a commitment for a weekly standing order of flowers and plants. This must be analyzed in view of the company's financial and sales figures. [The beneficiary] is also researching and analyzing the possibility of a joint marketing arrangement for a specialist dish garden, which can be used on graves and engraved to suit.

Interview, recruit, hire and fire all staff, including employees and independent contractors (15%)

[The beneficiary] does not interview, recruit, hire and fire staff on a daily basis. However, as President, he is primarily responsible for this function as necessary. Very recently the Sales & Marketing Assistant position became available when the employee who originally held the position, [REDACTED], left. [The beneficiary] was responsible for reviewing and approving

the advertisement for the vacant position as well as for interviewing replacement candidates and selecting and hiring the current Sales & Marketing Assistant, [REDACTED].

The petitioner also submitted the requested Florida Forms UCT-6, Employer's Quarterly Report, for the first three quarters of 2005. The Form UCT-6 for the quarter ended on September 30, 2005 shows that the company had three employees during the months of July, August and September and paid wages as follows: [REDACTED] \$373.50; [REDACTED] \$5,127.50; and [REDACTED], \$55.00. The petitioner stated that its current employees as of October 19, 2005 included [REDACTED] and [REDACTED]. The petitioner stated that additional staff would be hired as the business expands and a second shop is opened. Finally, the petitioner indicated that it utilizes an accountant and hires attorneys and other professionals as needed.

The director denied the petition on October 29, 2005, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted some discrepancies between the petitioner's organizational chart and wage records, and noted that the petitioner had failed to provide evidence of wages paid to a newly hired employee. The director concluded that the petitioner appears to have only one full-time employee other than the beneficiary. The director further noted that the petitioner did not establish how many hours the other employees work or the nature of their duties.

The director acknowledged the position description submitted for the beneficiary, but noted that duties such as paying bills, reviewing bank and credit card statements, negotiating contracts and performing market research and marketing duties are not managerial or executive in nature. The director therefore concluded that "the day-to-day duties of the position include a large number of duties that would appear to be performing the function of the business, rather than just managing or directing the business." The director further found that the beneficiary would have to engage in the day-to-day business activities given that the company employs only three other employees.

On appeal, counsel for the petitioner asserts that the petitioner does in fact function in an executive managerial and executive capacity. Counsel apologizes for any confusion regarding the number of subordinate employees working for the petitioner and the nature of their employment. Counsel confirms that two of the petitioner's four employees, [REDACTED] and [REDACTED], are employed on a part-time basis, and that they were hired in late September and mid-October 2005, respectively. Counsel notes that the other employee who left the company, [REDACTED] was hired in late June 2005 and quit during the first week of September. Counsel confirms that the petitioner currently has a total of four employees holding the roles of president, principal floral designer/shop manager, sales and marketing assistant, and deliveries/general assistance/cleaning.

With respect to the beneficiary's duties, counsel asserts that all of the beneficiary's duties are managerial and executive in nature, and that his role as president meets the regulatory criteria for both managerial and executive capacity. Counsel emphasizes that the petitioner's business is floral design, sales and delivery, and notes that the beneficiary himself does not arrange and design floral arrangements or participate in sales and

delivery of the petitioner's products. Counsel asserts that the beneficiary is engaged in "planning, organizing, directing, controlling, leading and managing the organization and doing so through his staff."

In support of the appeal, the petitioner submits photographs depicting its employees and employment documentation for its two newest employees. The records show that [REDACTED] worked 24.5 hours the week ended on October 21, 2005 and 13 hours the week ended on October 28, 2005. The only record provided for [REDACTED] shows that she worked for a total of four hours during the week ending September 24, 2005.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner'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.*

Here, while the petitioner has provided a breakdown of the beneficiary's duties and the percentage of time allocated to each duty, the description fails to establish that the beneficiary would primarily perform managerial or executive duties on a day-to-day basis. For example, the petitioner indicated that the beneficiary devotes 15 percent of his time to exercising "overall executive and financial control" over the petitioner's operations. However, the specific tasks associated with this responsibility include paying bills, reviewing banks statements and credit card statements, and other tasks that are essentially bookkeeping or administrative duties and have not been shown to be managerial or executive in nature. The petitioner states that the beneficiary spends an additional 15 percent of his time to setting and monitoring budgets and cash flow and representing the company before financial institutions, but again, these duties appear to be more akin to day-to-day bookkeeping and banking tasks than managerial or executive duties. Further, the petitioner's statement that the beneficiary has "overall executive control for the company's operations" offers little insight into his actual executive-level duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner stated that the beneficiary devotes an additional 20 percent of his time to "set and monitor company strategies, goals, policies and procedures." The petitioner indicated that this responsibility includes setting "growth strategy and financial goals," monitoring and determining marketing strategies, and setting marketing and sales goals. The petitioner did not describe the specific goals or strategies set by the beneficiary, the actual duties he performs in this regard, or identify who on its staff is responsible for performing ancillary duties such as market research. 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 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 further stated that the beneficiary devotes 20 percent of his time to exercising discretion over the day-to-day operations of the petitioner's business, which includes spending time at the business location "supervising and monitoring daily operations," and holding "ultimate discretion and authority over all operations of the business." Although the petitioner indicates that the beneficiary reviews and approves marketing and advertising activities, it has failed to establish who on its staff actually performs the day-to-day tasks associated with these functions. As discussed further below, the petitioner has not provided position descriptions for the beneficiary's subordinates. The petitioner has not established that the time the beneficiary devotes to overseeing the petitioner's retail store operations is spent performing duties that are primarily managerial or executive in nature, nor has it been entirely credible that the beneficiary works in the petitioner's shop but spends only 20 percent of his time performing what the petitioner describes as "hands-on" tasks. The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Finally, the petitioner indicates that the beneficiary devotes the largest portion of his time, 25 percent, to researching and implementing new business opportunities. Although the petitioner provided several examples of the types of business opportunities under consideration, the record fails to establish what specific tasks the beneficiary performs on an ongoing, day-to-day basis to expand the petitioner's business, nor did it provide any documentary evidence related to the petitioner's claimed expansion efforts. 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 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).

The AAO does not doubt that the beneficiary exercises authority over the U.S. company as its president, shareholder, and as the senior employee of its four-person staff. However, based a review of the record in its entirety, the AAO is unable to determine whether the claimed managerial and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative, operational and/or first-line supervisory duties. The position description provided, while considerable in length, provides little insight into what the beneficiary primarily does on a typical day. The fact that the beneficiary manages a business, regardless of its size, 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 (Feb. 26, 1987). Overall, the position description provided falls significantly short of articulating the beneficiary's day-to-day responsibilities, such

that they could be classified as primarily managerial or executive in nature. The petitioner cannot rely on vague characterizations and conclusory assertions to establish the beneficiary's employment in a managerial or executive capacity.

Although the beneficiary is not required to supervise personnel, if it is claimed that his managerial 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 beneficiary supervises a principal floral designer/shop manager, a part-time sales and marketing assistant/delivery person, and a part-time delivery/general help/cleaning employee. According to the organizational chart provided by the petitioner, the beneficiary directly supervises each of these employees, and is the only employee in the company with responsibility for supervising personnel. Accordingly, the petitioner has not established that the beneficiary manages one or more subordinate supervisory employees.

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 a 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. The petitioner has not established that any of the beneficiary's subordinates possess or require a bachelor's degree to perform their job duties, such that they could be considered professionals. Finally, although the petitioner claims that its principal floral designer is also a "shop manager," the petitioner has provided minimal information regarding her actual job duties and areas of responsibility. Again, 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. at 165. The petitioner has not established that this employee is a "manager" other than in position title. Furthermore, as noted above, according to the petitioner's organizational chart, the "shop manager" does not actually supervise the floral shop's other workers, rather, the beneficiary himself serves as their first-line supervisor. The petitioner has not established that the beneficiary supervises and controls a subordinate staff of managerial, professional, or supervisory employees.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. As observed by the director, the record does not demonstrate that the petitioner has a sufficient number of direct or contracted

employees who could perform the non-managerial duties associated with operating the petitioner's business on a day-to-day basis.

As required by section 101(a)(44)(C) of the Act, 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS 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 CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

At the time of filing, the petitioner was a one-year old company operating a retail floral shop that is open for business for a total of 46.5 hours per week. The petitioner employs the beneficiary as its president, a full-time principal floral designer/shop manager, a part-time "sales and marketing assistant" and delivery person, and a part-time employee whose duties are described as including "general help," deliveries and cleaning. The petitioner has not provided position descriptions for the beneficiary's subordinate employees or provided sufficient evidence of the number of hours worked by the part-time employees. It is also unclear how the subordinate employees divide their time among their various assigned roles; however, a weekly time sheet submitted for the sales and marketing employee suggests that this employee spends a large portion of her time delivering orders to customers, and even the principal floral designer/shop manager appears to spend some portion of her time on deliveries. The petitioner reasonably requires personnel to create floral arrangements, purchase inventory from suppliers and receive deliveries, monitor and maintain inventory, take special orders from customers, answer customer's questions, ring up sales transactions, and deliver orders to customers. In addition, it needs someone to market and advertise the business, and to perform day-to-day banking and bookkeeping duties, personnel record keeping, and other administrative and clerical tasks associated with operating any small business.

Based on the evidence submitted, it appears that the majority of the marketing, advertising, administrative, clerical and financial tasks are performed by the beneficiary himself, and these duties have not been shown to be primarily managerial or executive in nature. Furthermore, it is not clear from the record that the one full-time employee and two part-time employees actually relieve the beneficiary from performing all of the other non-managerial tasks associated with operating the petitioner's business. While the principal floral designer/shop manager is employed full time, she does not staff the store during all of its operating hours, and it has not been shown that she is able to essentially operate the business single-handedly while the part-time employees are engaged primarily in delivering orders to customers. Again, it must be emphasized that the petitioner did not provide position descriptions for the beneficiary's subordinates. The AAO will not speculate as to who performs the day-to-day tasks associated with operating the petitioner's business and will not assume that the beneficiary is relieved from performing non-qualifying operational duties.

Therefore, based on the petitioner's representations, it does not appear the petitioner would have a reasonable need for the beneficiary to perform primarily managerial or executive duties. The record does not establish that the beneficiary's three subordinate employees could relieve him from participating in the day-to-day operations of the company on a regular basis. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act and that someone other than the beneficiary performs the majority of the non-managerial duties associated with the business. The petitioner has not met this burden. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO acknowledges the petitioner's assertions that the U.S. company anticipates hiring additional employees and expanding their business operations in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

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.