

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

D7

File: EAC 08 156 52741 Office: VERMONT SERVICE CENTER

Date: JUN 12 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition 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 Georgia corporation, states that it is engaged in investment in commercial real estate and retail/wholesale outlets. It claims to be an affiliate of Sonal Garments, located in Mumbai, India. The beneficiary was previously granted L-1A classification for a period of one year in order to open a new office in the United States and the petitioner now seeks to extend her status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed 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 director inappropriately based his determination on the size and nature of the petitioner's business, rather than on the beneficiary's actual job duties. Counsel contends that the petitioner submitted sufficient evidence to establish that the beneficiary's duties are primarily managerial in nature. 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 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 will 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 petitioner filed the nonimmigrant visa petition on May 8, 2008. In a letter dated April 14, 2008, the petitioner described the beneficiary's duties as company president as follows:

[The beneficiary] is in charge of all administrative operations and management of the company. She has assumed overall responsibility of purchasing the goods, expanding the company's product lines and distribution channels. She enters into contracts on behalf of the company's advantage. She enters into contracts on behalf of the company with suppliers and wholesalers as well as with banks. She supervises sales personnel, establishes new business contracts, negotiates with corporate clients and purchasers, and administers new and existing business contracts. Through her education and experience [the beneficiary] has gained knowledge and experience regarding: examination of performance requirements, delivery schedules, and estimation of costs of materials and production as well as ensuring completeness and accuracy, prepares bids, tests and prepares progress reports, reviews bids for conformity to contract requirements, plans and directs sales programs to promote new markets, and improve fast and efficient customer service. She also has exclusive authority of hiring, firing and promoting employees.

. . . . Her duties include supervision of all financial and marketing operations for the company, as well as entering into contracts, over which she is exercising complete discretionary authority. She is in charge of training marketing representatives to procure orders and improve their performance. Negotiate contracts with banks and clients; requests and approves amendments and or extensions to contracts. She is responsible to direct activities of personnel in sale accounting, inventory, record keeping, receiving and shipping operations to implement fulfillment of contracts. Ultimately, it will be her responsibility to expand [the petitioner] on a sound footing. She recruits and trains the staff and have [sic]

hiring and firing authority over them. Since transferring on the L-1A, she has successfully negotiated business acquisitions and entered into contractual obligations on behalf of the company with vendors and distributors.

The petitioner indicated that the company purchased a gas station and convenience store in October 2007 and entered a management agreement to manage a second store as of February 2008. The petitioner stated that it had five employees at the time of filing and projected that its staff size would grow to ten employees by the end of 2008.

The petitioner submitted copies of its payroll register for both stores for the months of January and February 2008. According to the records, the Amoco gas station managed by the petitioner has three salaried employees, two who earn \$240 weekly and one who earns a bi-weekly salary of \$1,500. The AAO notes that the petitioner signed a management agreement with the owner of this business on February 1, 2008. The petitioner did not explain why the petitioner was responsible for paying employees to operate this store prior to that date.

According to the payroll records for January and February 2008, the Chevron gas station that is owned and operated by the petitioner paid five workers, including the beneficiary, during this period. One employee works 30 hours each week at a wage of \$7.00 per hour, while the other three employees have variable part-time hours at wages ranging from \$6.25 to \$8.00 per hour.

The director issued a request for additional evidence (RFE) on May 21, 2008, in which he requested an organizational chart for the U.S. entity and additional evidence regarding the company's management and personnel structure. Specifically, the director requested information regarding the number of subordinate supervisors managed by the beneficiary, the job titles and job duties of all company employees, and the amount of time the beneficiary allots to managerial or executive duties. The director further instructed the petitioner to submit evidence to establish that the duties the beneficiary will perform if the petition is extended.

In a response dated July 1, 2008, the petitioner stated that the beneficiary will perform the following duties under the extended petition:

- **Financial Management:** Her duties include supervision of the financial operations for the company. She is responsible for major decision making for petitioner relating to financing, general administration, expansion and direction of the company. She with the General Manager hires, fire and review performance of employees (primarily managers).
- **Management Decisions:** possesses all rights to execute all the managerial decisions of the Company; assess General Manager's performance and assist with management issues;
- **Company Representation:** acts in the name of the company in all kinds of business contacts and relations;

- Has total managerial, discretionary and executive authority over the company and all of its activities and employees without limitation.
- Directs and formulate[s] financial strategy to provide funding in developing and continuing the operations to maximize returns on investments; set sales and product cost targets for managers and monitor progress;
- Supervision of the company's operations; oversee standards regarding goods and customer satisfaction policy;
- Organizational Development: projects the Company's future development and executes steps to accomplish the desired growth; plan business strategy and business investments.

The petitioner further indicated the beneficiary's time would be allocated as follows:

1)	Time spent on Management Decisions	25%
2)	Time for Organizational Development	20%
3)	Supervising day to day operations	10%
4)	Financial Representations	20%
5)	Representing the company	15%
6)	Negotiating Business deals	10%

The petitioner also described the staffing structure of both stores operated by the company. The petitioner stated that the North Fork Chevron location employs a general manager, a deli manager, a sales clerk and a cashier, while the Amoco station employs a store manager, a sales clerk and a cashier. The petitioner indicated that the general manager, [REDACTED] is responsible for "overall administration of the business from marketing, purchases, financial matters, advertising hiring and training of employees." The petitioner further indicated that [REDACTED] "plans, develops and establishes policies and objectives of business organization"; "coordinate[s] functions and operations between stores"; and "directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize return on investments." The petitioner stated that the general manager "over looks both stores." The petitioner indicated that the store manager reports to the general manager and is responsible for supervising cashiers, over stocks and day-to-day running of the business, as well as customer relations. Finally, the petitioner indicated that it employs an accountant on an outsourced basis.

The director denied the petition on July 17, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner's description of the beneficiary's duties submitted in response to the RFE was vague and therefore insufficient to establish that the beneficiary performs primarily managerial or executive duties.

The director noted that although the petitioner indicates that it is operating an investment business, the employees do not perform duties associated with the investment function. The director noted that it appears that the beneficiary will in fact be directly involved in operating the convenience stores, with responsibility for first-line supervision of non-professional personnel.

On appeal, counsel for the petitioner asserts that the director erred in concluding that the beneficiary will not be employed in a primarily managerial or executive capacity and instead focused on the fact at the beneficiary is managing a small business. Counsel asserts that the director was "incorrect in making a presumption that 'she will be engaged in non-managerial duties' when its basis for this conclusion stems from the size and nature of the company."

Counsel reiterates a portion of the position description included in the petitioner's letter dated April 14, 2008 and asserts that such duties are managerial in nature in light of the type of business the petitioner operates. Counsel asserts that the beneficiary "employs enough people to operate her outlets and prevent her from having to perform the non-qualifying day-to-day duties of a non-manager."

Upon review, and for the reasons stated herein, the AAO concurs with the director's determination that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

Although the appeal will be dismissed, the AAO notes that the director based his decision, in part, on an improper standard. The director should not hold a petitioner to his undefined and unsupported view of what duties the beneficiary could be "presumed" to perform in light of the size and nature of the petitioner's business. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although U.S. Citizenship and Immigration Services (USCIS) must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification as an intracompany transferee.

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner initially stated that the beneficiary is responsible for "supervising sales personnel," "negotiating with corporate clients and purchasers," "examining costs of materials and production," preparing bids, testing and preparing progress reports," as well as "training marketing representatives to procure orders," and directing activities of "personnel in sale accounting, inventory, record keeping, receiving and shipping operations to ensure fulfillment of contracts." In light of the petitioner's descriptions of its business and organizational structure, these duties are not credible. The petitioner does not employ marketing representatives, sales, inventory,

record keeping or shipping and receiving personnel. It does not purchase materials or engage in production activities, nor is there any evidence that the business deals with corporate clients or purchasers, or any type of bidding processes. The company's clients are retail customers and its staff is comprised of retail store cashiers and their supervisors. 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).

Furthermore, the petitioner's initial description of the beneficiary's duties indicates that she is responsible for "all administrative operations," as well as purchasing the goods sold in the petitioner's stores, duties which do not fall under the definitions of managerial or executive capacity.

In response to the RFE, the petitioner provided an almost entirely different description of the beneficiary's duties. The duties described in the petitioner's response are even more generalized and provided little insight into what tasks the beneficiary actually carries out on a day-to-day basis. For example, the petitioner indicates that the beneficiary's responsibilities include supervision of financial operations, executing "all managerial decisions," having "total managerial and executive authority over the company and all of its activities," and "supervision of the company's operations." The petitioner further indicated that the beneficiary devotes 20% of her time to "organizational development," but did not provide any details as to how she carries out "organizational development" on a day-to-day basis. The petitioner indicated that the beneficiary spends 10% of his time supervising "day-to-day operations," but again provided no explanation regarding his specific tasks beyond this general statement. The petitioner indicated that the remaining 70% of the beneficiary's time will be spent, collectively, on "representing the company," "financial representations," "management decisions," and "negotiating business deals."

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 proposed activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Therefore, the beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to her position merely on the basis of the beneficiary's job title, placement on a general organizational chart or broadly-cast business responsibilities.

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 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). While it appears that the beneficiary exercises the requisite authority over the U.S. company as its president and shareholder, the conflicting and vague position descriptions provided fall significantly short of establishing that the beneficiary's primary duties are managerial or executive in nature.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the

nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit 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. As noted above, at the time of filing the petition in May 2008, the petitioner stated that it employed five workers. The petitioner did not provide its most recent payroll records, but did provide records showing that the company employed seven employees as of February 2008. The petitioner claimed to employ these same seven employees in July 2008 when it responded to the RFE. Given the petitioner's stated number of employees as of the date of filing, it is reasonable to believe that two employees left the company subsequent to February 2008. Otherwise, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, according to the petitioner's payroll records, the company was paying the workers of the Amoco gas station in January 2008, notwithstanding the fact that the petitioner signed a management agreement with the owner of this station on February 1, 2008. *Id.* Given these unresolved discrepancies, the petitioner has not clearly established its staffing levels as of the date the petition was filed.

Nevertheless, the AAO notes that the petitioner claims to employ two managers who are subordinate to the beneficiary, a general manager and a store manager. The store manager, according to the limited evidence in the record, has been working only 30 hours per week, and supervises two sales clerks and cashiers, who may or may not work full-time hours. Contrary to the petitioner's claims, it has not been established that a part-time store manager and two cashiers are sufficient to perform all non-managerial duties associated with operating a gas station and convenience store. This type of business is typically open significantly longer than 40 hours per week, and it is not unusual for such a business to be open for at least 12-14 hours daily.

The claimed staffing of the second business is similar and includes one general manager, one deli manager, and two clerks/cashiers. Again, the petitioner has not established how one deli manager will handle all food operations at the store during all of its operating hours, or that the two cashiers work sufficient hours to staff the store's operating hours. The petitioner's description of the general manager's duties essentially overlaps with the beneficiary's job description and largely paraphrases the statutory definition of executive capacity.

Therefore, a review of the totality of the record does not support a conclusion that the beneficiary's claimed subordinates are supervisors, managers, or professionals. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. Here, it is reasonable to conclude that the beneficiary's "managerial"

subordinate employees will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Even assuming *arguendo* that the petitioner had submitted sufficient documentation of its staffing levels, the petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. The petitioner has not claimed that the beneficiary will be primarily managing an essential function of the petitioning company, other than noting that she is responsible for "all company functions." As discussed above, the petitioner has not submitted consistent, detailed or credible job descriptions sufficient to establish the beneficiary's employment as a function manager.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

Furthermore, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If

the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

As discussed above, the petitioner initially indicated that the beneficiary herself is responsible for purchasing goods for the petitioner's stores and for administrative tasks, duties which are not managerial or executive in nature. The petitioner has not established through the submission of evidence of wages paid to employees the actual number of employees working for the company at the time of filing. Regardless of whether the petitioner employed five or seven employees as of May 2008, it is not evident how these employees would relieve the beneficiary from participating in the day-to-day operations of the company's two convenience stores. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, 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). The record does not demonstrate that the beneficiary will function primarily as a manager or executive under the extended petition.

The petitioner indicates on appeal that the petitioner has hired additional employees and intends to open additional retail locations 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 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, 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.