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



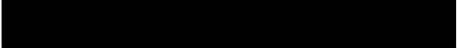
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File: WAC 09 041 50263 Office: CALIFORNIA SERVICE CENTER Date: **OCT 29 2009**

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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 extend the employment of its marketing director 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 California corporation, states that it is engaged in the design, production and sale of gifts, jewelry displays and beauty cases. It claims to be a subsidiary of Jacki Design Presentes Ltda, located in Sao Paolo, Brazil. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States, and the petitioner now seeks to extend her status for three additional years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director failed to take into account the petitioner's overall stage of development in evaluating its current staffing levels, and contends that the director "must take administrative notice of the national economic crisis." Counsel further claims that the director failed to evaluate whether the evidence establishes that the beneficiary manages an essential function of the petitioning organization. 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 it will employ the beneficiary 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 petition on December 1, 2008. The petitioner stated on Form I-129 that the U.S. company had six employees at the time of filing. In an attachment to Form I-129, the petitioner stated that the beneficiary performs the following duties in her position as marketing director:

Responsible for plans and develops company's policies and sales goals, and implements sales goals through subordinates; coordinates distribution channels; market research and pricing; coordinates with advertisement and promotion event; managing marketing and sales department; control commissions.

Coordinates activities with other departments such as operating, manufacturing, strategic planning, research and development, to improve operational efficiency and economy scale. In addition, directs and coordinates promotion of products and company images.

Also in charge of developing new markets, increase share of market, and obtain competitive position in industry. Moreover, analyzes, evaluates and presents market information concerning business strategy, products, market trends, to help company design and develop new products and brands reflect market demand.

The petitioner submitted an organizational chart for its international group of companies. The beneficiary is depicted as marketing director of the U.S.A. Branch, responsible for supervising marketing, administrative, logistics, accounting and design departments. The chart did not identify any subordinate employees by name or job title.

The petitioner submitted copies of its California Forms DE-6, Quarterly Wage and Withholding Report, for the first three quarters of 2008. The Form DE-6 for the third quarter indicates that the company had five employees, including the beneficiary, as of September 30, 2008. The petitioner also submitted copies of sales representative agreements the petitioner entered with On the Road Reps, Inc. and Chris Starratt & Associates, LLC. The agreements cover sales territories in the mid-Atlantic and southeastern United States.

The director issued a request for additional evidence (RFE) on December 8, 2008, in which she instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties in the United States, and the percentage of time spent in each of the listed duties; (2) a copy of the U.S. company's organizational chart, clearly identifying the beneficiary's subordinates by name and job title; (3) a brief description of job duties,

educational level, annual salaries/wages and source of remuneration for all employees; and (4) copies of the petitioner's Forms DE-6 for the last four quarters.

In a response dated December 9, 2008, former counsel for the petitioner submitted the following description of the beneficiary's duties:

[The beneficiary] is responsible for directing and managing the entire range of market planning and development, sales promotion and sales activities of [the petitioner]. Also, she needs to perform the following duties personally or through subordinate supervisors to formulate, recommend and implement policies and programs in the areas of sales, pricing, market and product research, and related activities. She'll make plans for marketing strategy, implementation plans and budgets. [The beneficiary] is also in charge of recruit, terminate, transfer, and promote employees. She's in the position to make key and fundamental decisions about the U.S. subsidiary company with coordination with CEO and Directors of Operations, R&D and Special Projects with the parent company in Brazil.

Counsel stated that, due to the state of the U.S. economy, the company's expansion has been slowed, but it nevertheless intends to expand the company to 15 employees in 2009.

The petitioner submitted an organizational chart indicating that the beneficiary supervises an administrative supervisor, a bookkeeper, a sales employee, and a logistics/warehouse worker. The chart indicates that the company has an open position for a design employee.

The petitioner stated that the administrative supervisor works 20 hours per week and is responsible for coordinating the activities of clerical personnel, organizing office operations and procedures, filing requisition of supplies, and preparing payroll. The petitioner indicated that the bookkeeper works 15 hours per week and is responsible for daily transactions, bank reconciliation, compilation and analysis of financial information, documenting business transactions, preparing payrolls, preparing and sending invoices to customers, and interfacing with outside accountants.

The petitioner stated that the sales employee works 35 hours per week and is responsible for: generating new business through phone contacts, networking and sales calls; providing services for existing accounts; attending trade shows; formulating product performance and customer feedback reports; and "other office related activities." Finally, the petitioner indicated that the warehouse and logistics employee's duties are: "reading customer orders and shipping orders to determine items to be moved, gathered or distributed"; "filling requisitions, work orders or requests for tools and other stock items and distributing items to production workers or assembly line"; "assembling customer orders from stock and placing orders on pallets or shelves or conveying orders to packing station or shipping area"; and "recording amounts of items received or distributed."

The petitioner re-submitted its Form DE-6 for the third quarter of 2008. The quarterly wage report shows that the petitioner paid: \$5,000 to the beneficiary; \$2,125 to the bookkeeper; \$1,000 to the administrative supervisor; \$361.80 to the sales employee; and \$355.20 to the logistics/warehouse employee. Three employees worked the whole quarter, while two employees, presumably the sales and logistics employees, were hired in September 2008.

The director denied the petition on December 18, 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 determined that the beneficiary's claimed job duties are too broad and nonspecific to convey an understanding of what she actually does on a day-to-day basis. The director further determined that the petitioner did not establish that it could support a managerial or executive position. The director noted that according to the company's 2007 Form 1120, U.S. Corporation Income Tax Return, the petitioner reported a loss of over \$78,000. The director therefore questioned whether the petitioner generates sufficient revenue to remunerate its five employees. Finally, the director found that the petitioner did not establish that the beneficiary supervises a staff of professional, managerial or supervisory personnel who relieve her from performing non-managerial duties. Rather, the director determined that the beneficiary will be directly providing the services of the company and supervising four non-professional employees.

On appeal, counsel states that "the petitioner recognizes that economic conditions have not permitted the retention of personnel for the enterprise at the desired level either in terms of number of employees or their proper designation as managers and sub-managerial personnel." Counsel asserts that the petitioner nevertheless achieved sales in excess of \$265,000 in 2008 and that such growth would continue under the beneficiary's supervision. Counsel asserts that the global economic crisis was not properly taken into consideration in the adjudication of the petition.

Counsel further asserts that the director's reliance on the small staff size of the petitioning company "was misplaced as it plainly did not take into proper account . . . the 'stage of development' of the enterprise."

Finally, counsel asserts that the beneficiary qualifies for the benefit sought as a functional manager, and contends that the director failed to analyze whether she manages an essential function within the organization. Specifically, counsel states:

In the instant matter, only the most scant consideration was given to the "functional manager" category. Yet, the facts before the Director suggest that only this analysis affords a true picture of the nature and scope of the beneficiary's U.S. assignment. Among these facts are the following: 1. Both the parent company and the U.S. petitioner actually bear the name of the beneficiary. [The beneficiary] is the "JACKI" referred to in the company name. 2. Her background prior to entering the U.S. includes successful completion of a baccalaureate degree in Product Design which is the evaluated equivalent of an American university degree in Design and Applied Arts. 3. Her background also includes several years of undisputed overseas managerial employment involving major responsibility for directing the research and design relating to the gift items that are the stock-in-trade of both the parent company and the U.S. enterprise. 4. Her assignment in the United States as manager in charge of the marketing component of the enterprise is directly related to her advanced education and her prior experience.

Counsel argues that "the marketing function is critical for an enterprise which seeks to enter the American market with imported gift products that will appeal to U.S. wholesale buyers," and that "only the beneficiary is suited to discharge this role." Counsel further asserts that the beneficiary, as the sole local manager, has been responsible for "all personnel actions, all decisions relating to pricing, sales contracts, participation in trade shows and other promotional marketing activities, and virtually all other decisions necessary to establish the presence of [the petitioner]."

Counsel concludes that "by applying the proper 'functional analysis' and taking into account relevant factors bearing on the 'stage of development' of the enterprise, it will be seen that her status as a true manager has been established beyond serious doubt."

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity 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.* The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(C) requires a statement of the duties the beneficiary performed during the previous year, and a statement of the duties to be performed under the extended petition.

Furthermore, the definitions of executive and managerial capacity each have two separate parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Despite multiple opportunities to provide the detailed description of the beneficiary's duties required by the regulations, none of the submitted job descriptions address the specific managerial or executive job duties to be performed by the beneficiary in the position of marketing director. For example, the petitioner stated that the beneficiary "plans and develops company policies and sales goals"; is "in charge of developing new markets, increasing share of market and obtaining competitive position in the industry"; "coordinates distribution channels"; "directs and coordinates promotion of products"; and "manages marketing and sales department." The petitioner did not identify any specific tasks the beneficiary performs to develop new markets, "obtain competitive position," or "coordinate" distribution channels or promotion of products. 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).

Although the petitioner submitted an organizational chart indicating that the beneficiary would oversee administrative, accounting, logistics, marketing and design employees or departments, the AAO notes that most of the beneficiary's stated duties suggest that she is primarily responsible for directly performing many aspects of the marketing function, including non-managerial duties such as performing market research; "analyzing, evaluating and presenting market information concerning business strategy, products, market trends," and coordinating promotion and advertising. The petitioner stated that the beneficiary manages the "marketing and sales department" but the petitioner has not established that it actually employs any subordinates responsible for performing the specific non-managerial marketing duties attributed to the beneficiary. Rather, the petitioner's "marketing and sales department" appears to consist of one sales employee. Furthermore, although the petitioner indicates that it hired the sales employee during the third quarter of 2008, the AAO notes that almost all of the petitioner's sales invoices for the month of September

2008 identify the beneficiary as the representative responsible for the sale. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO cannot conclude that the beneficiary would perform primarily managerial duties associated with the sales and marketing functions.

Upon review of the inadequate job description submitted with the petition, the director reasonably requested a detailed description of the duties the beneficiary performs on a day-to-day basis and the percentage of time the beneficiary devotes to specific duties. While the petitioner submitted a response to this request, the position description provided was even more general than the initial description, did not include the percentage of time the beneficiary devotes to specific duties, and therefore fell significantly short of providing the level of specificity requested by the director and required by the regulations.

For example, the petitioner stated that the beneficiary is responsible for "directing and managing the entire range of market planning and development, sales promotion and sales activities" of the U.S. company, including responsibility for "marketing strategy, implementation plans and budgets." The petitioner further stated that the beneficiary is responsible to "formulate, recommend and implement policies and programs in the areas of sales, pricing, market and product research," to recruit employees and make personnel decisions, and to "make key and fundamental decisions about the U.S. subsidiary." 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. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added additional generic duties to the job description. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Although the director specifically addressed the deficiencies of the submitted position descriptions in the notice of decision, on appeal, counsel again fails to clarify the beneficiary's actual duties, and instead asserts that the beneficiary is clearly a "functional manager," and that the director erred by failing to come to this conclusion. Therefore, the record as presently constituted contains no detailed description of the beneficiary's duties, and the petitioner's claim that she is employed in a primarily managerial capacity fails on an evidentiary basis. 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)).

Overall the minimal descriptions submitted suggests that the beneficiary exercises discretion over the U.S. company, but serves in a first-line supervisory capacity over non-professional subordinates and personally performs most aspects of the petitioner's marketing function, including both managerial and non-managerial aspects of the function.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial. The petitioner lists the

beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS 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 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.

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, 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 petitioner stated on Form I-129 that it employs a staff of six employees. The petitioner's organizational chart and quarterly wage reports identify a total staff of only five employees, including the beneficiary. The petitioner has not identified the claimed sixth employee or provided evidence of wages paid to him or her. The employees include one part-time administrative employee, a part-time bookkeeper, a logistics and warehouse employee and one sales employee. Although the petitioner claims that the sales and logistics employees work full-time, the petitioner has not provided evidence that they are being paid wages commensurate with full-time employment. In addition, some of the duties assigned to the beneficiary's subordinates are not entirely credible. For example, the petitioner indicates that the administrative supervisor "coordinates activities of various clerical workers within department" and is responsible for hiring staff. The administrative supervisor, notwithstanding his job title, is the only administrative or clerical employee of the U.S. company and clearly does not supervise other workers. The position description for the warehouse worker indicates that he is responsible for "filling requisitions, work orders or requests for tools or other stock

items and distributing items to production workers or assembly line." The petitioner does not have production workers or an assembly line. 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, as noted above, most of the beneficiary's duties are related to sales and marketing, and the record suggests that she was directly performing sales duties even after the sales employee was hired. The petitioner has not identified any lower-level workers who are responsible for importing products from the petitioner's foreign operations or relieving the beneficiary from performing non-managerial duties associated with the marketing and promotion of the petitioner's products. The petitioner has not provided sufficient evidence that it employs a subordinate staff who would relieve the beneficiary from performing non-qualifying duties. 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. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner's primary argument on appeal is that the director failed to consider whether the beneficiary would be employed as a function manager. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The petitioner does not claim that the beneficiary qualifies for the benefit sought based on her supervision of subordinate personnel, and the record does not support a finding that she supervises subordinate professional, managers or supervisors.

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 provide a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The fact that the beneficiary is the only employee in the company responsible for marketing the petitioner's products in the United States will not elevate her position to that of a function manager. In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish employment in a managerial capacity. However, the statute continues to require that an employee perform primarily managerial or executive duties in order to qualify for this visa classification. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Moreover, federal courts continue to give deference to USCIS's interpretation of the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. *See Boyang Ltd. v. INS*, 67 F.3d 305(Table), 1995 WL 576839 at *5 (9th Cir. 1995)(unpublished)(citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); *see also, IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991).

Counsel further argues that the beneficiary should be considered a function manager because she has a bachelor's degree in product design, because the petitioner's group of companies (which is owned by the beneficiary's parents), bears her name, and because she served in a managerial capacity with the foreign entity. Counsel has not explained how any of these factors have any bearing on whether the beneficiary performs primarily managerial or executive duties in her role as marketing director for the U.S. entity.

In this case, while the AAO does not doubt that the beneficiary has authority to make decisions with respect to the management of the United States entity, the record does not support a conclusion that her duties are managerial or executive in nature. 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).

The AAO acknowledges counsel's argument that the petitioner was negatively impacted by current economic conditions in the United States, and that such factors should be taken into account when analyzing the petitioner's staffing in light of its current stage of development. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or **executive position**. 8 C.F.R. § 214.2(l)(3)(v). **When a new business is first established and commences operations**, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. Neither the statute nor regulations provide for any additional accommodations for new offices based on economic conditions or other factors. If the petitioner cannot establish that the beneficiary is performing primarily managerial or executive duties at the end of the first year of operations, the beneficiary is ineligible for an extension.

The AAO also acknowledges the petitioner's claim that it intends to increase its staffing levels to 15 employees in 2009. 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. 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.