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



U.S. Citizenship
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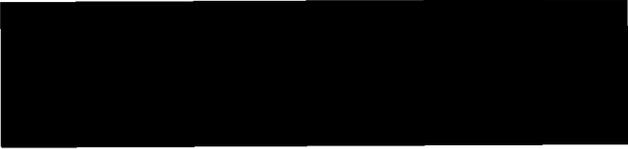
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File: EAC 09 026 50579 Office: VERMONT SERVICE CENTER Date: **MAR 12 2010**

IN RE: Petitioner: 
 Beneficiary:

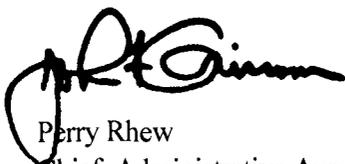
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration
 and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a limited liability company organized in the State of Maryland in 2003, states that it is engaged in the import of textiles. It claims to be an affiliate of Akcay Tekstil, located in Turkey. The petitioner seeks to employ the beneficiary in the position of chief financial officer for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director observed that the U.S. company currently has only one employee and the petitioner failed to establish how the beneficiary would be relieved from performing non-qualifying duties associated with the day-to-day operation of the business.

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 disregarded evidence that the petitioner intends to purchase a retail store with four employees, and failed to acknowledge that the beneficiary will continue to oversee the foreign entity and its staff of 54 workers during his assignment to the United States. 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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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

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

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 Form I-129, Petition for a Nonimmigrant Worker, on November 4, 2008. The petitioner indicated that it has one employee and is self-described as a "textile import company that imports and distributes Turkish textile products manufactured by the parent company, both retail and wholesale." In a letter dated October 31, 2008, the petitioner described the beneficiary's proposed duties as the following:

While serving as Chief Financial Officer of [the petitioner] in the United States, [the beneficiary] will continue to be responsible for managing, directing and overseeing business operations at [the foreign entity] in Turkey. Operating independently, he will continue to oversee and manage the global operations of the company. He will explore business opportunities and meet with prospective customers in the United States, and he will be responsible for negotiating contracts, increasing the success of the Maryland office, expanding business opportunities in other U.S. cities, and designing and implementing a marketing plan for the company's textile products. He will directly supervise the one U.S. employee currently working in the Maryland office, and will indirectly supervise the 54 employees in Turkey. As the U.S. operations grow, he will be responsible for hiring and supervising additional U.S. employees. . . .

[The petitioner] plans to increase its commercial customer base with major hotel and hospitality establishments for its bath product lines. [The beneficiary's] presence in the United States, as CEO and CFO of the company, will provide the company with the proven skills of an established leader who can meet with representatives of major establishments to discuss the company's products, provide samples of high quality materials used in making the products, and assure these potential customers of the company's ability to fulfill their product needs.

[The beneficiary] will pursue business development ideas for the company while he is in the United States. For these new projects, he will prepare business forecasts, negotiate contracts, and oversee the financing and financial reporting. He will consult with his managers in Turkey regarding the status of current and planned projects to determine whether projects are being completed in a timely manner and within cost limitations. He will supervise and develop project plans, specifying goals, strategy, staffing, costs, materials, contingency plans and resource allotment for each project.

The petitioner indicated that the U.S. company intends to purchase a retail store known as [REDACTED] located in Alexandria, Virginia. In this regard, the petitioner submitted: (1) a signed letter of intent dated August 4, 2008 which indicates that [REDACTED] intends to purchase the business for a purchase price of \$425,000, with an earnest money deposit of \$42,500; (2) a check for \$42,500 issued by the petitioning company as a deposit for the purchase price of [REDACTED]; (3) an asset purchase agreement dated October 9, 2008 which indicates that the petitioner agrees to purchase [REDACTED]; and (4) a payroll summary for [REDACTED] for the 2007 calendar year.

The director issued a request for additional evidence (RFE) on November 17, 2008, in which he requested additional evidence to establish that the beneficiary will be employed in an executive or managerial capacity, particularly in light of the petitioner's claim that it presently has one employee. The director instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's proposed duties; and (2) a list of all U.S.

employees which provides their names, position titles, and complete position description, including a breakdown of the amount of time each employee devotes to each of his/her duties on a weekly basis.

In response to the RFE, the petitioner submitted a letter dated November 25, 2008, from [REDACTED] who further described the beneficiary's proposed duties as the following:

As Chief Financial Officer of [the petitioner], [the beneficiary] will oversee all company accounting practices, preparing budgets and financial reports, and will be oversee[ing] the tax and audit functions. He will ensure that all financial documents . . . are in good standing for the company. Based on the financial results, he will prepare annual financial forecasts regarding the future of the company. He will direct and oversee the financial strategy for both the wholesale and retail operations of the business.

He will supervise capital investments and fund acquisitions for the planned company expansion, utilizing his more than 38 years of business experience. He will work with our CPA to research, analyze and report on business trends, expansion opportunities, and projections for company growth. He will make the ultimate decisions regarding which trade shows [the petitioner] will attend during the year, and which markets to pursue.

He will be responsible for supervising the hiring of new employees for [the petitioner] to promote the company's hotel line of towels and bathrobes, depending on operations needs. Upon the commencement of his assignment with [the petitioner], the company will begin the recruitment task, with plans to hire sales representatives in several major cities known for major hotel venues, including New York City, Las Vegas, Orlando, Los Angeles and Chicago.

In addition to hiring sales representatives in these cities, the company will place advertisements in hotel accommodation and travel magazines, attend trade shows, and encourage US businesses currently buying from our competitors to try our products. Once the sales representatives are hired, it will be the responsibility of [REDACTED] to supervise them on a daily basis. This will free [the beneficiary] to manage and oversee the financial function of the company.

[The beneficiary] will oversee the stock levels of both the US company and the company in Turkey, and determine the correct product levels required for daily operations based on sales. He will control stocks to avoid overstocking. He will also negotiate with the company's US vendors, to which we outsource needlework projects, packaging, and shipping, among other needs. [The beneficiary] will choose the vendors and negotiate contracts with them.

The percentage of time spent on each duty during an average week will vary, depending on the company's needs. The only exception is his main responsibility of overseeing and managing the accounting function, including budget preparation, the generation of financial reports, and working with the company's CPA, who prepares the tax and other financial reports. He will spend a minimum of 16 hours a week, or 40% of his weekly time, on this important function. He will spend approximately 2 hours a week (5%) supervising the company's investment and capital

raising; 10 hours a week (25%) analyzing business opportunities; 4 hours per week (10%) hiring sales representatives; 4 hours per week (10%) overseeing and determining company product levels; and 4 hours per week (10%) meeting and negotiating with vendors.

██████████ is the company's only current employee and stated that his duties will include supervising sales representatives and the employees of "██████████" upon completion of the purchase, performing purchasing functions, and performing the accounts payable function. Specifically, ██████████ states:

I will spend 20 hours per week (50% of my time) on sales and the management of sales representatives; 10 hours per week (25%) paying invoices; 8 hours a week (20%) in purchasing and 2 hours a week (5%) either attending or planning for trade shows.

The director denied the petition on December 9, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that, because the petitioner presently has one employee, the petitioner failed to establish that the beneficiary would be involved in the supervision and control of a subordinate staff of managerial, supervisory or professional employees who will relieve him from performing the services of the company. The director acknowledged the petitioner's claim that the company intends to hire additional workers, but emphasized that the beneficiary must assume a primarily managerial or executive position upon entry to the United States, and does not have additional time to establish the U.S. company or its expansion activities.

On appeal, counsel for the petitioner asserts that the director incorrectly concluded that the beneficiary will supervise only one employee, by disregarding the petitioner's initial support letter, which indicates that the beneficiary will continue to supervise 54 employees working at the foreign entity's textile factory. Counsel asserts that the foreign entity employs an accounts manager and an assistant accountant who "help the Beneficiary with the lower-level tasks." Furthermore, counsel contends that the director erroneously disregarded evidence that the beneficiary will supervise the employees of ██████████," noting that "once ██████████ is fully purchased, the Beneficiary will handle financial and decision-making responsibilities for this business, while at the same time managing [the petitioning company] and [the foreign entity]." Counsel emphasizes that the petitioner has made a substantial financial deposit showing "strong intent for the purchase," and indicates that "the final settlement is expected once financial inventory is complete." Counsel asserts that it is "only a matter of time before the paperwork is finalized" and as such, the beneficiary's duties relating to ██████████s should be considered.

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.

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.* Beyond the required description of the beneficiary's job duties, USCIS reviews the totality of the record, including the number and types of subordinate employees, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

The petitioner's initial description of the beneficiary's position was general and appeared to include a combination of qualifying and non-qualifying duties. For example, the petitioner stated that the beneficiary would "oversee and manage the global operations of the company," supervise the employees of both companies, and hire additional U.S. workers. While these duties suggest that the beneficiary will exercise the appropriate level of authority over the U.S. company, the job description also included duties that may be considered non-managerial, such as meeting with prospective customers, implementing the company's marketing plan, and providing customers with product samples. These duties suggest that the beneficiary would be directly involved in performing the petitioner's sales and marketing functions. The definitions of executive and managerial capacity each 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 time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In response to the director's request for a comprehensive description of the beneficiary's duties, the petitioner stated that the beneficiary's "main responsibility," requiring 40 percent of his time, would be "overseeing and managing the company's accounting function," including budget preparation, preparing financial reports, preparing financial forecasts, and overseeing financial strategy. Although the petitioner indicates that the beneficiary would work with the company's contracted CPA in performing these functions, the record does not contain any documentary evidence confirming the contractual relationship with an external accountant, nor has the petitioner specified what non-qualifying accounting tasks would be delegated. The AAO acknowledges counsel's claim on appeal that the foreign entity also employs an accountant and accounting assistant; however, once again, the petitioner has not indicated what duties these employees would perform, if any, in relation to the U.S. company's financial and accounting function, or how such employees would obviate the need for the beneficiary to perform non-qualifying accounting and financial reporting and analysis duties. 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)). Therefore, the petitioner has not established that the beneficiary's "main responsibility" as the petitioner's chief financial officer would involve primarily managerial or executive tasks.

The petitioner indicated that the beneficiary would devote an additional 25 percent of his time to "analyzing business opportunities." The petitioner offered no explanation regarding the specific tasks the beneficiary would perform other than researching, analyzing and reporting on business trends and expansion opportunities. 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 AAO acknowledges that the beneficiary would have the authority to make ultimate decisions regarding investments; however, the petitioner has not established that the research and analysis of business trends is a managerial function, and the record does not show that such tasks would be delegated to a subordinate employee.

Much of the beneficiary's remaining time would be devoted to "overseeing and determining company product levels," and "meeting and negotiating with vendors." The petitioner offered no additional explanation regarding the specific tasks the beneficiary would perform on a day-to-day basis with respect to these functions, and the AAO cannot determine whether such duties would qualify as managerial in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the AAO notes that, in responding to the RFE, the petitioner omitted several of the non-managerial sales and marketing-related duties set forth in the initial position description. When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. 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 new generic duties to the job description while omitting others. Overall, the position descriptions in the record fall significantly short of establishing that the beneficiary's primary duties will be managerial or executive in nature.

On appeal, counsel asserts that the director's decision disregards the beneficiary's responsibility to supervise and manage the foreign entity's 54 employees and the four employees of ██████████ in the United States. 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. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The AAO acknowledges that the petitioner's initial description of the beneficiary's duties indicated that he would continue to oversee the foreign entity's staff. However, the petitioner's "comprehensive" position description submitted in response to the RFE contained no reference to the foreign employees, the role of such staff in carrying out the day-to-day operations of the U.S. entity, or the beneficiary's supervisory responsibility over the foreign staff. Therefore, the AAO cannot find that the director erred by omitting the foreign employees in his analysis of the beneficiary's proffered position in the United States. The petitioner has not adequately explained the nature of the beneficiary's actual proposed duties in the United States, nor explained the extent and scope of his interaction with the foreign office and its staff in carrying out his duties as chief financial officer of the U.S. entity. Absent some description of how the beneficiary will exert authority over the foreign-based employees, how such employees are integrated into the daily operations of the U.S. entity, and how the foreign employees relieve the beneficiary from performing non-managerial duties associated with the U.S. petitioner's business, the AAO is not persuaded that the beneficiary will act as a bona fide manager vis-à-vis the Turkey-based staff, or that the foreign employees would obviate the need for the beneficiary to perform a number of non-managerial tasks as one of two employees of the petitioning

organization in the United States. 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 also indicates that the beneficiary will directly or indirectly supervise sales representatives who have yet to be hired, as well as the four employees of "██████████," the purchase of which has not yet been finalized. As correctly noted by the director, USCIS will not consider the petitioner's prospective hiring plans in determining whether the beneficiary will be engaged in qualifying supervisory duties. 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).

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. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Excluding the foreign employees and U.S. employees to be hired in the future, the petitioner has established that the beneficiary would be supervising one employee who is responsible for sales, paying invoices, purchasing and attending trade shows. The petitioner has not established that its sole employee possesses a bachelor's degree or that his position requires the completion of a bachelor's degree, such that he could be classified as a professional.¹ Nor has the petitioner shown that the sole U.S. employee supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor. Therefore, the beneficiary does not qualify for the benefit sought as a "personnel manager."

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

¹ 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.

organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description that explains duties to be performed in managing the essential function, i.e. 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. 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.

Other than ambiguously referring to the beneficiary's authority to "oversee and manage the accounting function" and "manage the global operations," the petitioner has not specifically claimed that the beneficiary manages an essential function of the company. Furthermore, as discussed, *infra*, the petitioner has not provided a detailed and consistent description of the beneficiary's proposed job duties, nor has it provided a credible claim regarding the amount of time the beneficiary will devote to managerial versus non-managerial duties. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The petitioner has neither articulated nor substantiated a claim that the beneficiary qualifies as a function manager.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the AAO acknowledges that the beneficiary will exercise discretion over the petitioning company, it is noted that the petitioner has not submitted evidence that the beneficiary will devote the majority of his time to focusing on the goals and policies of the organization, rather than participating in the day-to-day operations.

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). 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)).

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.*

Here it has not been established how a single employee will relieve the beneficiary from participating in the day-to-day non-managerial duties inherent to operating the petitioner's textile import and wholesale business. Collectively, the evidence brings into question how much of the beneficiary's time will actually be devoted to managerial or executive duties upon his transfer to the United States. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

While the petitioner indicates that it intends to hire additional sales employees and purchase a retail tobacco store in the near future, 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.