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



U.S. Citizenship
and Immigration
Services

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DATE: JUL 28 2011 Office: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 beneficiary's employment as a 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 operates an international recruiting firm. It claims to be a branch office of Search International, Inc., located in Seoul, Korea. The beneficiary was previously granted L-1A status for a period of one year, from December 2007 to December 2008, to open a new office in the United States, and the petitioner now seeks to extend her status so that she may continue to serve in the position of president.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States 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 evidence of record establishes that all of the beneficiary's job duties are executive in nature and do not involve the day-to-day functions of the company. Counsel suggests that the director did not understand the nature of the petitioner's business, and erroneously assumed that the beneficiary is responsible for performing recruiting services for the petitioner's clients. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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.

II. The Issue on Appeal

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 21, 2008. The petitioner indicated on the Form I-129 that it is operating an international recruiting firm with one employee and gross annual income of \$24,980. The petitioner stated that the beneficiary performs the following duties:

Establish new branch office of [the foreign entity] by developing business contacts and relationships, patronizing the existing and new clients for their future hiring agenda. Develop people relationships to secure effective entry in Korea to work for multinational companies and provide consultation and representation for compensation and benefits package.

The petitioner indicated that the beneficiary's former role as "President/Recruiter" of the foreign entity involved development of client and customer relations, "hands-on" recruitment of high-level employees and matching with positions at large firms, and assisting clients with compensation assessment, along with coaching, training and position evaluation. The petitioner stated that the beneficiary "has proven a track record as a retained recruiter for multinational companies."

The petitioner further described the beneficiary's duties in a letter dated September 2008:

[The beneficiary] has been serving [the petitioner] as representative consultant since January 31, 2008, a branch company of Search International Seoul. She has proven track records of her qualification as a retained recruiter (a member of AESC, NY) for multinational companies. Her duties and work scope with a branch office in the USA has been:

- Meet CEOs of branch offices of Korean Conglomerates, who are under the membership of [redacted] to recommend and encourage them to hire senior manager levels with a proper mix of all eligible international ethnic backgrounds thru [the petitioning company].
- Attend international conferences and develop interpersonal relationship for prospective clients and candidates; develop various memberships to announce and build rapport of its presence of [the U.S. petitioner].
- Patronize new prospective clients for their future hiring agenda for their Korea/Asia operations.
- Develop people relationship for them to secure effective entry in Korea/Asia as they come to work for Korean conglomerate and/or multinational companies regardless of their nationalities.
- Provide [compensation and benefits] package, living condition and labor issue for employment offer.

The petitioner provided evidence that the beneficiary is a registered Management Consultant with the Korean Small and Medium Business Administration, and evidence of the petitioner's membership in [redacted]

[redacted] In addition, the petitioner provided a list of 13 "Activities with Prospective Clients & Conferences executed/attended for FY 2008," and attached documentary evidence of the beneficiary's participation or attendance. Finally, the petitioner submitted documentation dated 2007 that appears to have been submitted in support of the petitioner's initial request for L-1A status for the beneficiary.

The director issued a request for additional evidence ("RFE") on December 17, 2008 in which she instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the company's organizational chart clearly identifying the beneficiary's position and the employees she supervises by name and job title; (2) a brief description of job duties, educational level, annual salaries/wages and immigration status for all U.S. employees; (3) a more detailed description of the beneficiary's duties indicating the percentage of time spent performing each of the listed duties; (4) copies of the company's California Forms DE-6, Quarterly Wage Reports for the last four quarters; (5) copies of the company's payroll summary, Forms W-2 and W-3 evidencing wages paid to employees; and (6) if the petitioner claims the beneficiary will be employed in an executive capacity, a list of specific discretionary decisions that the beneficiary has exercised over the last six months and a specific day-to-day description of the duties the beneficiary has performed during the same time period.

In a response dated January 26, 2009, counsel for the petitioner requested that the director consider that the U.S. company is an international recruiting company and that "[r]ecruiting relies primarily on building business relationships and marketing those relationships with other companies." Counsel noted that such

contacts "can take longer to set up than the operations of a 'regular business.'" Counsel also emphasized that "'normal' business workplace fixtures such as staff, equipment and other furniture and signage are not essential to a recruiting company since much of the meetings and work are done at client locations."

In a letter submitted in response to the RFE, the petitioner described the company as being in a "developmental stage," noting that it "requires significant time to develop a reputation and reliable contacts for networking and organic marketing." The petitioner provided a description of the beneficiary's first six months in the United States as follows:

- Set up new office in Milpitas, California and establish contacts for recruiting.
- Register various memberships under [REDACTED] in USA or Chamber of Commerce, etc.
- Check industrial conference schedules and target West Coast for attending and study niche market, target market and their global market expansion plan to properly focus;
- Check how to begin presentation to Korean companies operating in the U.S.;
- Set up contacts with Korean companies operating in the USA;
- Open Los Angeles office to target Southern California companies.

The petitioner indicating that during the second half of 2008, the company has continued networking and marketing through [REDACTED] and the Los Angeles Chamber of Commerce using "soft landing strategies." Specifically, the petitioner indicated that these strategies include "announcement of the U.S. company's existence as a member to Korean investors, attending seminars, attending/promoting golf tournaments and other social events." The petitioner indicated that it has also been introducing the company to administrative managers individually, followed by meetings with general managers, as an entry point for selection as a human resources consulting partner.

In addition, the petitioner indicates that the company distributes its PowerPoint presentation to potential clients after an initial face to face cold call/meetings, presents market research data on Koreans working in the United States directly to prospective clients, and scouts westerners or Korean-Americans to Asia Market on an expatriate status when requested by the client to look for talents globally.

The petitioner submitted an organizational chart for the U.S. company for Fiscal Year 2009 which depicts the beneficiary as "project consultant" and describes her role and responsibilities as follows:

- Strategic Initiative of business activities
- Initiate new BD Opportunities
- Profitable Business Execution
- Strong Project Management
- Mobile to business trips/conference/cold call

In addition, the petitioner provided the following expanded job description for the beneficiary:

Initiate to increase ethnic diversity hiring ratios (30%)

- Persuade potential Korean clients operating in the U.S. to increase ethnic diversity recruiting ratio from current 0% - 40% to more than 50% through [the petitioning company]. In many cases, 0% hirings are prevailing depending on the size of companies.

Strategic Alliance to increase people hiring service delivery: (20%)

- Initiate strategic collaboration with one or two US Nasdaq listed Placement Consulting companies:

For Service Industry such as Airline/Financial Industries: [The petitioner] is in process of aligning with one of the top #1 U.S. Placement Consulting Firm as a strategic partner to induce important and complex call works to be tailor made for such industries.

Develop and execute expatriate recruitment to relocate to Asia (30%)

- For International companies, recommend senior level talents with specialized/general management skill-sets in the U.S. to relocate, Asia and European countries through our firm's network.
- Korean companies requiring globalization in full swing demand are still in growing pains. Lead them to maximize our firm's management consulting service to regain momentum for their continued restructuring with global talents.

Develop and select outside advertisement/design agencies: (10%)

- [The petitioner] is to rigorously present our firm on a face to face approach on various seminars. For second phase, plan advertisement aspect for leaflet, exhibit tools.

The petitioner identified a proposed "Sales/Marketing" role to be filled by a staff or contracted consultant and indicated that this employee would be responsible for making cold calls to potential and existing clients, supporting and inputting on job market reaction, and preparing exhibition and event participation for public relations. The petitioner indicated that it intends to hire sales staff or a contracted consultant during the second half of 2009 on an as needed basis.

In response to the director's request for an explanation regarding the beneficiary's purpose for coming to the United States, the petitioner stated:

[The petitioner's] basic business relies on the Beneficiary in order to function. When it is considered being 'business as usual' that there are only a few rainmakers in each Executive Search Consulting firms, and their branches worldwide, who generate revenue. These consultants should not only be trusted by clients to talk about confidential people matters but also be a known consultant in his/her respective market and surrounding countries.

The petitioner indicated that the beneficiary performs a "pivotal role" for the operation of the US company as a qualified Executive Search Consultant by Association of Executive Search Consultants ("AESC") in NY and licensed by the Korean government. The petitioner further explained:

The beneficiary's managerial capacity directs the management and supervises subordinates of Search International in Seoul and streamlines client's requests in collaboration. For Korean GMs and CEOs operating in the US, the beneficiary is instrumental in answering their queries and assisting their scouting issues back to their HQ and open positions current and following years. Since the beneficiary is the direct contact point from the prospective clients and networks, day-to-day exercise on a discretionary manner is essential functions of the beneficiary through phone conversation, e-mail and so on.

The director denied the petition on February 5, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition. The director determined that "the beneficiary's recruiting duties and vaguely defined responsibilities preclude USCIS from classifying the beneficiary as a manager or executive."

On appeal, counsel asserts that all of the beneficiary's duties are executive in nature and do not involve any day-to-day functions of the company. Counsel asserts that the duties include "overseeing overall marketing and business development, promoting the company through networking, supervising subordinates and directing human resource activities."

Counsel explains that given the nature of the petitioner's business as a "boutique executive search firm," the "nuts and bolts' of this business are generally handled by recruiters who meet with clients, determine their specific needs and then begin searching for suitable job candidates (headhunting)." However, counsel states that in the early stages of such a business "it is all about pure networking and time investment to lay the foundation for future business growth," duties which "rest exclusively on the shoulders of the company President, not the recruiters." Counsel asserts that during the first one to three years, the critical role of a president in such a firm is "doing the legwork in getting out there and networking (i.e. attending conferences, seminars, business functions and any other networking events), which is exactly what [the beneficiary] has been doing."

Counsel states that the beneficiary's other key role is "to guide the management and direction of our organization" and that such work is "executive in nature and totally different from the functions of a recruiter, who is actually the one who performs the tasks to produce the 'product' and provides our company's services." Counsel contends that the director mistook the beneficiary's activities as "recruiting," when in fact the beneficiary performs no recruiting duties.

In support of the appeal, the petitioner submits a new description of the beneficiary's duties. Briefly, the petitioner indicates that the beneficiary is accountable for the following:

- Oversee and implement the company's overall marketing and business development plans to create and increase the recruitment consulting business (35%)
- Promote the company through networking with the client's industrial community, relevant governmental and professional agencies (35%)

- Supervise subordinates, provide guidance on recruitment projects, and evaluate their work and performance. (10%)
- Oversee preparation of service proposals (5%)
- Negotiate agreements with clients (5%)
- Direct human resource activities such as selection, development, training and termination of staff (5%).
- Budget development and forecasting as well as evaluating operational and financial performance (5%)

The petitioner submits an updated organizational chart identifying the beneficiary as president, and indicating that she oversees a "recruiter search consultant" and a receptionist provided as part of her office building's executive suite service. The petitioner provided evidence that the subordinate employee began working for the U.S. company as of February 1, 2009.

The petitioner also submits additional evidence relating to the beneficiary's memberships in [REDACTED] the Los Angeles Chamber of Commerce, and the National Human Resource Association, and a reference letter from the petitioner's potential client, [REDACTED]

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

As a preliminary matter, we acknowledge the petitioner's claims that it may take up to three years to move beyond the start-up or development phase of operations due to the nature of the petitioner's industry. However, we emphasize that 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. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, USCIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(I)(14)(ii). The petitioner concedes the U.S. company was not staffed at the time of filing and has generated only \$25,000 in revenues.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. 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. 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.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the start up of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

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 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). The fact that the beneficiary owns and manages a business 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, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. While the AAO does not doubt that

the beneficiary exercises discretionary authority over the U.S. company as its sole employee, the petitioner has not submitted a consistent or credible breakdown of how the beneficiary will allocate her time among specific responsibilities. At the time of filing, the petitioner characterized the beneficiary's role as both president and "representative consultant" with an emphasis on the beneficiary's qualifications as a "retained recruiter . . . for multinational companies." The petitioner indicated that the beneficiary's duties include attending conferences to "develop interpersonal relationship for prospective clients and candidates," obtaining membership in business organizations as a means to introduce and build rapport for the new company, patronizing new prospective clients for their future hiring agenda, and meeting other [REDACTED] members to promote the petitioner's services"

Moreover, at the time of filing, the petitioner noted that the beneficiary will "provide consultation and representation for compensation and benefits package," and noted that her former role as "President/Recruiter" of the foreign entity involved development of client and customer relations, "hands-on" recruitment of high-level employees and matching with positions at large firms, and assisting clients with compensation assessment, along with coaching, training and position evaluation. Therefore, contrary to counsel's assertion on appeal that the petitioner has never represented the beneficiary as a "recruiter" the petitioner's initial evidence suggested that the beneficiary would be directly involved in providing the company's services, as well as developing business, promoting the company, selling its services and being responsible for its overall strategy and direction as its president. The petitioner claims that its services include "executive coaching/building leadership," "executive searching," salary assessment and industry research. The beneficiary is the sole employee working in the United States, and the petitioner did not attribute the provision of these services to any external employees. To the extent that the company is doing business, the beneficiary is the sole employee available to provide these services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). 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 record shows that the beneficiary has joined several business associations and attended conferences in an effort to establish a rapport with business community and potential clients. While these type of networking activities may typically be performed by an executive in the petitioner's industry, they do not necessarily fall within the statutory definition of "executive capacity," pursuant to section 101(a)(44)(B) of the Act. Essentially, the beneficiary, at the end of her one-year period in L-1A status, is continuing to lay a foundation for the petitioner's provision of recruiting and other consulting services in the United States, while the regulations governing the extension of a new office petition require the petitioner to establish that it has been doing business for the previous year and has grown to the extent that it requires the beneficiary to primarily perform qualifying duties pursuant to section 101(a)(44)(A) or (B) of the Act. Based on the evidence submitted with the current petition, it is evident that the petitioner was not prepared to commence the proposed business activities upon approval of its new office petition, and thus the beneficiary has not progressed beyond "development phase" activities in terms of her job responsibilities.

In response to the RFE, the petitioner assigned the beneficiary the new job title of "project consultant" along with a new set of broadly-drawn job duties which included "strategic initiative of business activities," "initiate

new [business development] opportunities," "profitable business execution," "strong project management" and "mobile to business trips/conference/cold call." This description offered little insight into the nature of the beneficiary's duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Finally, and also in response to the RFE, the petitioner presented a different set of duties accompanied by the percentage of time the beneficiary allocates to each area of responsibility. The petitioner indicated that the beneficiary devotes 30 percent of her time to persuading potential Korean clients operating in the United States to increase the ethnic diversity of their recruiting by using the petitioner's services. Without additional explanation, it appears that this responsibility amounts to directly marketing and promoting the petitioner's services, rather than managing or directing these functions. Again, the petitioner failed to identify anyone subordinate to the beneficiary who would actually provide services to these potential clients once an agreement was reached.

The petitioner indicated that the beneficiary devotes an additional 30 percent of her time to "develop and execute expatriate recruitment to relocate to Asia, and noted that this responsibility entails recommending to international companies senior level talents to relocate from the United States. Although counsel insists on appeal that the director was mistaken in finding that the beneficiary is engaged in recruiting duties, the AAO is uncertain how else the words "execute expatriate recruitment" could be interpreted. If the beneficiary is executing recruitment activities and recommending talent to companies, then it is reasonable to conclude that she is in fact directly involved in recruiting activities on behalf of clients. Overall these two areas of responsibility, based on the petitioner's representations, require 60 percent of the beneficiary's time, and have not been shown to be managerial or executive in nature. Therefore, it was reasonable for the director to conclude that the beneficiary would not be performing in a primarily managerial or executive capacity under the extended petition.

While the petitioner has submitted a revised job description on appeal, the AAO notes that it diverges significantly from all prior descriptions provided, and references the beneficiary's supervision of subordinate employees. As the U.S. company had no employees other than the beneficiary when the petition was filed, we assume that the position description is meant to convey the beneficiary's duties as of March 2009. 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).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The record shows that the beneficiary was the petitioner's sole employee at the time the petition was filed. Counsel emphasized that the business relies on "building business relationships and marketing these

relationships with other companies," and noted that the "normal" trappings of a workplace, such as "staff, equipment, furniture and signage" are not essential to an international recruiting business. The AAO notes 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). In reviewing the relevance of the number of employees a petitioner has, however, 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).

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, or is otherwise not sufficiently operational, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

At the time of filing, the petitioner was a one-year-old company established for the purpose of providing executive recruitment services, as well as research, salary assessment, and coaching services. The beneficiary, while charged with overall oversight of the business and making contacts with the executive officers of potential clients, is also the sole employee working for the U.S. company. Thus, it is reasonable to conclude, and has not been shown otherwise, that she provides any services the company is retained to provide, and performs all other administrative and operational tasks associated with the operation of a consulting business. The petitioner has not established that it had a reasonable need for the beneficiary to perform primarily managerial or executive tasks as of the date of filing.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. Again, 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'r. 1988).

The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The petitioner indicates that it has hired one employee as of February 1, 2009, more than two months after the petition was filed. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). The AAO concurs with the director's determination that the petitioner has not grown to the point where the beneficiary is primarily engaged in managerial or executive duties.

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.