

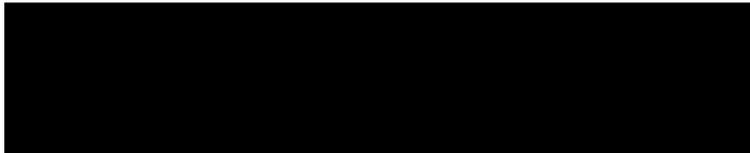
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



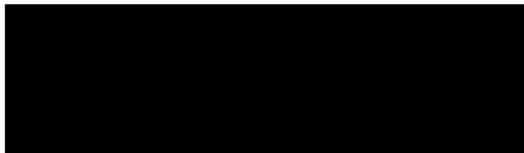
D7

DATE: **JUN 22 2011** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 a real estate investment company. It claims to be a subsidiary of [REDACTED], located in South Korea, and claims to have one employee and gross annual income of \$64,710. The beneficiary was previously granted L-1A classification for a period of one year, from December 30, 2007 until December 29, 2008, to open a new office in the United States, and the petitioner now seeks to extend his status so that he may continue to serve as the U.S. company's president for three additional years.

The director denied the petition based on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that the U.S. company has been doing business for the previous year pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(B).

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 asserts that the beneficiary clearly serves in a "managerial/executive capacity," and notes that the size of the company is irrelevant given the nature of the real estate investment business. Counsel emphasizes that, while the petitioner's initial residential investment project failed to materialize, the beneficiary has been pursuing a commercial investment project, with decision-making authority to enter the contract and determine all necessary personnel, resources and timeline for the project once it is approved. 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.

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.

II. The Issues on Appeal

A. Employment in a Managerial or Executive Capacity in the United States

The first 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 16, 2008. The petitioner indicated on the Form I-129 that it is operating a real estate investment business with one employee and gross annual revenues of \$64,710.

In a letter dated December 8, 2008, the petitioner indicated that the beneficiary's role as president of the U.S. company has been to establish and develop the enterprise. The petitioner noted that the beneficiary's L-1A visa was issued in April 2008 and that he had been in the United States for "about six months" during which time he has "made review and put effort into investment project."

The petitioner further described the status of the U.S. company and the beneficiary's current role as follows:

[The beneficiary] is in charge of [the petitioner's] projected business plan to build new residential condominiums and commercial shopping center in Southern California area. The

first project was focused on building 70 units of condominiums with commercial shopping center on the level 1. However due to economic downturn and downturn in real estate market, the project did not pass feasibility and attached hereto is the escrow documentation which sought consideration of the documented project.

However, under the direction of [the beneficiary], [the petitioner] is currently reviewing for investment the Brookhurst Triangle Project in Garden Grove, CA. Currently, [the beneficiary] has requested cooperation [sic] from parent company for legal requirements for construction and construction management as well as detailing the contract specifications as well as revenue and tax considerations. [The beneficiary] has forwarded the Garden Grove City information as well as Brookhurst Traingle [sic] Project information and is in constant correspondence with parent company to cooperatively review the project underhand and generating master business plan to approach the real estate investment project. Upon approval from the board for ratification into participating into the Brookhurst Project, [the beneficiary] will direct his management effort to recruit necessary personnel and enter into major contracts to carry out the detailed investment and construction projects and follow through to completion of construction as well as sales of construction units.

The petitioner indicated that the investment project "has been and will be a challenging task and many tasks need to be sorted out." The petitioner stated that the beneficiary is "in charge of the daily operation as well as exercising executive control over the subsidiary corporation." The petitioner further indicated that the beneficiary will be responsible for negotiating and entering into contracts in the United States, directing and training new U.S. employees expected to be hired within the year, and will hold "wide discretion in the operation of the office being answerable to the Board of Directors of the Korean Parent Company."

The petitioner provided a list of the beneficiary' proposed duties with the approximate percentage of time he is expected to devote to each area of responsibility. These included:

Policy Setting (30%) – Provide strategic contract and target policies to managerial staff and employees for meeting scheduled construction projects; conduct routine daily/weekly/monthly/quarterly meetings with headquarter office to meet target goals.

Administration (30%) – Oversee managerial staff and coordinate progress of contracts and allocation of project teams necessary for underlining projects. Hire/Fire/Train Managerial staffs for efficiency and quality. Provide guidance for projects and revenue generation. Administer all U.S. based investment and development activities.

Development & Expansion (20%) – Develop plans for company expansion by allocating cost effective measure in implementing project allocation as making a decision of targeted development area as well as approving architecture layout and providing the parent company of cost and profit basis of underlining projects. Meet potential clients/vendors for major contract/license. Survey potential areas for expansion and development.

Research (10%) - Research current trends in commercial and residential development as well as construction industry. Keep informed and update on current regulation/policy.

Direct and Organize (10%) – Direct activities of staff/employees/contractors/supply chains. Organize system of project teams. Make critical decision for improvements and expanding company's planning in depth of future commodities and development projects for company. Receive statistical reports from various sectors of the company/headquarter office to determine project feasibility as well as allocating outside resources to develop investigative projection costs and returns. Allocate human resource/project resource for quality and efficiency. . .

The petitioner's supporting evidence included a copy of the company's original business plan, which discusses the company's intent to invest money to build 70 units of new residential condominiums with a shopping center in Southern California. Based on the business plan, the petitioner initially anticipated that it would receive a permit for construction in October 2008 and finish construction by October 2009.

The petitioner submitted copies of its income statement and balance sheet as of September 30, 2008. The financial documents show that the petitioner has assets of nearly \$2.5 million, had no sales, and reported total operating expenses of \$110,000 including \$17,230 in salaries and approximately \$20,000 in professional fees. The petitioner also provided a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for the fiscal year ended on February 28, 2008. The 2007 tax return reflected interest income of \$64,710 and minimal operating expenses, but no sales, receipts, salaries or rent. The petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, and California Form DE-6, Quarterly Wage Report, reflect that the beneficiary is the only employee on the petitioner's payroll.

Finally, the petitioner submitted evidence related to the above-referenced Brookhurst Triangle commercial property development project, including a Commercial Property Purchase Agreement dated August 15, 2008, a report sent by the beneficiary to the parent company in September 2008 requesting a business feasibility report in relation to the U.S. company's involvement in the Brookhurst Triangle project, and a Master Plan for development of the project created by [REDACTED]

The director issued a request for additional evidence ("RFE") on December 29, 2008. The director instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties, including the percentage of time spent on each specific task; (2) a copy of the U.S. company's organizational chart showing the names and job duties of all employees supervised by the beneficiary; (3) for all U.S. employees, a brief description of job duties, educational level, annual salaries wages, source of remuneration and immigration status; and (4) if the beneficiary is employed in an executive capacity, a list of the specific goals and policies he has established during the last six months, and a specific day-to-day description of his duties during the same period.

In a response dated January 5, 2009, the petitioner explained that although the U.S. company's original residential condominium project was ultimately not feasible, the beneficiary "has found the Brookhurst

Triangle Project and is currently in the review process in legal matters, participatory ratio, returns on investment and projected schedules and costs." The petitioner noted that it "will take considerable time until the final contract ensures and the project beginning will begin after such contract and escrow is put forth and actual construction may be further years down the line."

The petitioner emphasized that the beneficiary is the "sole collaborator between parent company and subsidiary company to pursue this project and will be the top executive for running a hierarchical organization once project is ratified by the board." The petitioner also noted that due to a "circumstantial delay" surrounding the approval of the beneficiary's L-1 visa, he was unable to enter the United States until June 2008. The petitioner indicated that the U.S. company has two independent contractors who work as support staff to the beneficiary, who "directs and controls their daily operation and in the process of recruiting additional full time support personnel." The petitioner noted that, once a contract is ratified, a "hierarchical organization with tier level employee, supervisor, managers and necessary departments will be organized under the direction of [the beneficiary]."

The petitioner's response to the RFE included a letter from [REDACTED] of the petitioner's parent company. [REDACTED] provided a description of the beneficiary's present duties, as follows:

Collaboration - Communicate with parent company's necessary department including legal and finance department to provide information on projected details. (30% of time)

Research and Information Gathering – Keep the board informed of current economic condition in targeted construction project area as well as provide necessary vital information, data, demographics and feasibility report (20% of time)

Planning and Execution – Plan and compose detailed guidelines for schedule, parent company support function, contracting vendors, gathering resources for successful venture. Execute proposal, negotiations, contract on behalf of parent company and stakeholders. Plan and execute all future recruitments. (20% of the time).

Management – Keep US company viable for all regulatory requirement and manage funds into accountable financials distinguishing foreign and localized income/expense. Contract specialist required to carry on procedural projected requirements including accounting, contracts, provide necessary reports to appropriate agency, departments, parent company's board of directors. (30% of the time).

[REDACTED] letter included a separate set of duties which he indicates will apply "once project is ratified and contract for major construction has begun and the plan is set in motion with organization and personnel defined." This description is the same as the job description included in the petitioner's letter dated December 8, 2008. [REDACTED] confirmed that the beneficiary's duties still lie "in the development and set up phase as the

multi-million dollar project has not been completely ratified due to the redirection of the company's project from residential to commercial target centers."

The petitioner submitted an organizational chart for the U.S. business which identifies the beneficiary as "president" and "strategy." The chart indicates that [REDACTED] is a marketing employee who reports to the beneficiary. Other evidence in the record indicates that [REDACTED] is the president of Vision Investment Realty Co., the petitioner's landlord. The petitioner indicates that [REDACTED] is also the company secretary for the U.S. company.

The director denied the petition on February 9, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that the beneficiary appears to be the U.S. company's only employee, and noted that, as such, it appears that he has been performing many aspects of the day-to-day operations of the business. The director noted that the beneficiary's claimed duties are too broad and nonspecific to convey any understanding of what he actually does, and that he would not be deemed to be a manager or executive based on his job title alone.

On appeal, counsel asserts that the beneficiary "does serve in the function of 'executive and managerial capacity', whereas he manages the organization in U.S. as well as the parent company's business function in U.S. namely contracting [*sic*] major land/commercial/residential projects." Counsel emphasizes that the beneficiary "has the full authority to enter into contracts on behalf of the organization, set new guideline, recruit and terminate personnel." In addition, counsel states that the beneficiary's "essential function at this time is administering the liaison relationship due to international timeline in pursuing the project with direct vendors and with stakeholders in S. Korea and U.S. and major recruitment effort and major investment from parent company through subsidiary company in U.S. once contract is ensued."

Counsel further asserts that the beneficiary's current duties "relate to day to day management of the contracting processes which is deemed by oversight with support from professional staffs from parent company as well as collaborating with accounting and legal professionals in the U.S." Counsel stresses that the beneficiary's extension of status "does not solely rest upon staffing levels." Counsel notes that the beneficiary "is not involved in mere supervisor duties of encompassing normal transaction but rather serves an executive capacity in terms of operation and setting goals and reviewing policies of the company."

In support of the appeal, the petitioner submits letters from [REDACTED] California, and the Garden Grove Chamber of Commerce requesting favorable review of the appeal. The letters confirm that the petitioning organization has shown interest in the Garden Grove Brookhurst Triangle Project has been working with the city's Chamber of Commerce and Economic Development Department.

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 was unable to proceed as planned in establishing the U.S. company based on poor economic conditions that prohibited pursuit of the company's intended residential construction project and "circumstantial" reasons that delayed the issuance of the beneficiary's visa petition. 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(l)(14)(ii). The petitioner concedes the beneficiary remains the company's own employee and indicates that his duties still lie "in the development and set up phase."

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. 5738, 5740 (Feb. 26, 1987). 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).

Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its initial new office petition, and now claims that one year is simply not enough time to implement its start-up plans. This failure on the petitioner's part is not a result of some impossibility created by the law or regulations. The one-year period was not included in the regulations as a hindrance to new offices. On the contrary, the new office provisions were added to the regulations in 1987 specifically to recognize that it would be impossible for some new offices to immediately employ someone in an executive or managerial capacity as defined in the regulations. *See* 52 Fed. Reg. at 5739-5740. At the same time, the legacy INS stated that it "must concern itself with abuse or the potential for abuse of any visa category" and further noted that "one year is sufficient for any legitimate business to reach the 'doing business' standard." *Id.* 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 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 several of the duties the beneficiary would perform may require the beneficiary to exercise an appropriate level of authority, the petitioner has not submitted a sufficient breakdown of how the beneficiary will actually allocate his time during the petitioner's on-going "initial set-up stage." The petitioner indicates that the beneficiary devotes 30 percent of his time to "collaboration," which includes communicating with the parent company's legal and finance departments with respect to project feasibility. While these tasks are undoubtedly necessary in order to eventually establish the U.S. operations, the petitioner has not indicated how such duties qualify as either managerial or executive in nature.

Similarly, the petitioner indicates that the beneficiary, as of the date of filing, spends approximately 20 percent of his time on research and information gathering needed to provide the foreign entity with "vital

information, data, demographics and feasibility reports." The petitioner has not established that anyone is assisting the beneficiary with these economic and market research tasks, which also do not fall under the statutory definitions of managerial or executive capacity. Although the petitioner's organizational chart lists a marketing employee who reports to the beneficiary, the petitioner has failed to provide evidence of any payments to this individual to establish that he was working for the company as a contractor or in any other capacity as of the date of filing the petition, nor did it provide the marketing employee's job description. 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)). 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).

The petitioner indicated that the beneficiary allocates an additional 20 percent of his time to "planning and execution," and 30 percent of his time to "management" but failed to establish that a company that remains in the "set-up" phase requires the beneficiary to perform primarily managerial or executive duties related to either of these broad responsibilities. 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. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

All other duties described in the record pertain to the beneficiary's "proffered duties once [the] project is ratified and contract for major construction has begun." The AAO must emphasize that the critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. 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); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of any meaningful percentages of time allocated to specific duties, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Furthermore, while making a final decision regarding which investment projects to pursue may require an exercise of managerial or executive discretion, the beneficiary, as the sole employee, would also be required to perform all non-qualifying administrative and operational duties associated with the start-up of the company. The fact that the beneficiary manages or directs a business as its "president" 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"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioning company as the president and sole employee, the petitioner has failed to demonstrate that his actual day-to-

day duties as of the date of filing the petition would be primarily managerial or executive. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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 petitioner's initial business plan indicates that the company intended to obtain all required licenses and at least begin construction of its proposed residential condominium building within one year of commencing operations in the United States. Although the petitioner's business plan does not include a personnel plan, it is reasonable to assume that the company intended to hire staff prior to undertaking the construction project and prior to the end of the beneficiary's initial year in L-1A status. As of the date of filing the petition, the petitioner has abandoned its original project, is pursuing a new project, and concedes that, even if the project is ultimately approved, the commencement of construction activities may still be years away. The petitioner's confirmed staff at the end of the first year of operations includes the beneficiary only.

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). As noted above, the petitioner has not established that the beneficiary directly supervises any employees in his role as president of the U.S. entity.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function 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 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 description of the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, as discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial. The beneficiary, as of the date the petition was filed, appears to act primarily as a

liaison between the foreign entity and potential U.S. business partners with responsibility for investigating and reporting real estate investment opportunities to the overseas entity.

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 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.* The beneficiary in this matter, although he holds the executive job title of "president" has not been shown to be primarily engaged in establishing goals and policies for the U.S. company or overseeing its management given the company's preliminary stage of development.

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 is not sufficiently operational after one year, 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 petition, the petitioner was a nearly two-year-old company established for the purpose of real estate investment in the United States. The beneficiary, while charged with the ongoing research and negotiations related to the company's first investment project as the parent company's representative in the United States, is also the sole employee working for the U.S. company. The U.S. company appears to be no

closer to commencing operations in the United States than it was when it filed the new office petition, and in fact no longer has a projected start date for its proposed construction project. 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 the petition.

The petitioner indicates that it plans to make a sizeable investment in a commercial real estate project in the future and will charge the beneficiary will recruiting, hiring and managing subordinate managers and employees at that time. However, as noted above, 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 it requires the beneficiary to engage primarily in managerial or executive duties. Accordingly, the appeal will be dismissed.

B. Doing Business

The second issue the director addressed is whether the petitioner established that the U.S. company is doing business as defined at 8 C.F.R. § 214.2(l)(2)(H). "Doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. *Id.*

As the instant petition is a request for an extension of a new office petition pursuant to 8 C.F.R. 214.2(l)(14)(ii), additional considerations must be made in determining whether the petitioner is "doing business." If a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. 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 commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the end of a one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of goods or services. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

As discussed above, it is apparent that the petitioner was not prepared to do business upon approval of its initial new office petition, and in fact has never commenced the proposed real estate investment project which formed the basis of the initial new office petition. Moreover, the record does not support a finding that the petitioner has been doing business for the previous year. The petitioner's only income to date is interest income based on its monetary assets, and the petitioner's only apparent activities at the end of the first year of operations consist of continued pursuit of a suitable real estate investment project, an action that should have been completed prior to filing the new office petition. For these reasons, the AAO concurs with the director's determination.

Counsel contends on appeal that the petition was denied based solely on the petitioner's failure to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Therefore, the petitioner has not contested the director's determination that the petitioner has not been doing business, and the appeal will be dismissed.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.