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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

PUBLIC COPY



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DATE: MAY 11 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:
[REDACTED]

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 is an importer of carpet and rugs. It states that it is a subsidiary of [REDACTED] located in Pakistan. The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States. The petitioner now seeks to extend the beneficiary's petition for two additional years so that he may continue to serve in the position of president and chief executive officer.

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. On appeal, counsel for the petitioner asserts that the beneficiary's job duties, and not the size or complexity of the U.S. operations, should determine whether he is eligible for an extension of his L-1A status. Counsel asserts that the beneficiary's duties while in the United States will include the "lead executive role in managing a company of over 150 employees." Counsel submits a brief and additional evidence in support of the appeal. The petitioner supplemented the record with evidence of the U.S. company's current operations and staffing levels in January 2011.

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 would be employed in a primarily managerial or executive capacity under the extended petition.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

A. Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 22, 2009. The petitioner indicated on Form I-129 that it operates as an importer of carpets and rugs, with U.S. gross revenues of \$1 million and 150 employees worldwide. In a letter dated January 21, 2009, the petitioner described the beneficiary's duties as President and CEO as follows:

Over the last year [the beneficiary] has focused on U.S. trading partners by expanding the company's exports of carpets to the United States. He will continue to develop U.S. operations, when he returns to the U.S. [he] will make face-to-face sales contacts with potential customers throughout the U.S., employ U.S. office and warehouse workers, and oversee initial day-to-day operations. At the same time, he will continue to serve as the President and CEO and direct through trusted managers, the manufacturing and export activities in Pakistan.

Since expansion of the business, including the establishment of the showroom, has been delayed because of [the beneficiary's] forced absence from the U.S. due to visa delays, we will be satisfied with an extension of one year.

The petitioner explained that the beneficiary had departed the United States six months previously for a short trip, and had been unable to return due to a five-month delay in the processing of his L-1 visa application at the U.S. Consulate in Islamabad. The petitioner noted that the beneficiary's spouse, a co-owner and officer of the company, has been responsible for the day-to-day operations of the U.S. business, including the lease of new office space, in the beneficiary's absence.

The petitioner submitted a copy of the company's profit and loss statement for 2008 which indicates that the U.S. company achieved gross revenues of \$376,422 in 2008 and paid \$108,000 in salaries. According to the petitioner's IRS Forms W-2, Wage and Tax Statement, the beneficiary and his spouse were the only company employees in 2008, and each received a salary of \$54,000.

On January 30, 2009, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to provide the following to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company: (1) an organizational chart for the U.S. entity indicating the names of all executives, managers and supervisors, and clearly identifying the beneficiary's subordinates by name and position title; (2) a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision, along with the source of remuneration for each employee; (3) a more detailed description of the beneficiary's duties, including specific tasks and the amount of time the beneficiary allocates to each listed duty; and (4) copies of the petitioner's California Forms DE-6, Quarterly Wage Report, for the last four quarters.

In a response dated March 2, 2009, the petitioner indicated that the petitioner currently employs the beneficiary as president and his spouse as vice president. The petitioner restated the position description provided at the time of filing, and also provided the following list of duties to be performed by the beneficiary:

- Negotiate business with U.S. clients.
- Market the company's products in the U.S.
- Supervise the importing of products.
- View the latest trends of color and quality of carpet design for manufacturing.
- Visit carpet design centers in U.S. to improve our product.
- Attend carpet exhibitions to promote business activities.
- Oversee the administration and financial matters of the company
- Oversee the parent company's business affairs.

The petitioner emphasized that the beneficiary has had to undertake many of these duties from abroad due to the delay in the processing of his visa application, and noted that such delay had negatively impacted the business.

The petitioner stated that the vice president's job duties include assisting in the development of U.S. operations, assisting in day-to-day operations, liaising with the company's accountant, corresponding with clients and administering customs clearing.

The petitioner indicated that the beneficiary's presence in the United States is required for the expansion of business activities, such as opening a showroom in California. The petitioner explained that, while the vice president has been running the business, "she is not able to expand the business without her husband's presence in the U.S. to make investment and expansion decisions, and to meet with customers as the company President." The petitioner emphasized that the beneficiary needs to apply the parent company's established business practices to "expand the importation of fine rugs into the U.S. through wholesale and showroom sales."

The director denied the petition on March 11, 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 determined that the job description provided in response to the RFE indicates that the beneficiary will be performing many aspects of the day-to-day operations of the business, including marketing and sales tasks. The director further observed that the record fails to establish that the beneficiary would have any subordinates to relieve him from having to perform tasks that are necessary to produce a product or to provide a service. The director concluded that the U.S. company has not grown to the point where it is able to support a primarily managerial or executive position.

On appeal, counsel for the petitioner emphasizes that the beneficiary and his spouse own and manage one of the largest carpet manufacturing enterprises in Pakistan with 150 direct employees and over 450 independently contracted weavers. Counsel emphasizes that the beneficiary opened the U.S. subsidiary to expand his business and "plans to spend extensive periods in the United States developing the U.S. enterprise and promoting the company's products, and to open a 2,000 square foot showroom in Los Angeles.

Counsel explains that the beneficiary was granted an L-1A visa in May 2008 and used that visa to enter the United States on July 1, 2008. Counsel indicates that the beneficiary departed the United States for Pakistan on August 21, 2008 with the intention of returning in September 2008. Counsel again emphasizes that the subsequent delay in the issuance of the beneficiary's new visa also delayed plans for the development and expansion of the U.S. company.

Counsel objects to the director's finding that the U.S. company has not reached the level of organizational complexity to support an executive or managerial position. Counsel asserts that the beneficiary is the top executive of an international company that includes the U.S. subsidiary, and employs hundreds of workers. Counsel indicates that the beneficiary will continue to run operations in Pakistan, but also travel to the United States several months out of the year to develop the U.S. company and expand the U.S. market. Counsel contends that the U.S. company's operations "cannot be viewed in isolation from his overall duties as the chief executive of the integrated company in Pakistan." Counsel further asserts that "the beneficiary's executive job duties in the U.S. cannot be distinguished from his executive duties in Pakistan," as he possesses, in both cases "final responsibility for a large and complex organization with several layers of hierarchy and management of the managers of the various departments of the company."

With respect to the beneficiary's job duties, counsel asserts that his role in the United States was described in terms of his marketing function because marketing is the purpose of the U.S. company, and is a duty often

performed by executives. Counsel asserts that the beneficiary's role must be distinguished from that of a manager sent to the United States to manage a sales office of which he is the only employee, and emphasizes that the only reason the U.S. entity has not achieved a greater organizational complexity, opened its showroom or hired other employees is because the beneficiary has been unable to return to the United States.

Finally, counsel asserts that "it is only fair (and certainly not precluded by the regulations) to continue to extend L-1 eligibility to a prospective manager who has not been in the U.S. for most of the first year." Counsel states that if the petition is approved, the beneficiary will perform the lead executive role of the petitioner's international organization, and be involved in expanding the U.S. company to increase sales, make executive decisions regarding its growth, and manage the development and staffing of a showroom in Los Angeles.

In support of the appeal, the petitioner submits a detailed organizational chart for the foreign entity. The petitioner also submitted an article titled "Afghan refugee turns rug exporter in Pakistan," published on the website of The United Nations Refugee Agency, which details the beneficiary's history in the carpet business in Pakistan as an Afghani refugee, and notes that the company exports US\$3 million worth of carpets, 90 percent of which go to the United States. The article indicates that the beneficiary deals with 10 different companies in the United States and "recently set up a sales centre in San Francisco 'to know about the trends and to be able to deal more directly with the customers.'"

The petitioner submits additional evidence relating to the delay in the processing of the beneficiary's L-1 visa, emphasizing that, as an Afghani citizen, the beneficiary is only eligible for a three-month, single entry visa and was subject to a lengthy security check even after his most recent application was approved in September 2008. The petitioner also submitted a list of the beneficiary's business visits to the United States over the last ten years. According to this information, the beneficiary was in the United States from December 2007 until February 2008, and from July 2008 until August 2008. The beneficiary was granted a change of status from B-1 to L-1A on January 25, 2008.

On January 27, 2011, the petitioner submitted additional evidence relating to the current operations of the U.S. company, including its 2009 IRS Form 1120, U.S. Corporate Income Tax Return, photographs of its showroom, a lease agreement and floor plan, a business license, evidence of payments made to employees in 2010, and job descriptions for the company's current staff consisting of the vice president, showroom manager, import manager and showroom assistant.

B. Discussion

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended 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). While the AAO does not question that the beneficiary has the appropriate level of authority as the co-owner, president and chief executive officer of both the petitioner and the foreign entity, the focus of this analysis is on the nature of the beneficiary's role within the United States operation. The beneficiary will not be considered to be employed in an executive capacity within the U.S. entity based on his position with the foreign entity. The regulations at 8 C.F.R. §§ 214.2(l)(3)(v) and 214.2(l)(14)(ii) clearly require that the new U.S. entity support a managerial or executive position within one year of commencing operations. Here, the petitioner has not established that the beneficiary would be performing primarily managerial or executive duties for its "U.S. sales and import office," under the extended petition, nor has it established that the U.S. entity is currently capable of supporting a managerial or executive position.

At the time of filing the petition, the petitioner indicated that the beneficiary will "develop U.S. operations," make "face-to-face sales contacts with potential customers throughout the U.S.," "employ U.S. office and warehouse workers," and "oversee initial day-to-day operations." The director correctly determined that this description fell significantly short of establishing that the beneficiary would be employed in a primarily managerial or executive capacity. Rather the description implies that the petitioner is still in the initial stages of development, has not yet hired workers, and will require the beneficiary to personally seek out potential customers, a duty that is not traditionally considered to be a managerial or executive task. While signing major contracts with customers may require managerial or executive authority, it is reasonable to expect a sales office to maintain sales and marketing staff other than its president. The petitioner did not describe what managerial or executive duties the beneficiary would perform to "oversee" day-to-day operations, nor did it establish that employees are in place to perform the non-managerial and non-executive duties associated with operating an import and sales office. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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 director requested that the petitioner provide a detailed description of the beneficiary's duties as president of the U.S. entity, and advised the petitioner to be specific and provide information regarding the percentage of time the beneficiary devotes to each specific duty. The petitioner submitted a list of eight duties in response, but failed to provide the requested percentages of time devoted to each specific duty. This failure of documentation is important because several of the beneficiary's assigned tasks, such as "market the company's products in the U.S.," "view the latest trends of color and quality of carpet design," "negotiate business with U.S. clients," and "attend carpet exhibitions to promote business activities," do not fall directly under traditional managerial or executive duties as defined in the statute, and, again, there are no subordinate sales or marketing staff employed by the U.S. company to whom the beneficiary could delegate non-qualifying duties associated with these functions. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion is actually non-managerial. *See Republic of Transkei*

v. *INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Although the petitioner indicated that the beneficiary's role in the United States includes overseeing the parent company's business affairs, the petitioner offered no further explanation of exactly what this duty entails, how much of the beneficiary's time would be devoted to such duties, or how the foreign entity's employees in Pakistan would be able to relieve the beneficiary from involvement in the day-to-day operations of the U.S. sales and import office. The foreign entity, based on the organizational chart submitted on appeal, does not have a sales department, a marketing department, or an export department. While we acknowledge that the beneficiary remains responsible for the overall direction of the foreign entity even while he is in the United States., the beneficiary's actual duties in the United States, 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). Given that the U.S. company employs only the beneficiary and his spouse, the petitioner has not established that it will require him to primarily manage the foreign entity while in the United States. The regulations contain separate requirements with respect to the beneficiary's duties abroad and his proposed duties in the United States and the petitioner cannot rely on the foreign duties to establish his employment in a qualifying capacity in the United States. See 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv).

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 U.S. company employs the beneficiary and a vice president. Notwithstanding the vice president's position title, the brief position description provided for this employee is insufficient to establish that she would be performing primarily managerial or supervisory duties, or that the position is professional in nature.¹

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. The possession of a bachelor's degree by a subordinate employee does not

In fact, when this petition was filed on January 22, 2009, the beneficiary's spouse was the only employee in the United States and would have been responsible for all aspects of the company's day-to-day operations. Although counsel suggests on appeal that the director should have taken into account the foreign entity's large staff in determining whether the beneficiary would be employed in a qualifying capacity for the petitioner, there is no evidence in the record of the role of the foreign employees in contributing to the operation of the U.S. entity, and therefore, the petitioner has not established that these employees should be taken into account when analyzing the beneficiary's proposed employment capacity in the United States.

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 position description that describes the 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. The petitioner has not articulated a claim that the beneficiary primarily manages an essential function of the U.S. company. While performing non-qualifying tasks will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; see also *Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, the petitioner has not sustained this burden.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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 definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, while the beneficiary is responsible for the goals and policies of the company as its president, the

automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

evidence of record fails to demonstrate that these are his primary duties, nor has it explained who performs the majority of the non-qualifying tasks associated with operating a sales and import office. As discussed above, the petitioner's claim that the beneficiary qualifies for the benefit sought based on his role as chief executive of the foreign entity is not persuasive.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

Furthermore, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner operates a sales and import office which employs the beneficiary as president and his spouse as vice president. The AAO notes that both employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and a vice president. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO acknowledges the petitioner's contention that the expansion of the U.S. business and the hiring of U.S. employees were delayed due to the beneficiary's "forced absence" from the United States while awaiting clearance of his L-1 visa application. While it appears that this absence was beyond the beneficiary's control, we note that the beneficiary departed the United States in February 2008 within weeks of receiving a change of status from B-1 to L-1A and did not return again until July 2008. The petitioner has not provided any explanation for this lengthy absence. It is reasonable to expect that the beneficiary would have taken steps to establish the U.S. office, showroom and staffing levels upon approval of the L-1A petition rather than departing the country for more than four months, or that he would have made some progress towards these goals when he returned to the United States in July 2008. Furthermore, it is not clear why the beneficiary is

unable to make business decisions from abroad by communicating with the vice president when the petitioner simultaneously indicates that the beneficiary will "oversee" the foreign entity while in the United States.

The most critical deficiencies in the evidence do not pertain to the small size of the company, but to the petitioner's failure to establish that the beneficiary's actual duties in the United States, as of the date of filing, would be primarily managerial or executive in nature. While the petitioner claims that additional office and warehouse staff will be hired upon the beneficiary's return to the United States, 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).

We note counsel's suggestion on appeal that the beneficiary should be granted one additional year to establish the new office, and his assertion that "it is only fair (and certainly not precluded by the regulations) to continue to extend L-1 eligibility to a prospective manager who has not been in the U.S. for most of the first year." However, the petitioner is no longer a "new office" and is not eligible for an extension of the original petition under the regulations applicable to new offices.

The L-1A nonimmigrant visa classification 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. The only provision that would allow 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).

In general, the statute allows nonimmigrant L-1A classification for an alien that is being transferred from an overseas employer temporarily to the United States to work for a related company in a managerial or executive capacity. Section 101(a)(15)(L) of the Act. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient approach to petitions filed on behalf of managers or executives who 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).

USCIS will not grant a second petition under the more lenient "new office" provisions because it would undermine the established regulatory scheme for L-1 nonimmigrants and create an incentive for foreign companies to delay or under-fund the implementation of their U.S. business plans. By allowing multiple petitions under the more lenient standard, USCIS would in effect encourage foreign entities to create inactive, under-funded or under-staffed 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. While we acknowledge that the beneficiary was unable to return to the United States in September 2008 as planned after his August 21, 2008 departure, the record shows that the beneficiary spent less than three months in the United States between January 23, 2008 and August 21, 2008, presumably by his own choice, as the petitioner has not claimed that his absence between February and July 2008 was beyond his control.

In conclusion, the petitioner may not be granted a second petition under the more lenient "new office" provision. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of a new office petition to support an executive or managerial position. 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.

Finally, we acknowledge that the petitioner has submitted documentation regarding the U.S. company's current operations as supplemental evidence on appeal. 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 the petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If the petitioner or beneficiary becomes eligible under a new set of facts after the petition is denied, the proper course of action is to file a new petition. Despite the previous denial, there is no bar to the petitioner's filing of a new petition supported by new evidence of eligibility.

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.