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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

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DATE: **MAY 17 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: SELF-REPRESENTED

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 consulting services company. It claims to be an affiliate of Meigyoku Human Laboratory, Inc., located in Japan. The beneficiary was previously granted L-1A status for a period of one year, from August 1, 2008 to July 31, 2009, to open a new office in the United States, and the petitioner now seeks to extend her status so that she may continue to serve in the position of president.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director determined that the petitioner failed to establish that the new U.S. office had grown to the point where it can support a managerial or executive position.

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, the petitioner explains why the U.S. company was unable to hire employees and purchase real estate during the first year of operations, indicates that the company is in the process of opening a Manhattan branch, and provides more information regarding the beneficiary's duties during the first year of operations. The petitioner indicates that it requires the beneficiary's services in the United States for several years, requests reconsideration of the petition, and inquires as to whether another visa type would be appropriate.

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 Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 4, 2009. The petitioner indicated on the Form I-129 that it is operating a consulting services business with one employee and gross annual revenues of \$200,000. The petitioner stated that the beneficiary's proposed duties in the United States are "management, development of the U.S. corporation and importantly to recruit the additional employees."

The petitioner submitted a copy of the beneficiary's passport, Form I-94 and prior approval notice. The majority of the documentary evidence submitted at the time of filing consisted of copies of documents that were submitted in support of the initial L-1A petition in July 2008. In a letter dated July 20, 2008, the petitioner indicated that the beneficiary's duties would include: management of the California corporation; establishment of a New York Corporation in Manhattan; recruiting and supervising an accounting manager, sales promotional manager and corporate secretary; financing both corporations; counseling on import and export business between the United States and Japan; and providing psychological and psychic counseling mainly to businessmen and students traveling between the United States and Japan.

The petitioner did not submit a statement of the actual duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition, or a statement describing the staffing of the new operation, as required by 8 C.F.R. §§ 214.2(1)(14)(ii)(C) and (D).

Accordingly, the director issued a request for additional evidence ("RFE") on June 10, 2009 in which she instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the company's organizational chart clearly identifying the beneficiary's position and the employees she supervises by name and job title; (2) a brief description of job duties, educational level, annual salaries/wages and immigration status for all U.S. employees; (3) a more detailed description of the beneficiary's duties indicating the percentage of time spent performing each of the listed duties; (4) copies of the company's California Forms DE-6, Quarterly Wage Reports for the last four quarters; (5) copies of the company's payroll summary Forms W-2 and W-3 evidencing wages paid to employees; and (6) clarification regarding the specific nature of the U.S. company's business and a detailed description of the beneficiary's initial year of employment in the United States.

In a response dated June 20, 2009, the petitioner stated that the beneficiary's one year visa approval "was not long enough to make the California corporation to be well under way." The petitioner noted that it had intended to purchase real estate for office space in Manhattan and in San Diego or La Jolla, California, but "2008 and 2009 were and are very bad years to invest money to purchase the real estates all over the world including the U.S." The petitioner further stated that it took longer than expected for the beneficiary to obtain her initial L-1A petition approval in 2008, and therefore the company's plans had to be delayed and rescheduled.

The petitioner stated that, as a result, the one-year period of approval did not give the beneficiary sufficient time to perform the following key duties: invest to purchase real estate in New York and California; to recruit, train and supervise three key staff; to find and contact as many clients as possible, particularly large corporations based in the San Diego area; or to set up a new corporation in New York. The petitioner noted that "it is time-consuming and a sort of difficult to make one Corporation in San Diego run in a right way with the new employees we are going to hire, and the business lucrative." The petitioner also noted that the beneficiary will also need to travel to Japan to concentrate on her duties with the petitioner's affiliates. In light of the circumstances, the petitioner requested that the beneficiary be granted an extension of five years.

The petitioner confirmed that the beneficiary is the U.S. company's only employee and that she has been traveling between the United States and Japan. The petitioner indicated that it had expected to have an assistant manager, a sales promotional manager and a corporate secretary in place "within a year or two."

The petitioner described the beneficiary's duties as follows:

- Recruiting Assistant Manager, Sales Promotional Manager, and Corporation Secretary (30%)
- Purchasing two properties in Manhattan, New York and CA (30%)
- Psychological and Psychic Counseling, Interpreting, and Translating Business (20%)
- Establishment New York Corporation in Manhattan, NY. (10%)

- Management and Development of California Corporation. (10%)

The record also includes copies of the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for 2007 and 2008, during which the petitioner received gross receipts or sales of \$44,633 and \$39,985, respectively.

The director denied the petition on June 26, 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. The director observed that, based on the petitioner's statements regarding its staffing and level of business, it had not grown to the point where it can employ the beneficiary in a primarily managerial or executive capacity.

On appeal, the petitioner once again explains why the petitioner did not grow as expected and notes that the beneficiary, while awaiting an opportunity to purchase real estate for company offices, has been "advertising our counseling services to the major Japanese companies in CA, meeting some applicants to manage this corporation on behalf of the beneficiary, finding the good timing to purchase the real estates and their locations."

The petitioner indicates that it requires the beneficiary to stay in the United States for "several more years" and inquires whether it would be necessary to obtain a different type of visa. At the same time, the petitioner requests reconsideration of the denial.

In a separate statement dated June 30, 2009, the petitioner indicates that the beneficiary has performed the following duties during the previous year:

1. Research works to establish New York Corporation in Manhattan, New York.
2. Research works to develop the business in San Diego, CA
3. Beneficiary has been looking for the real estates both in San Diego and Manhattan, New York to purchase our office buildings. She actually found several prospective buildings, when all of a sudden, such a great economical depression spread all over the United States. She had not choice but suspend to purchase them for the time being.
4. Beneficiary started to advertise our business especially by visiting the Japanese corporations in California and in New York state.
5. Financing and Accounting.
6. Recruit calibers to work as the manager of the corporations.

Because of such short time to stay in the States as the holder of L-1A Visa and also of hard luck beaten by the economical depression, our plans have been pushed back several years. Though we have our temporal office leased in San Diego, CA we really have to purchase our offices and we are going to do this in coming year, which are the main jobs of the beneficiary. We are going to have our own offices, recruit our employees and manage the

corporations with the new people we are going to hire under the management of the beneficiary.

The petitioner indicates that it intends to hire two managers, one financial and accounting officer and two assistant managers to work as consultants to prospective customers. The petitioner concedes that the company has not done much business because the beneficiary "has been only concentrating on the startup works for the corporations." The petitioner states that the extension will allow the beneficiary to "finish the preparation."

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 and a longer-than-expected visa petition process. 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 U.S. company is not staffed and that it has not done much business in the United States.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

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

open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B).

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 a managerial or executive level of authority, the petitioner has not submitted a credible breakdown of how the beneficiary will allocate her time among her responsibilities. For example, the petitioner indicates that the beneficiary will devote a total of 70

percent of her time to recruiting personnel, purchasing real estate and establishing a New York corporation, and only 20 percent of her time to providing psychological and psychic counseling, interpreting and translating services. The beneficiary is the sole employee of a company that is engaged exclusively in the provision of such services. To the extent that the company is doing business, the beneficiary is therefore the sole employee available to provide these services. In light of these circumstances, the petitioner's claim that it requires the beneficiary to devote only 20 percent of her time to service-oriented tasks is simply not credible. Furthermore, collectively, the petitioner's evidence brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. 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 credible percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Furthermore, while making a final decision regarding which property to purchase or which employees to hire may require an exercise of managerial or executive discretion, the beneficiary, as the sole employee, would also be required to perform all non-qualifying duties associated with the property search and recruitment process, as well as all service-oriented, administrative and other operational tasks of the company.

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). 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 her actual day-to-day duties as of the date of filing would be primarily managerial or executive. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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 concedes that the beneficiary, who had intended to recruit at least three employees during the first year of the petitioner's operations, was the sole employee as of the date of filing this petition. The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d

41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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

At the time of filing, the petitioner was a two-year-old company established for the purpose of providing psychic counseling services to Japanese students and business persons residing in the United States, to provide consulting services to U.S. corporations who wish to engage in import and export with Japan, and to provide translation and interpretation services for U.S. and Japanese corporations. The beneficiary, while charged with hiring employees and purchasing real property for the expansion of the business, is also the sole employee working for the U.S. company. Thus, it is reasonable to conclude, and has not been shown otherwise, that she provides the company's services, and performs all other administrative and operational tasks associated with the operation of a consulting business. The petitioner has not established that it had a reasonable need for the beneficiary to perform primarily managerial or executive tasks as of the date of filing.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

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

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.