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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 18 2011**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The director subsequently granted the petitioner's motion to reopen and affirmed his decision to deny the 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 employ the beneficiary 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 Florida corporation established in April 2005, intends to operate a construction consulting services business. It claims to be an affiliate of [REDACTED] located in Bogota, Colombia. The petitioner seeks to employ the beneficiary as the vice president of operations for its new office in the United States for a period of one year.

On June 4, 2007, the director denied the petition on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the petitioner has secured sufficient physical premises to house the new office; and (2) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, or that the U.S. company will grow to the point where it can support a managerial or executive position within one year.¹

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 asserts that, although not required by the regulations, the petitioner did in fact secure physical premises for the new company prior to filing the petition. With respect to the beneficiary's employment capacity, counsel asserts that the beneficiary "has sufficient experience and education for the managerial and consultant position sought," and that the company does in fact have sufficient funds to do business and pay the beneficiary's salary. Counsel submits a copy of its most recent motion and supporting documentation 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(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

¹ The director initially denied the petition as abandoned, pursuant to 8 C.F.R. § 103.2(b)(13) on October 19, 2005, based on a conclusion that the petitioner failed to respond to a request for evidence. The director dismissed the petitioner's first motion to re-open on May 30, 2006. The director granted the petitioner's second motion to reopen and ultimately denied the petition on substantive grounds on June 4, 2007.

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (I)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

II. The Issues on Appeal

A. Sufficient Physical Premises to House the New Office

The first issue addressed by the director is whether the petitioner established that it secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

Evidence of the physical premises secured for the new office is required initial evidence for a petition filed pursuant to 8 C.F.R. § 214.2(l)(3)(v). Therefore, 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'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r. 1998).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 13, 2005. The petitioner stated on Part 1 of the Form I-129 that its mailing address is [REDACTED]. Under Part 5 of the Form I-129, the petitioner stated that the beneficiary would also work at this address. In addition, the petitioner indicated under Part 3 of the Form I-129 that the beneficiary was physically present in the United States at the time the petition was filed, and listed the same address as his U.S. address.

The petitioner did not submit evidence, such as a lease agreement or ownership deed, documenting that it has secured this premises for the operation of the U.S. business. The petitioner submitted a "Corporate Overview" outlining the strategies and plans for the new business, but this document did not address the company's space requirements or mention any business premises already secured for the operation of the business.

Accordingly, on July 15, 2005, the director issued a request for additional evidence ("RFE"), in which she instructed the petitioner to provide documentary evidence demonstrating that the U.S. company has secured sufficient physical premises to house the new office and commence the type of business described in the petition. The director noted that such evidence should include, at a minimum, a completed and signed lease.

In response, the petitioner submitted a commercial lease for the premises located at [REDACTED]. The lease was signed on July 25, 2005, and had a two-year validity period beginning on August 1, 2005, with an annual rental payment of \$700. According to the terms of the lease, the premises are authorized for use as an administrative office.

The petitioner also submitted invoices in support of its latest motion to reopen to establish that the company has commenced business activities. Those invoices indicate that the petitioner was located at [REDACTED] as of October 2005.

The director denied the petition on June 4, 2007, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. The director emphasized that the petitioner is required to establish that such premises have been secured prior to filing the petition, and, in this case, the petitioner signed the submitted lease twelve days subsequent to filing the petition. The director also noted that, even if the submitted lease had been signed prior to the filing of the petition, the lease stipulates that such premises could only be used as an administrative office, and had not been shown to be sufficient to operate a construction business.

On appeal, counsel objects to the director's finding, and asserts:

First, the regulations do not require that the petitioner secure physical premises before the petition is filed. The Petitioner did secure office premises and submitted evidence of the same to the USCIS. To this date, the petitioner still has office premises which are being used to run the company. The USCIS argues that the premises are to be used for an administrative office and not a construction company. The reality of the matter is that USCIS has misinterpreted the nature of petitioner's office. The petitioner has never stated that it would open a construction office. The nature of the petitioner's office is quality control and consulting for construction projects. The petitioning company and the beneficiary offer consulting services to construction companies.

Upon review, counsel's assertions are not persuasive. The petitioner has not submitted evidence that it had secured adequate physical premises to house the new office as of the date of filing. Contrary to counsel's contentions, it is the petitioner's burden to establish eligibility at the time of filing the nonimmigrant visa petition. As noted above, 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'r. 1978). Furthermore, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(12). Evidence of physical premises to house the new United States company is required initial evidence pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time of filing, the petitioner indicated that its address is [REDACTED] an address which also appeared to be the beneficiary's residential address. Absent evidence that the premises located at this address was sufficient for the operation of the intended construction consulting services business, the petitioner cannot meet the eligibility requirement at 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner has not submitted a lease agreement for this address. Accordingly, the appeal will be dismissed.

With respect to the lease secured subsequent to the filing of the petition, the AAO notes that an "administrative office" could be sufficient for the operation of the intended consulting services business. However, the petitioner has not furnished a comprehensive description of its anticipated organizational structure or its physical space requirements. The office lease furnished in support of the petition does not indicate the size of the space leased. Based on this minimal documentation, it could not be determined that the petitioner has secured sufficient physical premises to house the new office. Finally, we note that the evidence submitted to establish that the petitioner commenced business operations indicates that the petitioner is not, in fact, operating from the leased commercial premises but rather from another location in Orlando, Florida. Therefore, even if the AAO were required to consider facts that came into existence after the petition was filed, the evidence submitted would be insufficient to meet the requirements of 8 C.F.R. § 214.2(l)(3)(v)(A).

B. Employment in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity within one year of commencing operations, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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.

When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or

managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

In a letter dated July 1, 2005, the petitioner described the beneficiary's proposed duties as Vice President of Operations as follows:

In this position, [the beneficiary] will be responsible for establishing and developing the infrastructure of the company, as well as establishing and developing relationships with prospective clients in the U.S. Construction industry in the area of Central Florida in order to offer the company's services as to quality control, development and management of construction projects.

The petitioner indicated on the Form I-129 that the beneficiary will "establish company's infrastructure, seek potential clients and counseled [*sic*] those clients in the management, development and quality control of projects." The petitioner indicates that the beneficiary is qualified for the position based on his degree in civil engineering and his postgraduate studies in the areas of quality control and project management.

The petitioner submitted a separate statement of job duties, which listed the beneficiary's proposed tasks as follows:

1. Design, develop and control of the [U.S. company] project.
2. This position is responsible for managing the total relationship of all aspects of a implementation/installation and/or professional services engagements within the organization and the staff assigned to the specific project or projects.
3. Participates in strategic planning sessions with both client and management to determine the scope and objectives of each project.
4. This position require[s] coordination and communication at all management levels.
5. Responsible for identifying the role of each project team member.
6. Responsible for effectively coordinating the activities of the team to meet project milestones.
7. Manage the implementation and installation, within the processes and procedures.
8. Prepare management reports reflecting project status and priorities.
9. Monitor the amount and quality of work.
10. Control, plan, manage and organize assigned projects in the time reporting system.
11. Direct detail project plans, budgets and time frames; monitor plans and take corrective action where appropriate to achievement of project goals.

According to the position description, the employees to be supervised are subcontractors.

In support of the petition, the petitioner submitted a "Company Overview" outlining the purpose for establishing the company, its intended business activities and its short and long-term plans. The company overview indicates that the foreign entity has provided a sum of \$10,000 for the purpose of covering the U.S. entity's start up costs, acquiring licenses, and buying necessary equipment. The company's short-term objectives, are as follows:

- Receive from the companies in Colombia the sum of US\$10,000.00 to start the corporation
- Obtain all the required licenses in the State of Florida.
- Obtain support from the Small Business Administration
- Obtain membership in the Chamber of Commerce in the major cities of Central Florida
- Penetrate the market by winning management contracts.
- Create a company brochure to show all the projects the company have been part of.
- Obtain information about licenses and regulations to develop construction projects in the State of Florida.
- Increase the number of contracts in order to receive at list [sic] US\$6,000.00 per month as a result of operations
- Reinforce the company's image by showing accomplishments in other projects
- Analyze and apply the different strategies for expansion, according to the current market, potential needs and opportunities derived from other projects.
- Identify and Target new potential clients by sending the information about the company and soliciting business
- Increase the number of contracts in the area of home and commercial building.
- Achieve earnings of US\$10,000 for the development of projects and strength of the company
- Increase the number of full time staff

- Obtain the Construction licenses required by the State of Florida.

The petitioner also submitted a list of "long-term" goals that it anticipates achievement in "2-5 years."

The petitioner indicated that the service to be provided by the company at the outset is "the participation of our qualified personnel in the verification of quality systems, compliance by the contractor and the client at all stages of the project and the mediation between client, contractor and sub contractor in order to achieve the objectives in the specified time and in the budget previously stipulated." As a long-term goal, the petitioner intends to obtain a general contractor's license and initiate its own construction projects.

The petitioner indicated that it anticipates a total start-up cost of \$15,000, which will include funds from the foreign entity and a \$5,000 loan. The petitioner's company overview does not address anticipated staffing levels, but rather indicates that the beneficiary will earn \$30,000, and that at the end of the fiscal year "salaries will be revised and the company will determine staffing needs and fair compensation." The petitioner submitted a letter from the petitioner's bank confirming that the beneficiary opened a business checking account with a balance of \$6,612 as of May 25, 2005.

In the request for evidence issued on July 15, 2005, the director requested that the petitioner: (1) identify the proposed staffing level which should be realized by the U.S. company by the end of the first-year start-up period, including all position titles, associated duties, and educational requirements for all proposed employees; (2) clarify whether the beneficiary, while in the United States, would be operating as a consultant providing services to client companies; and (3) provide documentary evidence of the funding or capitalization of the U.S. company, including such evidence as copies of wire transfers showing the transfer of funds from the foreign company or evidence of financial resources committed by the foreign company.

In a letter dated August 22, 2005, counsel for the petitioner referred the director to the company overview submitted at the time of filing for information regarding proposed staffing. Counsel noted that "the staffing projections will depend on the success of the company the first year." With respect to the beneficiary's proposed role, counsel stated:

Initially, the beneficiary would be in charge of establishing the infrastructure of the US Company, as well as establishing the contacts with clients and developing such relationships. As such, the beneficiary's knowledge and studies in the field of quality control and project development make him the ideal candidate to act also as a consultant for petitioner's clients, thus rendering services as a consultant on behalf of the petitioner.

In response to the director's request for evidence of the funding and capitalization of the U.S. company, counsel stated that it was submitting copies of checks and banks statements demonstrating that the foreign entity has been transferring funds to maintain the U.S. company while the visa petition is pending. This evidence included: (1) a Washington Mutual Bank statement for August 2005 showing a balance of \$7,812.01 and customer deposits in the amount of \$3,750 and \$1500; and (2) evidence of payments from [REDACTED] to the beneficiary in the amounts of \$5,350, \$500, \$3,500, \$500, \$368, and \$2,100. The payments were made between June 2004 and July 2005 and appear to relate primarily to the beneficiary's expenses, such as immigration expenses, travel, and a feasibility study for the U.S. office.

The director denied the petition, concluding that the petitioner failed to establish that the U.S. business will support a managerial or executive position within one year of the approval of the petition. In denying the petition, the director noted that the petitioner has failed to identify with specificity any staff to be hired within the first year of operations other than the beneficiary, and notes that many of the activities planned for the company's first two years of operations, such as obtaining licenses and developing an advertising strategy, should have been undertaken prior to filing the petition. The director determined that the evidence submitted did not establish that the U.S. company was prepared to commence business activities and expand to the point where it would support a managerial or executive position.

On appeal, counsel objects to the director's finding and asserts:

[T]he beneficiary has sufficient experience and education for the managerial and consultant position sought. In terms of the ability to pay the beneficiary's salary, the same is evident by the fact that the company is doing business and paying the beneficiary's salary. Evidence of the latter was also submitted with the petitioner's response and request to reopen.

The petitioner submits evidence that the petitioner has issued 18 invoices for "estimating/quality control" services and "coordination/quality control" services between October 2005 and June 2006.

Upon review, we affirm the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year. This finding is based primarily on the petitioner's failure to provide a description of the beneficiary's proposed duties that establishes that such duties will be primarily managerial or executive in nature, and the failure to establish the scope of the organization and the proposed staffing levels of the U.S. entity within one year.

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 either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

The position description submitted at the time of filing suggested that, while the beneficiary would have discretionary decision-making authority over the operations of the petitioning company, he would also be responsible for sales, marketing and directly providing the services of the petitioner's construction consulting services business. The petitioner indicated that the beneficiary will "establish the company's infrastructure," "seek potential clients," develop client relationships and counsel clients in "the management, development and quality control of projects." Counsel later confirmed that the beneficiary is the "ideal candidate to also

act also as consultant for the petitioner's clients, thus rendering services as a consultant on behalf of the petitioner." On appeal, the petitioner describes the beneficiary's proposed role as a "managerial and consultant" position. Based on these duties, it is evident that the beneficiary would be directly involved in providing the services of the company. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

While the petitioner provided a separate list of eleven duties the beneficiary would perform as vice president of the U.S. company, that iteration of the beneficiary's job duties described the position as one primarily responsible for managing "implementation/installation and/or professional services engagements within the organization and the staff assigned" to such projects. Based on the petitioner's evidence, the U.S. company has no immediate or short-term plans to implement its own construction projects, but rather will be providing consulting services on project quality and management to other construction companies. As such, this list of duties does not appear to reflect the beneficiary's proposed duties for the first year of operation. According to the petitioner's company overview, it hopes to obtain its general contractor license and initiate its own construction projects only after two to five years in operation.

Overall, based on the evidence submitted, the beneficiary's duties during the first year of operations will include obtaining business licenses, performing sales and marketing tasks necessary to obtain clients, and directly providing consulting services to local construction companies. Although the petitioner indicates that the company may "increase the number of full-time staff" within the first two years of operation, it has not specified what positions would be filled or provided a more detailed timeframe for the staffing of the company. Thus, it cannot be concluded that the beneficiary would be relieved from performing sales, marketing, operational and administrative tasks within one year of the approval of the petition.

For the reasons discussed above, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. While performing non-qualifying tasks necessary to produce a product or service 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). Here, the petitioner indicates that the beneficiary will be engaged primarily in non-qualifying duties associated with the day-to-day operation of a consulting business. While the beneficiary will exercise authority over the company, the petitioner has failed to identify with any specificity what managerial duties he will perform or how much time the beneficiary would devote to managerial duties within one year.

The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed

duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

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 discussed by the director, the petitioner has not submitted evidence of the proposed organizational structure of the United States entity. The petitioner's vague statements that the company will hire "full time staff" during the two years of operation, and that the hiring of any staff depends upon the performance of the company, is insufficient to establish that he beneficiary would be primarily supervising a staff composed of managerial, supervisory or professional employees within one year, or to establish that any employees at all would be hired within that timeframe. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a position that would meet the requirements for a "personnel manager."

The AAO's analysis of this issue is severely restricted by the petitioner's failure to submit an adequate business plan. A review of the totality of the evidence submitted provides no documentation indicating the number of employees to be hired, no timeline for hiring employees, little evidence regarding the current financial position of the U.S. company, and little evidence regarding the petitioner's anticipated start-up costs, anticipated operating expenses, and financial objectives for the first year of operations. Based on the "company overview" the only salary the petitioner intends to pay during the first year is the beneficiary's salary. The petitioner indicates that it would determine staffing needs after the first year. The regulations require the petitioner to present a credible picture of where the company will stand in exactly one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Moreover, although the record does contain evidence that the foreign entity has been financing the beneficiary's expenses associated with the start-up of the company, and indicates that the petitioner has begun providing consulting services to a few clients in the United States, the petitioner also indicates that the hiring of staff is dependent on the performance of the U.S. company, rather than on any investment from the foreign entity. Again, the petitioner has not identified in its business plan what level of business it needs to achieve before it hires staff, or when it anticipates reaching this unidentified threshold.

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president and general manager. However, 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 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 has submitted a job description which indicates that he will be directly providing the services of the U.S. company while also holding responsibility for administrative, sales and marketing tasks, that would reasonably require more of his time than any managerial duties he may perform. Considered in light of the petitioner's failure to adequately document its hiring plans and financial objectives for the first year of operations, the AAO cannot conclude that the petitioning company could realistically support a managerial or executive position within one year. Accordingly, the appeal will be dismissed.

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.