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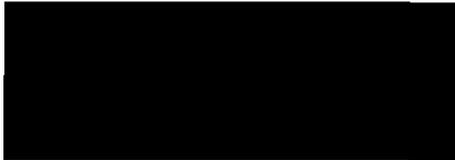
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

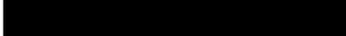
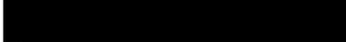


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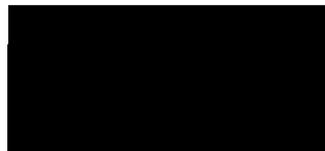


DATE: **OCT 19 2011** Office: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. 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 classify 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 [REDACTED] corporation, states that it is engaged in the wholesale purchase and export of motor vehicles and motor vehicle parts. It claims to be an affiliate of [REDACTED] located in [REDACTED]. The beneficiary was previously granted L-1A classification for a period of one year in order to open a new office in the United States as the company's president and chief executive officer. The petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

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 director erred by basing the denial solely on the small size of the petitioning company. Counsel emphasizes that the beneficiary serves as the chief executive officer for both the U.S. petitioner and its [REDACTED] affiliate and manages a total of 31 employees. Counsel asserts that the beneficiary qualifies as both an executive and a manager. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in

the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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. Discussion

The primary 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 12, 2008. The petitioner indicated that it has five employees and gross annual income of \$371,782. The petitioner provided the following description of the beneficiary's proposed duties:

Will enter the US to coordinate the opening of the business, coordinate purchasing of vehicles, parts, accessories, directly from manufactures [sic] and other dealers, will negotiate contracts directly with wholesalers.

The petitioner provided an organizational chart depicting the beneficiary as CEO and President. The chart depicts a general manager who reports to the beneficiary, and three employees who report to the general manager, including a secretary, an accountant and a salesperson. The petitioner submitted a copy of its Form [REDACTED] which indicates that the petitioner employed the beneficiary and the four individuals identified on the organizational chart throughout the quarter. The beneficiary and the secretary earned \$3,000 for the quarter, while the three remaining employees were paid \$1,500.

The director issued a request for additional evidence ("RFE") on September 26, 2008, in which the director requested additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity, and that he would be relieved from performing the services of the corporation. Specifically, the director requested detailed position descriptions for every position highlighting whether or how the beneficiary's subordinates can be deemed managers or professionals.

In a response dated November 6, 2008, counsel for the petitioner emphasized that the U.S. company did not commence operations until February 2008, when the beneficiary was first admitted to the United States with an L-1 visa. Counsel noted that, although the beneficiary's initial L-1A classification petition was approved in September 2007, he was abroad at the time and had to wait until February 2008 to obtain a visa appointment at the U.S. Embassy in Caracas, Venezuela.

The petitioner provided the following description of the beneficiary's duties:

[The beneficiary] will be in charge of the establishing and overseeing the opening the commercial office of the company in [REDACTED] will be in charge of studying the commercial opportunities available for development of the commercial enterprise and all related aspects like location, customers taste, demographic, community needs, will develop the commercial plan, strategies to be followed, will structure the goals and corporate policies to be complied with in order to maximize corporate revenue and growth, will select key personnel to direct the departments of the company as it develops and who in turn will uphold the company's mission, will direct the commercial organization's administration, will follow channels of opportunity available in the market that may lead to further business endeavor.

The petitioner stated that the general manager performs the following duties:

[The general manager] will be in charge of directing the department of the operation as it develops, will oversee the sales, import and export department through it[s] subordinate personnel, will be in charge of recruitment of personnel including the authority to fire them, and the ability to transfer personnel among department[s] or re-assign them to other positions or change their duties, prepare schedule, will oversee the preparation of reports in regards to reporting sales, import and exports, oversee preparation of financial reports and tax compliance, oversee compliance with fiscal requirements, comply with budgetary goals, make recommendations to president in all aspects necessary for the well functioning and profitability of the company.

The Accountant's duties are described as follows:

[The accountant] will be in charge of all accounting and financial aspect of the company, in charge of gathering all accounting information and entering of data into established accounting system, in charge of verifying bank accounts and reconciling accounts, oversee and verify all related bank transactions, calculate corporate tax burden, prepare tax returns and reports to ensure the payment of municipal, state and federal taxes and other fiscal requirements, analyze corporate finances to determine financial capability to enter into new projects or acquire property while meeting all commercial commitments, calculate budget and oversee compliance with the same, find alternative to decrease expenditures and increase commercial revenue to facilitate corporate growth, prepare reports and advise management as to the daily financial situation.

The petitioner stated that the National and International Sales Representative performs the following duties:

In charge of meeting with customer, receive from customer request for products or merchandise, negotiate prices with customers, discuss prices, availability of products, time tables and schedule of delivery of products, prepare quotes and proposals, oversee customs process for the export of the products, oversee compliance with customs documents necessary to comply with import laws, suggest commercial leads and refer possible new business opportunity to management or follow up and recommendation.

Finally, the petitioner stated that the secretary will be in charge of providing support to the staff of the company, including preparation of documents requested by the general manager, accountant and sales representative, organizing documents, maintaining records, distributing correspondence, maintaining the calendar, ordering supplies, receiving clients and visitors, managing messages, incoming mail and calls, and maintaining inventory of office equipment and resources.

The director denied the petition on April 2, 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, or that the petitioning company has grown to the point where it can support such a position. The director determined that the petitioner's evidence was insufficient to establish that the beneficiary's subordinates are managerial or professional employees, or that the subordinate staff would relieve the beneficiary from performing the services of the company. Further, the director determined that the petitioner's "five-person car dealership does not appear to require a bona fide manager or executive who would perform the tasks you have listed on a full-time basis."

On appeal, counsel for the petitioner contends that the beneficiary is employed in an executive capacity. Counsel acknowledges the small size of the petitioning company, but emphasizes that, pursuant to section 101(a)(44)(C) of the Act, the number of employees supervised is not determinative.

Counsel further asserts that the director's determination was "based upon the mistaken belief that [the petitioner] is a stand-alone company." Counsel emphasizes that the petitioner is an affiliate division of the Venezuelan company, and that the two entities operate in cooperation with each other. Counsel also corrects the director's assumption that the petitioner operates a car dealership, noting that the company "is in the business of wholesale car parts import-export, whereby [the petitioner] purchases car parts produced in the U.S. and delivers these parts to [the foreign entity] where they are sold to retail stores and also used by [the foreign entity's] car repair services."

Counsel explains that, as the beneficiary is the CEO of both entities, the beneficiary supervises the foreign entity's 26 employees along with the petitioner's five employees, and that such employees relieve him from involvement in the daily operations of the company. In addition, counsel indicates that the petitioner is in the process of purchasing a [REDACTED] store with 12 employees who will report to the petitioner's general manager upon completion of the acquisition.

Therefore, counsel concludes as follows:

The Beneficiary's position of CEO does quality as being in an executive capacity. As the CEO, the company's top executive, the Beneficiary has the full authority to direct the management of the company. The Beneficiary is responsible for establishing the goals and policies of the company. As the CEO, the Beneficiary has full discretion in decision-making for the company. And finally, as the CEO, the Beneficiary reports directly to the Board of Directors of [the petitioner] of which he is the President, and receives only general supervision from the Board.

Alternatively, counsel indicates that the beneficiary is acting in a managerial capacity, as he supervises a total of three general managers in the United States and [REDACTED], who in turn supervise the work of the company's other employees. Counsel asserts that "the operational function of the company, the purchasing and sale of car parts, as well as car repair services, are conducted by the other employees who report to the General Managers."

In support of the appeal, the petitioner submits a letter from [REDACTED] dated April 6, 2009 indicating the petitioner's intent to purchase a [REDACTED]. The petitioner also submits organizational charts for the U.S. and foreign entities.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in an 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).

At the time of filing the petition, the petitioner failed to provide the required detailed statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary would perform under the extended petition. See 8 C.F.R. § 214.2(l)(14)(ii)(C). The petitioner stated on the Form I-129 that the beneficiary would "coordinate the opening of the business, coordinate purchasing of vehicles, parts, accessories, directly from manufactures [*sic*] and other dealers, will negotiate contracts directly with wholesalers." Based on this limited information, it appeared that the beneficiary's primary duties would include the purchase of vehicles and parts from U.S. suppliers. Given that the stated purpose of the U.S. company is to purchase and export such goods, the petitioner's initial brief statement regarding the beneficiary's duties suggested that he would spend some portion of his time directly providing these services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

Accordingly, the director requested that the petitioner provide a comprehensive description of the beneficiary's duties. The petitioner's response, however, offered little additional insight into the nature of the duties the beneficiary performs on a day-to-day basis. The petitioner stated that the beneficiary will be "in charge of establishing and overseeing the opening of the commercial office," "studying commercial opportunities available for development," "structure the goals and corporate policies," "select key personnel to direct the departments of the company," "direct the commercial organization's administration," and "follow channels of opportunity available in the market." The petitioner failed to acknowledge or elaborate on its previous statement that the beneficiary's primary duties would be coordinating purchasing and negotiating contracts, and instead providing a list of broadly cast duties that merely paraphrase the statutory definition of executive capacity.

As noted by the director, some of these broadly described duties would generally fall under the definitions of managerial or executive capacity. However, it is the lack of specificity which raises questions as to the nature of the beneficiary's actual day-to-day responsibilities. Given that the petitioner was operational at the time of filing, the submission of such a vague and speculative job description in support of a request for an extension of the beneficiary's status is insufficient to meet the petitioner's burden of proof. As noted above, the regulations require

a detailed statement of the duties the beneficiary performed during the previous year and a description of duties he will perform under the extended petition, starting from the date of filing. 8 C.F.R. § 214.2(l)(14)(ii)(C). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide adequate detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the petitioner has failed to show that the beneficiary's duties as of the date of filing are primarily managerial or executive in nature.

Beyond the required description of the beneficiary's job duties, 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 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). Counsel claims on appeal that the beneficiary qualifies for an extension of his L-1A status as a personnel manager. 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 petitioner's organizational chart reflects that the beneficiary supervises a general manager, who, in turn, supervises the company's accountant, sales representative and secretary. On appeal, counsel asserts that the beneficiary also supervises the foreign entity's two general managers, who, in turn supervise up to 24 additional workers in [REDACTED]. The AAO will not consider the beneficiary's claimed supervision of the foreign workers in determining whether he will be employed in a managerial capacity in the United States. The petitioner had ample opportunity prior to the decision to describe the scope and nature of the beneficiary's supervisory responsibilities, and did not previously claim that the beneficiary's role as president of the U.S. company involves daily or regular supervision of the foreign entity's management staff. While the record reflects that the petitioner exports goods to its foreign affiliate, this evidence is insufficient to establish that the foreign entity's staff are involved in the operation of the U.S. company or perform any functions for the U.S. company other than receiving the purchased goods exported by the petitioner. Counsel's assertions that the companies work "in tandem" is insufficient to

warrant consideration of the foreign entity's staffing structure along with the petitioner's own staff. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner indicates that its general manager oversees the company's sales and import and export department, has the authority to recruit, fire and reassign personnel, and oversees the preparation of sales, financial and import and export reports. Notwithstanding the fact that the petitioner does not claim to have an import and export department, these duties appear to be supervisory in nature as the petitioner does employ a sales employee and an accountant. The petitioner has not, however, provided evidence that the general manager works on a full-time basis. The only evidence of wages paid to this employee indicate that she was paid \$1,500 over a three month period, which would reflect an annual salary of \$6,000. Therefore, while the beneficiary may manage one supervisory-level employee, the evidence of record does not reflect that this responsibility was his primary duty as of the date the petition was filed, or that it requires a significant portion of his time. Personnel managers are required to *primarily* supervise and control the work of other supervisory, professional, or managerial employees.

In the alternative, the petitioner claims that the beneficiary qualifies for the benefit sought as an executive. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of 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 beneficiary's job description borrows liberally from the statutory definition of "executive capacity," the facts of this case do not support a finding that his actual duties are primarily focused on the broad policies of the U.S. company. As discussed above, the petitioner has failed to provide a detailed description of the beneficiary's actual duties, such that they could be classified as primarily executive in nature. 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).

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). However, 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, 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). In addition, 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 petitioner operates a one year-old company claimed to be engaged in the wholesale purchase and export of vehicles and vehicle parts. Based on the evidence submitted, three of the petitioner's five employees, including the general manager, sales representative, and accountant, are earning a salary of \$500 per month and have not been shown to be full-time workers.¹ Furthermore, although the petitioner indicates that the U.S. company is primarily engaged in purchasing and exporting goods, the petitioner does not claim to have a single employee who is responsible for purchasing goods or coordinating exports. In fact, at the time of filing the petition, the petitioner attributed the company's purchasing activities to the beneficiary. Based on the lack of staff available to perform such tasks, the record does not establish that the petitioner has a reasonable need for the beneficiary to perform primarily managerial or executive duties. 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO acknowledges the petitioner's claims that the petitioner was delayed in commencing operations through no fault of its own, and is currently pursuing expansion plans, including a tire distributorship agreement, purchase of a warehouse, and purchase of an auto repair franchise.

The petitioner's initial petition on behalf of the beneficiary was filed on September 10, 2007 and approved on September 20, 2007. The petitioner filed the petition while the beneficiary was physically present in the United States and requested that he be granted a change and extension of status. Counsel indicates that USCIS "approved the L-1 visa in September 2007 while the beneficiary was abroad" and "the Consular Section at the US Embassy in [REDACTED] for reasons unknown to the beneficiary or us gave him an appointment for February 2008, 5 months later." The petitioner did not adequately support its contention that the five-month delay can be attributed to a delay at the U.S. Embassy.

Based on counsel's statements, it appears that the beneficiary abandoned his request for a change and extension of status by departing the United States during the ten-day period in which his initial L-1 petition was pending. USCIS records reflect that the petitioner filed a Form I-824, Application for Action on an Approved Application or Petition, to request that the U.S. Embassy in [REDACTED] be notified of the approval of the petition on October 17, 2007, and that the consular notification occurred on January 10, 2008. The petitioner has not established through the submission of any supporting evidence that the beneficiary faced an undue delay in obtaining his visa at the U.S. Embassy in [REDACTED]. Going on record without supporting documentary evidence is not sufficient for

¹ The petitioner submitted its [REDACTED] Form UCT-6, Employer's Quarterly Report, for the second quarter of 2008. The petition was filed in the third quarter of 2008, for which no wage data has been provided. It is the petitioner's burden to provide evidence of wages paid to employees pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(D). Accordingly, the AAO has relied on the most recent available evidence.

purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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. The regulations clearly state that a new office petition "may be approved for a period not to exceed one year," irrespective of the length of time the beneficiary actually spends in the United States. 8 C.F.R. § 214.2(l)(7)(i)(A)(3). The fact that the beneficiary did not enter the United States until five months after he was approved for L-1A status does not render him eligible for additional time in order to open a new office.

The AAO acknowledges the petitioner's claim that it intends to acquire in the near future an auto repair franchise which currently has a staff of twelve employees. 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. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.