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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

[REDACTED]

D7

DATE: JUL 23 2012 Office: VERMONT SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 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 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 Texas corporation, states that it operates an industrial precision machine shop. It claims to be an affiliate of [REDACTED] located in Ciudad Juarez, Mexico. The petitioner is seeking initial employment for the beneficiary in L-1A status for a period of three years to serve in the position of General Manager.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record establishes that all of the beneficiary's job duties meet the requirements for a functional manager. Counsel submits a brief and additional evidence in support of the appeal.

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 the 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 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.

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 January 21, 2010. The petitioner indicated that it operates an industrial precision machine shop with two employees and no stated gross or net annual income. In a letter dated January 15, 2010, the petitioner explained that the company has been in operation since 1998. In 2009, the company underwent a name change to [REDACTED] at which time the business focus shifted from freight transportation to "a precision industrial machine shop serving the cross-border manufacturing base" in the region. The petitioner further stated that as General Manager, the beneficiary will manage "an essential function, specifically, the entire U.S. operation, supplier network

expansion effort, and manufacturing capabilities." The petitioner stated that the beneficiary will perform the following duties:

- Establishing and managing supplier network for raw materials;
- Monitoring and reporting to senior management of [REDACTED] on profitability and performance forecasting for all U.S. accounts;
- Developing and implementing the plan to achieve supplier expansion goals and turn-around time on manufacturing contracts within U.S.;
- Overseeing responses to customer technical specification issues relating to raw materials properties and on manufactured components;
- Managing general administrative activities, including compliance with payroll, tax, and accounting requirements, as well as coordination with any local, state and federal agencies as needed;
- Overseeing expansion of industrial tool and lathing capabilities to support [REDACTED] operations in Mexico with finished "just in time" components and blanks to speed up operations in Ciudad Juarez, Mexico; and
- Analyzing acquisition strategy for new machinery in light of cost, return on investment, available personnel; contract obligations and target market expansion.

The petitioner explained that the beneficiary will serve in a senior position with respect to the function managed. Specifically, he will report directly to the petitioner's ownership structure. Furthermore, he is authorized to negotiate and bind the petitioner in contracts as well as make personnel decisions.

The petitioner submitted an existing organizational chart showing two employees reporting to the beneficiary. The position of Shop Manager is filled while the position of Admin Tech remains open. Reporting to the Shop Manager are two open positions: Material Handler and Swiss Lathe Operator.

In a document dated November 13, 2009, the petitioner provided a position description for the General Manager. The petitioner stated that as General Manager, the mission is to establish a "prosperous and growing business" and the duties "will be basically General Administration." The duties were to include: payroll; basic accounting; payments of services, suppliers, taxes, permits, etc.; dealing with Federal, State, and local agencies; development of suppliers; establishing a line of credit with suppliers; development of new customers; analysis and acquisition of machinery; hiring and training employees; and coordinating with the company in Mexico.

The petitioner also submitted a copy of the beneficiary's job offer letter. The letter stated that the beneficiary's duties would include: general administration; dealing with federal, state, and local agencies; developing a new client base; customer service and support; analysis and acquisition of machinery; hiring and training of employees; and coordination with the company in Mexico.

The director issued a request for additional evidence ("RFE") on February 1, 2010 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the United States company's latest Federal Income Tax Return and IRS Form 941, Employer's Quarterly Tax Return for the fourth quarter of 2009; and (2) a more detailed description of the beneficiary's duties in the United States including subordinates under the beneficiary's management, job duties of employees managed, how much time will be allotted to

executive/managerial duties, and degree of discretion exercised by the beneficiary; and (3) a percentage breakdown of the number of hours devoted to each of the beneficiary's duties on a weekly basis.

In a response dated March 3, 2010, the petitioner stated that the beneficiary will have "complete and total control on decisions" concerning the petitioner's operations. The petitioner stated that the beneficiary's duties will be as follows:

- Administration of the day to day operations
- Hiring of personal [sic]
- Training of personal [sic]
- Direct supervision of all employees
- Evaluations of employees
- Development of Suppliers and Customers.
- Customer Support.
- Purchasing of Materials.
- Acquisition of Equipment.
- Taxes and Licenses.
- Contract signing on behave [sic] of [REDACTED]
- Sales
- Market expansion.

In a second letter dated March 3, 2010, the petitioner provided answers to the short questions posed by the director. The petitioner stated that the beneficiary will supervise an estimated four employees, spend 90% of his time on executive/managerial duties, and will have complete discretionary authority in day to day operations.

In a third letter dated March 3, 2010, the petitioner provided yet another iteration of the beneficiary's duties, with the hours per week spent performing each. The beneficiary's duties stated by the petitioner were as follows:

- Quotation of potential new projects. 5 hr/week
- Customer Support on current projects. 5 hr/week
- Supervision of personal [sic]. 20 hr/week
- Administrative work. 5 hr/week
- Training of personal [sic]. 4 hr/week
- Evaluation of employees. 1 hr/week

The petitioner also provided job descriptions including hours per week spent on each of the listed duties for the Shop Manager, Administration Technician, Material Handler, and Lathe Operator. The petitioner provided the IRS Form 941, Employer's Quarterly Federal Tax Return for the Fourth Quarter of 2009 showing one employee. The petitioner also provided the 2009 Federal Tax Return showing -\$2950.75 in taxable income.

The director denied the petition on March 29, 2010. The director found that the petitioner has not established that the beneficiary will be involved in the supervision and control of other professional, supervisory, or

managerial employees who will relieve the beneficiary from performing the services of the organization. Specifically, the director found that the petitioner had only one employee at the time of filing. The director stated that the petitioner was "a machine shop with no workers hired yet to operate the equipment." Accordingly, the director concluded that the U.S. entity was not "sufficiently operational to support a managerial position."

On appeal, counsel asserts that the beneficiary is a function manager. Counsel for the petitioner provides a position description for the beneficiary and stated that those duties "entail complete managerial control over the U.S. operations." Counsel for the petitioner contends that the director failed to take into account the corporate reorganization of the petitioner in November of 2009 and the resulting redevelopment. Counsel for the petitioner cites to *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and an unpublished decision in support of the appeal.

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.

As a preliminary matter, counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS).

In *National Hand Tool Corp.*, the court emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. Consistent with both the statute and the holding of *National Hand Tool Corp.*, however, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 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 fact that the beneficiary manages 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").

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The petitioner has provided many different iterations of the beneficiary's proposed job duties in the initial petition, in response to the RFE, and on appeal. Many of these position descriptions include a number of duties that, without further explanation, do not appear to fall under the statutory definitions of managerial or executive capacity, and such duties do not appear to be incidental to any qualifying managerial or executive duties that the beneficiary performs. Specifically, the many descriptions of the beneficiary's position include duties such as general administration; client development; customer service and support; "analysis and acquisition of machinery"; "dealings" with federal, state, and local agencies; and creating quotations for new projects. The petitioner did not describe the specific tasks the beneficiary would perform or otherwise describe what these areas of responsibility entail or who would perform administrative tasks associated with these administrative and development functions. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

To allow the broad application of the term "essential function" to include any minor or low-level function within a business would render the term meaningless. The term "essential" is defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, the petitioner must establish that the function is inherent and indispensable to the business rather than a low-level collateral task that is superfluous to the company's essential operations.

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. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists some of the beneficiary's duties as managerial, but due to the five different position descriptions provided by the petitioner, the AAO is unable to determine the actual duties performed by the beneficiary. Although the petitioner submitted a breakdown of the percentage of time the beneficiary spends on each of his duties, the various position descriptions undermine the credibility of the breakdown provided in response to the RFE. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

This failure of the petitioner's documentation is important because, as stated above, several of the beneficiary's daily tasks, such as general administration; client development; customer service and support; "analysis and acquisition of machinery"; "dealings" with federal, state, and local agencies; and creating quotations for new projects do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

While the petitioner has submitted a revised job description on appeal, the AAO notes that it diverges significantly from the prior description provided. The initial descriptions appeared to have the beneficiary doing more of the actual work, while the iteration of the job description on appeal has the beneficiary managing more of the work done in the petitioner's operation. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Even though the petitioner claims that the beneficiary directs and manages the expansion function, it does not claim to have anyone on its staff to actually perform the administrative functions associated with business expansion including general equipment operation, equipment purchasing, sales, marketing, and compliance. Thus, either the beneficiary himself is performing the expansion function or he does not actually manage the expansion function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the expansion function, the AAO notes that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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 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). Therefore, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

The record established that the beneficiary will be one of only two employees available to provide the services of the machine shop. 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 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).

The petitioner provides information in response to the RFE regarding the educational and experience requirements for staff to be hired by the beneficiary in the future. Although the petitioner plans to staff the company with additional employees, the record shows that those employees were not hired as of the date of filing the Form I-129. 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 developed to the point where the beneficiary is primarily engaged in managerial or executive duties.

The proposed position of the beneficiary is general manager of an industrial precision machine shop consisting of one employee, a shop manager. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an

organizational hierarchy. Even though the enterprise is in a preliminary stage of development, the petitioner is not relieved from meeting the statutory requirements. Based on the limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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).

At the time of filing the petition, the petitioner was a 12 year-old company that underwent a corporate reorganization one year prior to filing with a negative annual income. The firm intends to employ the beneficiary as its General Manager plus a Shop Manager. The AAO notes that both of the employees at the time of filing have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company as of the date of filing. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and one managerial employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The 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 his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his time on non-qualifying duties. Again, 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 record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. While 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended

United States operation one year within the date of approval of the petition to support an executive or managerial position, the petitioner's business was established in 1998. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. The petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

While not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. For this additional reason, the appeal must be dismissed and the petition denied.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

ORDER: The appeal is dismissed.