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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



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DATE: **MAY 30 2012** Office: CALIFORNIA 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 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 with the field office or service center that originally decided your case by filing a 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, California 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 petition to classify the beneficiary, its chief executive officer, as an L-1A intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it distributes and exports decoration materials. It claims to be a subsidiary of [REDACTED] located in Hong Kong. The beneficiary was previously granted one year in L-1A status to open a new office in the United States and the petitioner now seeks to extend his status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a 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 Service erred in simply focusing on the past one year of performance of the company and thus the one year of work of the beneficiary . . . and failed to also focus on the previous two years of the company and of [the beneficiary] as required by law." Counsel further contends that, as U.S. Citizenship and Immigration Services (USCIS) previously approved an L-1A petition filed on behalf of the beneficiary and granted him L-1A status for one year, "it would be arbitrary and capricious on the part of the Service to now make a different finding based on the fact that [the petitioner] did what it started to do under approval of the Service." Counsel submits a brief, but no 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(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

## II. Discussion

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary 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;
- (ii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

#### A. Facts and Procedural History

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129) on March 30, 2010. The petitioner stated that it has two employees and projected gross income of \$200,000 for 2010.

In a letter dated March 28, 2010, the petitioner explained that the U.S. company was established "to explore North America market for China fabulous decoration materials; export America branded and environmental protected decoration & construction materials to the Asia markets, and conduct investment in the United States." The petitioner indicated that the U.S. company is distributing [REDACTED] paint in the Hong Kong and Macau regions, and intends to substantially increase its exports of [REDACTED] products from the United States to the Hong Kong building industry with its parent company's support. The petitioner further indicated that it is negotiating with another American company, Industrial Wholesale Lumber Company, to distribute its timber products into Asian markets.

The petitioner indicated that the beneficiary serves as its chief executive officer and is "in charge of the overall operation, " and he will "coordinate the business activities of the U.S. Subsidiary and the Parent Company in Hong Kong." The petitioner described his duties as the following:

- Communicate with the Parent Company on a regular basis concerning the Business development of the US Subsidiary in the United States;
- Investigate the market and make business proposals to the Parent Company;
- Negotiate, execute and enforce buy and sale contracts with local companies;
- Seek business partners to have more market shares of decoration materials in the United States and export more America branded decoration and constriction [*sic*] materials into Asia markets;
- Establishing distribution and service channels in the United States;
- Oversee distribution, service, export and investment activities, and policy making;
- Look [for] high quality research and development professional to innovate new products for the Parent Company and the US Subsidiary; and

- Make employment decisions for hiring local employees.

The petitioner submitted an organizational chart for the foreign entity which depicts the beneficiary as CEO and [REDACTED]. The chart includes departments for planning, sales, shipping, finance, administration and customer service, but the petitioner did not indicate that these departments were staffed. The petitioner provided a copy of its lease agreement for a 250 useable square foot office and photographs of the beneficiary and one other employee working in an office.

The petitioner also provided a copy of IRS Form 1120, U.S. Corporation Income Tax Return, for 2009. The tax return shows that the company had gross receipts of \$62,407 and paid a total of \$15,840 in salaries and compensation of officers. The petitioner provided IRS Forms W-2, Wage and Tax Statement, for the beneficiary, who earned \$12,000, and [REDACTED], who received \$3,840. The petitioner also submitted copies of paychecks issued to [REDACTED] in January and February 2010. The paystubs indicate that she works 40 hours per week at an hourly wage of \$8.00.

The director issued a request for additional evidence (RFE) on April 9, 2010. The director instructed the petitioner to submit a more detailed description of the beneficiary's duties, and advised that the petitioner should be specific and indicate the percentage of time the beneficiary spends in each of the listed duties. The director also requested that the petitioner identify each person the beneficiary supervises including their names, job titles, position descriptions and the education level required for each position.

In a response dated May 10, 2010, the petitioner provided a lengthy description of the beneficiary's duties. The petitioner stated that the beneficiary spends 50 percent of his time on the following duties:

Negotiate, execute and enforce distributorship agreement, buy, sale contracts, cooperation agreements, and export documents with local companies, including distributorship agreement with [REDACTED] wood purchasing agreement with [REDACTED] and the cooperation agreement in establishing carbonized wood production line in the United States with [REDACTED]

The petitioner emphasized that it is the exclusive distributor of [REDACTED] in Hong Kong and Macau and exported over \$80,000 of [REDACTED] in less than one year. In addition, the petitioner indicated that it is negotiating with [REDACTED] to export is wood products to Hong Kong. The petitioner submitted a copy of a letter dated March 15, 2010 from the beneficiary to the potential supplier requesting a quote for its wood products. Finally, the petitioner explained that "after extensive market research, business feasibility study and cooperation negotiation, the petitioner has reached an agreement with [REDACTED], and [REDACTED] to establish a carbonized wood production line in California." Under the agreement, the petitioning organization "provides the wholesale and retail network in China as well as the selection and acquisition of the latest carbonized wood equipment and technology in China to be deployed in the California."

The petitioner indicated that an additional 10 percent of the beneficiary's time would be allocated to communicating with the parent company regarding the business development of the U.S. subsidiary. The petitioner indicated that this responsibility would include communication of the detailed terms of distributorship, sales contracts and strategies, market research results for each business project, the U.S. company's financial and hiring situations and other matters. In addition, the petitioner stated that the beneficiary would spend 10 percent of his time investigating the market and making business proposals to the

parent company. The petitioner noted that the parent company has already opened a new store in Hong Kong for the sale of [REDACTED] and American wood products.

According to the petitioner, an additional 25 percent of the beneficiary's time will be allocated to the following tasks:

- Seek business partners to have more market shares of decoration materials in the United States and export more American branded decoration and construction [sic] materials into Asia markets;
- Establishing distribution and service channels in the United States;
- Oversee distribution, service, export and investment activities and policy making;
- Look [for] high quality research and development professional to innovate new products for the Parent Company and the U.S. Subsidiary.

The petitioner noted that the beneficiary has worked closely with local companies "to seek business partners or establish distribution and service channels in distributing wood doors, windows, cabinets and other decoration and construction materials in the United States since its Parent Company is able to support those high quality and low cost products." In addition, the petitioner stated that the beneficiary "makes company policies in controlling and guidance company's business activities of distribution, sales, export, customer service and other important investments in the United States."

Finally, the petitioner stated that the beneficiary "makes employment decisions for hiring local employees." The petitioner indicated that the beneficiary hired [REDACTED] as its sales manager in October 2009 and described her duties as follows:

Assist in the development and implementation of marketing plans; prepare and maintain sales materials; manage account services; identify and manage potential buyers; provide status reports, maintain accurate records of all pricings, sales and activity reports; control expenses; and other tasks assigned by the Chief Executive Officer.

The petitioner indicated that the beneficiary is also recruiting a planning and marketing manager and provided a copy of the job posting and resumes received in response.

The director denied the petition on May 26, 2010 concluding that the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity. In denying the petition, the director noted that "the beneficiary is primarily performing the sales, marketing and exporting functions" of the business rather than primarily directing the organization or managing a staff or a function. The director acknowledged that the company has one other employee but determined that she would not relieve the beneficiary from performing non-qualifying duties.

On appeal, counsel asserts:

The Service erred in simply focusing on the past one year of performance of the company and thus the one year of work of the beneficiary . . . , and failed to also focus on the two previous years of the company and of [the beneficiary] as required by law.

The Beneficiary . . . was approved as an L-1(A) for a period of one year. He sought an extension for an additional time as an L-1(A) to continue the development of the company. This time, the Service rules that [the beneficiary's] time in the United States was not in full compliance of the mention[ed] regulation. However, the same Service approved [the beneficiary] to be an L-1(A) for the first one year of time this U.S. branch company, presumably having made a finding that [the beneficiary] has met the regulatory requirements of L-1(A) for the past three years before his entry in the U.S. in that status. This is undisputed and was approved in the form of [the beneficiary] having been granted said status and worked for one year in such a capacity.

The Service also erred in failing to look into [the beneficiary's] job and job requirements for the two preceding years. Had it done so, an approval would have been issued, just as it did when it gave Chan the L-1(A) status the first time. Nothing was changed because these are events and considerations of the Service for the past three years of this company and [the beneficiary].

Counsel concludes that "the Service error lies in the fact that it looked only into the recent most one year of the company's business history and that of [the beneficiary] and did not reach back two additional years in its consideration process."

Counsel goes on to emphasize that "this is a start-up company in the U.S. which has a history of one year," with "few employees." Counsel asserts that "small start-ups do not have much in the form of employees in the beginning of its life until it has had time to mature." Counsel states that USCIS already approved the beneficiary as an L-1A executive and it "would be arbitrary and capricious on the part of the Service to now make a different finding based on the fact that [the petitioner] did what it started to do under approval of the Service – to develop a paint business to supply Asia's paint demands."

#### B. Discussion

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

As a preliminary matter, the AAO notes that counsel's primary contention on appeal is that the petition should have been approved because USCIS previously approved the new office petition, and already found that the beneficiary qualifies for L-1A classification as an executive. Counsel's reliance on the prior approval is misplaced. The director's approval of the new office petition was based on a finding that the beneficiary had been employed by the foreign entity in a qualifying managerial or executive capacity for at least one continuous year in the three years preceding the filing of the new office petition, and on a finding that the new office in the United States would, more likely than not, support a managerial or executive position within one year of the approval of the petition.

The previous petition was governed by the regulations pertaining to new offices at 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status and is governed by the regulations at 8 C.F.R. § 214.2(l)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director had a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved

on behalf of the beneficiary does not serve as prima facie evidence that eligibility has been established in the present proceeding.

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

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

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

Upon review of the current petition, the AAO concurs with the director that the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner 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.* Furthermore, 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 petitioning company is engaged in sourcing decorative products in the United States, obtaining distribution agreements for Hong Kong and other Asian markets, and exporting the products for distribution by its parent company. A review of the beneficiary's position description reflects that he is primarily responsible for performing the day-to-day functions associated with these activities. The petitioner indicated that the beneficiary spends 50 percent of his time negotiating and executing distributorship agreements, purchase and sale contracts, cooperation agreements and export documents with local companies. While the beneficiary exercises managerial authority based on his ability to bind the company to contracts and agreements, the record shows that he must also perform a number of non-managerial tasks that lead to the finalization of a contract. At the time of filing the petition, the petitioner had signed a single distributorship agreement.

The petitioner stated that the beneficiary spends an additional 25 percent of his time seeking business partners, establishing distribution and service channels, and "overseeing" distribution, service, export and investment activities. The petitioner indicated at the time of filing the petition that its planning, sales, shipping, finance, administration and customer service departments were unstaffed. To the extent that the petitioner is engaged in distribution, service, export and investment activities, it is evident that the beneficiary is directly performing such activities, rather than overseeing them. Furthermore, the petitioner did not explain how marketing and operational tasks such as seeking business partners and establishing sales and distribution channels rise to the level of 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. The petitioner has not met this burden.

Based on the petitioner's description of the beneficiary's duties, the AAO agrees with the director's finding that the beneficiary is primarily performing the petitioner's sourcing, sales, marketing, market research and exporting functions, and is thus precluded from performing primarily qualifying duties. Counsel has not contested these findings on appeal, but rather, as discussed above, objects to the denial of the petition primarily on the grounds that USCIS previously approved a petition granting the beneficiary L-1A classification to open a new office in the United States.

The beneficiary's position is chief executive officer of an export company consisting of the beneficiary and a sales manager who performs primarily administrative and clerical duties, despite her managerial job title. 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 or executive duties. The fact that the beneficiary manages a business as the senior member of the company's two-person staff does not necessarily establish eligibility for classification as an intracompany transferee in a

managerial or executive capacity within the meaning of section 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 definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The 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 clearly describe 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed, the beneficiary is primarily responsible for performing most of the company's essential functions, including non-qualifying duties associated with these functions, and as such, the petitioner has not established that his duties are primarily managerial or executive in nature.

Finally, the petitioner has not supported its claim that the beneficiary is employed primarily in an executive capacity. 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.* The petitioner indicates that the beneficiary devotes only a small portion of his time to developing policies for the U.S. company, and is primarily engaged in the day-to-day operations of sourcing products, performing market research, seeking business opportunities and establishing distribution channels.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. It is appropriate, however, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The regulations provide strict evidentiary

requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. In this matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. The AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Reading section 101(a)(44) of the Act in its entirety, 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 or her time on non-qualifying duties. 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 Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

The AAO acknowledges that the petitioner has immediate plans to hire a marketing and planning manager, and proposes to eventually staff departments in the areas of shipping, finance, administration, customer service and sales. 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).

The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

### III. Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.