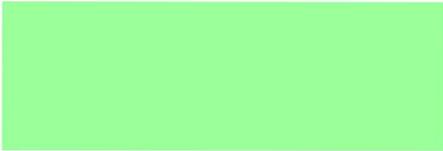


(b)(6)

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

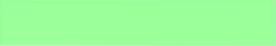


U.S. Citizenship
and Immigration
Services



DATE: FEB 04 2013

Office: VERMONT SERVICE CENTER

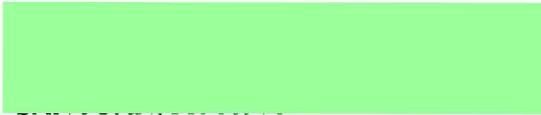
FILE: 

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:

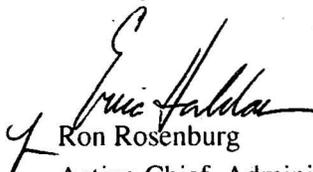


INSTRUCTIONS:

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 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,


Ron Rosenberg

Acting 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 the petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner is a retail and wholesale florist in Puerto Rico. It claims to be a subsidiary of [REDACTED]. The beneficiary was initially admitted to the United States in L-1B classification in November 2006, and was subsequently granted an extension of his L-1B status until September 30, 2011. The petitioner filed the instant petition on September 30, 2011, requesting that the beneficiary be granted a change of status from L-1B to L-1A based on his promotion to the position of store manager. The petitioner also requested that the beneficiary's L-1 status be extended through October 1, 2013.

The director denied the petition on February 16, 2012, finding the beneficiary was ineligible for an extension of L-1 status beyond the five year limit imposed on L-1B nonimmigrant intracompany transferees by the regulation at 8 C.F.R. § 214.2(l)(12). In denying the petition, the director noted that in order for the beneficiary to qualify for the requested two-year extension, pursuant to 8 C.F.R. § 214.2(l)(15)(ii), the petitioner must establish: (1) that it filed an amended, new, or extended L-1 petition at the time the promotion took place; and (2) that the beneficiary has been employed by the petitioner in a managerial position for at least six months prior to reaching the five-year limit on L-1B status. The director concluded that the petition was not filed at the time the promotion occurred, and that the petition was not filed six months prior to the beneficiary reaching the five year limit on L-1B status.

Further, the director found that the petitioner had not established the beneficiary will be employed 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 record to the AAO. On appeal, counsel for the petitioner contends that the petitioner was unable to file a petition to change the beneficiary's status at the time the beneficiary was promoted because the petitioner needed the beneficiary to complete a probationary period before filing for the change of status. Counsel also asserts that the beneficiary is employed in a managerial capacity as a function manager.

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 (I)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. Facts and Procedural History

The petitioner states that the beneficiary was initially admitted to the United States in L-1B status on November 1, 2006. The beneficiary's L-1B status was subsequently extended through September 30, 2011. The petitioner filed the instant petition September 30, 2011 seeking a change the beneficiary's classification from L-1B to L-1A, and requesting an extension of stay for two additional years.

The issues to be addressed in this matter are: (1) whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity; and (2) whether the beneficiary is eligible for an additional extension of his L-1 status pursuant to 8 C.F.R. § 214.2(l)(15)(ii).

The petitioner claims the beneficiary's employment changed from a specialized knowledge to a managerial capacity when he was promoted to the position of Store Manager. The petitioner submitted a letter from its president stating the beneficiary was promoted to Store Manager effective February 1, 2011 and provided a copy of the beneficiary's resume. The beneficiary's resume states that the beneficiary was employed as a decorator and floral designer from November 2006 to January 2011 and indicates the beneficiary was promoted to store manager of the petitioner's Puerto Nuevo store in February 2011.

The resume and a letter supporting the petition provide the following description of the beneficiary's responsibilities as store manager:

[D]ay-to-day operation of [REDACTED] store, including extending hours of operation when required because of a special holiday . . . selecting flowers and placing orders, meeting with and negotiating with clients the flowers and price of decorating an events, incurring in additional transportation costs to meet a client's demand, organizing employees' work schedule, selecting and training flower designers for the Company's two stores in Puerto Rico, preparing samples of flower arrangements for store displays and for meetings with clients planning special events, supervising design and quality of flowers and other materials used in decoration of special events to ensure that Company standards as an exclusive florist

and leader in the market are maintained, turning down flower shipment if quality of flowers does not meet standards:

The director issued a Request for Evidence (RFE), requesting additional evidence to establish the beneficiary would be employed in a primarily managerial capacity. Specifically the director requested, *inter alia*, (1) a comprehensive description of the beneficiary's duties; (2) evidence to demonstrate the beneficiary will be managing a subordinate staff or professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties; (3) a list of U.S. employees who will be subordinate to the beneficiary identifying each employee by name, position title, and providing a complete position description including required education level; (4) organizational chart depicting where the beneficiary's position fits into the organization; and (5) copies of the latest U.S. federal income tax returns, to include all schedules filed by the U.S. entity.

The director also specifically noted in the RFE that the beneficiary appeared to be ineligible for the requested extension of stay for two additional years because the petitioner had not filed a new petition or a petition to amend or extend the beneficiary's status at the time of the beneficiary's claimed promotion and that the instant petition was filed less than six months before the beneficiary reached the maximum five year period allowed in L-1B status on November 1, 2011. The director requested further evidence to establish that the beneficiary met the eligibility requirements for an extension of stay.

The petitioner responded to the RFE, providing: (1) a weekly schedule for nine employees and the beneficiary; (2) an organizational chart for the U.S. entity; (3) an organizational chart for the store managed by the beneficiary; (4) a lengthy description of duties for the store manager position; and (5) position descriptions for the beneficiary's subordinate employees. The response failed to address the director's comments regarding the beneficiary's eligibility for the extension of stay in L-1 status.

The organizational chart provided in response to the RFE indicates that the beneficiary is one of two store managers under the direction of the President and Vice President of the company. According to the chart, the beneficiary has eight direct subordinate employees: three flower designers, four delivery/driver positions, and one flower boy. The position descriptions and the chart do not indicate that any of the beneficiary's subordinate employees hold managerial or supervisory positions. The position descriptions also state that a college degree is not required for any of the positions subordinate to the beneficiary.

The response to the RFE included a lengthy description of the beneficiary's duties. The letter states the beneficiary's duties as store manager include: opening and closing the store, scheduling employees, controlling and purchasing inventory, designing and maintaining flower storage areas, managing special flower orders over \$100, balancing the cash register, making bank deposits, supervising store employees, resolving issues with farms and customers regarding payment and quality, disposing of discarded flowers, conducting quality checks of all floral arrangements, and interacting with corporate clients and clients planning special events.

The director denied the petition, finding in part that the beneficiary is not eligible for an extension of L-1 status beyond September 30, 2011 because the petitioner did not file, and USCIS did not approve, an amended, new, or extended petition changing the beneficiary's classification to L-1A at least six months prior to the expiration of the beneficiary's total permissible period of stay of five years in L-1B status.

The director also concluded that the petitioner failed to establish the beneficiary is and will be employed in a primarily managerial capacity. The director stated that the "duties as stated, indicate that the beneficiary may function as a first line supervisor."

Counsel for the petitioner filed an appeal claiming the director's decision fails to comply with the regulation at 8 C.F.R. 103.3(a)(1)(i) requiring that when denying the petition, "the officer shall explain in writing the specific reasons for denial." Counsel claims the statement that "the beneficiary may function as a first line supervisor" is inconclusive and that the decision does not state specifically which of the described duties indicate the beneficiary is employed as a first line supervisor. Counsel asserts that "[the] ambiguity places the Petitioner at a disadvantage appealing the decision because he is unable to identify with certainty the basis for the adverse decision."

Counsel provides the National Labor Relation Act (NLRA) definition of supervisor, and asserts that this definition is similar to the definition of managerial capacity provided at 8 C.F.R. 214.2(l)(5)(ii). Counsel asserts that the distinction between a "first line supervisor" or "junior manager" are more "semantic than substantial" and claims there is no "limitation in the definition of managerial capacity to bar a 'junior manager' from eligibility for L-1A classification." Counsel resubmits the position description provided in response to the RFE.

Finally, counsel explains that although the beneficiary was promoted in February, he had to complete a probationary period allowing the petitioner to evaluate his performance before the petitioner would file to change the beneficiary's classification and extend his status. Therefore, counsel contends that the filing of the instant petition should be "considered *nunc pro tunc* to February 1, 2011."

III. Discussion

A. Employment in a Managerial Capacity

The first issue to be addressed is whether the petitioner established that the beneficiary will be employed by the petitioner in a managerial capacity. The petitioner does not claim that the beneficiary will be employed in an 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.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity.

Preliminarily, although the decision does state the job duties and evidence the director considered in determining that the beneficiary will function as first-line supervisor, the AAO acknowledges counsel's assertions that the director provided a fairly vague explanation for the denial of the petition. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)

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.* 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 definition of managerial capacity has two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definition. 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 operational 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 or a component of 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 petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be employed in a primarily managerial capacity. The description of the beneficiary's many responsibilities are indicative of his involvement in the company's daily operational activities. For example, the petitioner states that the beneficiary opens and closes the store, purchases and manages inventory, balances the cash register, designs

flower storage areas, disposes of discarded flowers and meets with clients planning special events. The petitioner has not explained how these responsibilities fall within the statutory definition of managerial capacity. Moreover, though petitioner provided position descriptions for the beneficiary's subordinates, the descriptions do not include responsibilities such as routine sales, marketing, administrative, and clerical tasks. Rather, the beneficiary's subordinates' duties, as described in the record, consist solely of creating and delivering floral arrangements, while all other necessary functions associated with operating the business are left to the beneficiary in his role as store manager.

Therefore, the petitioner has not demonstrated that the beneficiary is relieved from performing these non-qualifying duties on a regular basis or explained how the beneficiary's performance of the company's purchasing, sales, marketing, financial, and administrative functions rises to the level of managerial capacity. 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial sales, administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008).

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).

On appeal, counsel uses the definition of "supervisor" from the National Labor Relations Act to conclude that the distinction between "manager" and "supervisor" is "more semantics than substantial." Counsel states an opinion that is based on a review of documents and definitions outside of the record and not based on a review the immigration statute or the applicable regulations. The statute and regulations mandate that a beneficiary is not considered to be acting in a managerial capacity merely by virtue of his supervisory duties unless the employees supervised are professional. *See* section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). Textbook or common understanding of business terms will not supersede the statutory

definitions; the applicable definition of manager and executive are contained in the statute at sections 101(a)(44)(A) and (B) of the Act.

At the time of filing, the petitioner claimed the beneficiary had eight subordinate employees. The job descriptions submitted by the petitioner do not establish that any of the employees working for the beneficiary are professional-level employees.¹ In support of the petition and in response to the RFE, the petitioner provided the service with an organization chart and a description for each of the following positions: four delivery drivers, three floral designers, and one flower boy. The organization chart submitted with the petition and in response to the RFE indicates that all the positions are directly subordinate to the beneficiary. The description of the beneficiary's duties states that the he "supervises four delivery/drivers," "supervises three full time floral designers and assigns their schedules and tasks," and "takes disciplinary action including firing of designers, 'flower boy', and deliveries under his supervision." The chart indicates that the positions of floral designer, flower boy, and delivery/driver do not have subordinate employees, and the position descriptions provided for the beneficiary's subordinates do not show that any of the subordinate employees have managerial or supervisory authority over a clearly defined department or function of the petitioner or other employees. Thus, the petitioner has not shown that the beneficiary supervises and controls supervisory, professional, or managerial staff, as required by section 101(a)(44)(A)(ii) of the Act.

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 position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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.

¹ In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has stated that no bachelor's degree is required for the positions of floral designer, delivery driver and flower boy.

In the instant matter, the petitioner has not established that the beneficiary will be employed as a function manager. Although counsel asserts on appeal that the beneficiary manages a function, neither counsel nor the petitioner have identified the function, articulated the essential nature of the function, or indicated how much of the beneficiary's time is allocated to managing an essential function. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Furthermore, as discussed above, the record does not support an affirmative determination that the beneficiary will perform primarily managerial duties. Again, 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. Here, the petitioner has not met that burden.

The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act. The record indicates that the beneficiary and his subordinates perform the actual day-to-day tasks of operating the petitioner's floral business. The petitioner has not established that the staff will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in primarily managerial duties. Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a qualifying managerial capacity. Accordingly, the appeal will be dismissed.

B. Beneficiary's Eligibility for an Extension of Status

Even if the petitioner had established that the beneficiary was employed in a managerial capacity, the second issue is whether the beneficiary is eligible for a change in employment classification from L-1B to L-1A and two year extension of stay.

The regulation at 8 C.F.R. § 214.2(l)(15)(ii) states the following, in pertinent part:

The total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity. The total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. When an alien was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, he or she must have been employed in the managerial or executive position for at least six months to be eligible for the total period of stay of seven years. The change to managerial or executive capacity must have been approved by [Citizenship and Immigration Services] in an amended, new, or extended petition at the time that the change occurred.

The regulation at 8 C.F.R. § 214.2(l)(7)(i)(C) states:

The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying

organizations under a blanket petition, change in capacity of employment (i.e., from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The regulation at 8 C.F.R. § 214.2(l)(15)(i) states the following, in pertinent part, with respect to requests for extensions of stay:

In individual petitions, the petitioner must apply for the petition extension and the alien's extension of stay concurrently on Form I-129. . . . Even though the requests to extend the visa petition and the alien's stay are combined on the petition, the director shall make a separate determination on each.

While the beneficiary's claimed promotion occurred on February 1, 2011, more than six months prior to the expiration of the beneficiary's L-1B status, the petitioner failed to file a new or amended petition to obtain approval of the change from a specialized knowledge to a managerial or executive position. Counsel asserts on appeal that the filing of the petition should be "*nunc pro tunc* to February 1, 2011"; however, the regulation at 8 C.F.R. § 214.2(l)(7)(i)(C) clearly mandates the documentation of a beneficiary's change to a managerial or executive capacity at the time the change occurred and not at some future time, e.g., when the petitioner decides to extend the stay of an alien initially admitted as a specialized knowledge worker beyond the fifth year, or after a probationary period of employment.

The beneficiary had 32 days remaining from the time the petition was filed until he reached the five year maximum time allowed in L-1B status on November 1, 2011. The petitioner was obligated to document the beneficiary's assumption of managerial duties in an amended, new, or extended petition at least six months before the beneficiary reached the end of his L-1B five-year period of stay if it wanted to preserve its opportunity to extend the beneficiary's stay through the seventh year. In this case, as the petitioner chose not to document the beneficiary's assumption of managerial duties as required by the regulations, the regulations prohibit an extension beyond the fifth year.

Based on the foregoing discussion, the director properly concluded that the beneficiary is ineligible for the requested two additional years of L-1 status. However, had the petitioner established that the beneficiary will be employed in a managerial or executive capacity, the AAO notes that the beneficiary would in fact have been eligible for an extension of stay through November 1, 2011, five years from his date of admission in L-1B status. As the director correctly determined that the beneficiary would not be employed in a qualifying capacity, further discussion of this issue is moot and no period in L-1A status can be granted.

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.