



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAY 14 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, California 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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company, operates a wellness center. It is an affiliate of [REDACTED] located in Piaseczno, Poland. The petitioner seeks to employ the beneficiary as the business manager/director of its new office in the United States for a period of two years.<sup>1</sup>

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of commencing operations in the United States.

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 beneficiary will be employed in a managerial/executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

### I. The Law

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

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

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

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<sup>1</sup> The petitioner seeks to employ the beneficiary for two years. However, pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

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

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.

## II. The Issue on Appeal

The sole issue to be addressed is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (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.

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. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(1)(3)(v). 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.*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker. On Form I-129, the petitioner described the petitioner's proposed duties in the United States as to "direct all day to day activities of the United States Enterprise" and "train staff in the [redacted] technique and direct the corporation to make the [redacted] a technique available on a large scale for the wellness of the general public." On Form I-129, the petitioner asserted that the beneficiary's presence is desperately needed in the United States because "she is the only individual learned in the practice of [redacted]

In a letter accompanying the initial petition, the petitioner explained the [REDACTED] as a therapeutic method developed by the beneficiary that focuses on “the relationship between the body and our emotional selves; it focuses on [REDACTED]” The petitioner described the beneficiary’s “primary objective” in the United States as to “introduce [REDACTED] into the U.S. and Latin American Market by conducting various seminars and locating a U.S. publishing company to collaborate with in order to insert [REDACTED] written materials into the market.” The petitioner described the beneficiary’s other duties in the United States as including the following: directing and coordinating the company’s financial activities; overseeing the day-to-day operation and executive functioning of the company; the determination of the direction of the company; the coordination of corporate activities/investments; the review and implementation of corporate objectives; coordinate the activities involving the parent company; and review and implement corporate objectives and conduct new strategies to expand the company’s business in the United States and other Latin American countries.

In support of the initial petition, the petitioner submitted copies of its certificate of use, local business tax application, insurance policy, and recent purchase receipts indicating that the U.S. office will be a spa and beauty salon offering services such as waxing, nails, and massages. The petitioner also submitted a copy of a presentation about the beneficiary entitled “International Motivation Speaker and Channeling.” The presentation explained how the beneficiary has been “an emotional and business coacher and advisor” for more than 19 years and is now starting her business in the United States “showing her strong energy, her motivation ability and her extraordinary skills to show how to achieve personal and business success.” The presentation stated: “At 2010 she created her American company [the petitioner] based in Miami and begins her tour around United States as a Motivational Speaker unique in the world [*sic*].”

The petitioner indicated on Form I-129 that it employs 4 employees, and submitted payroll documentation establishing that it employs [REDACTED] Initial documentation identified [REDACTED] Assistant Manager, but did not identify the job titles of the other employees.

The director issued a request for evidence (“RFE”), in which he instructed the petitioner to submit, *inter alia*, the following: (1) documentation to establish that the beneficiary would be relieved of non-qualifying duties that would be involved in providing her services personally and directly to the public in the United States; (2) the petitioner’s U.S. business plan; and (3) a detailed description of the staff of the new U.S. office to include the number of employees, their job titles and duties, including a breakdown of the number of hours devoted to each of the employee’s job duties, and a description of the management and personnel structures of the U.S. office.

In response to the director’s request for evidence that the beneficiary would be relieved of non-qualifying duties that would be involved in providing her services personally and directly to the public in the United States, counsel responded:

USCIS cannot claim that [the beneficiary] is not an executive simply because she personally conducts lectures, personal appearances, writes books and promotes [REDACTED] as the main public image of her foreign and U.S. subsidiary. To do so would be contrary to the INA, CFR and FAM. Please keep in mind that she developed this system and she is the only person that people want to hear from in that respect. She does in fact oversee the operations of her European company, as she will with the U.S. entity. The people working for her have

a certain amount of discretion to transact business in her name on a daily basis, but she is ultimately the one that will make final decisions on important matters.

Regarding the director's request for evidence regarding the U.S. staff, counsel provided the following description:

1. [REDACTED]: Office Administrator
  - a. Schedule appointments for clients for [REDACTED] treatment, beauty and / [sic] body therapies, etc. (constant duty);
  - b. Organize staff meetings (3 hours a week);
  - c. Organize one on one training sessions with [the beneficiary] and trainees for [REDACTED] training sessions and participate in same (10 hours a week);
  - d. Organize and schedule seminars, lectures and personal appearances for [the beneficiary] (10 hours a week);
  - e. Assist [the beneficiary] with development of U.S. company website (5 hours a week);
  - f. Assist [the beneficiary] with locating publishers interested in the sale of [the company's] learning materials (5 hours a week); and
  - g. Responsible for all correspondence and purchase of materials used at business locations (7).
2. [REDACTED] trainee
  - a. Study [REDACTED] techniques through the use of [the company] learning materials (10 hours a week);
  - b. Personal training on the [REDACTED] technique with [the beneficiary] (7 hours a week);
  - c. Meet with clients to discuss the benefits and uses of [REDACTED] and when able and authorized by [the beneficiary] to do so, conduct [REDACTED] sessions with clients (20 hours); and
  - d. Review client requests and make responses accordingly (3 hours a week).
3. [REDACTED]: Beauty specialist
  - a. Provide body and facial therapies to [the petitioner's] clientele (40 hours a week).
4. [REDACTED]: [REDACTED] trainee
  - a. Study [REDACTED] techniques through the use of [the company] learning materials (10 hours a week);
  - b. Personal training on the [REDACTED] technique with [the beneficiary] (7 hours a week);
  - c. Meet with clients to discuss the benefits and uses of [REDACTED] and when able and authorized by [the beneficiary] to do so, conduct [REDACTED] sessions with clients (20 hours); and
  - d. Review client requests and make responses accordingly (3 hours a week).
5. Please note that [REDACTED] whose information was previously submitted no longer works for the U.S. subsidiary . . . .

The petitioner submitted its one-year business plan describing the petitioner's business, [REDACTED] by [REDACTED], as "a new upscale wellness center located in Coral Gables, Florida that offers a complete

relaxation experience.” The business plan described the petitioner’s offered services as split into personal and business services. Specifically, the personal services include facial and body treatments, reflexology, aromatherapy, manicures, pedicures, massages, and energy works. The business services include “therapy in a variety of styles incorporating in all of them the [REDACTED] method” and “personalized analysis of the business, online and live classes to succeed in the business world, business coaching, training on the [REDACTED] technique, seminars, motivational speaking conferences and conflict resolution technique.” The business plan stated: “[The beneficiary] will provide all the training and tools necessary so that all center personnel will have the knowledge required to implement these unique techniques.”

The business plan described the petitioner’s hiring plans as hiring a general manager, chief marketing officer, administrative assistant, and two therapists in December 2011. In January 2012, the petitioner will train the therapists in [REDACTED] technique for two months. In February 2012, the wellness center will open and introduce hand and foot therapy. In March 2012, the petitioner will incorporate coaching to corporations. In April 2012, the petitioner will introduce therapeutic massage services. In June 2012, the petitioner will introduce facial treatments. In July 2012, the petitioner will introduce energy works treatment. In August-October 2012, the petitioner plans to provide “full treatment services for personal and business customers.”

Finally, the business plan provided more details regarding the job duties for the U.S. employees. In particular, the beneficiary’s duties in the United States will be to: develop a strategic plan; oversee company operations; plan, develop, and implement strategies for generating resources and/or revenues; identify acquisition and merger opportunities; direct implementation activities; approve company operational procedures, policies, and standards; review activity reports and financial statements; evaluate performance of executives; oversee foreign operations to include evaluating operating and financial performance; and decide on franchise opportunities. The business plan also clarified that the two [REDACTED] trainees are licensed massage therapists whose job duties are to provide “a variety of massage techniques in order to promote relaxation and rejuvenation of the body and mind.”

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. In denying the petition, the director found that it was not clear who would actually provide the goods and services of the United States operations to its customers/clients. The director concluded that the beneficiary would likely be primarily performing non-qualifying duties.

On appeal, counsel asserts that the beneficiary will manage an essential function of the organization, as well as supervise and control the work of other personnel. Counsel asserts that the office manager will assist the beneficiary in the supervision of the trainees, support staff, and independent contractors, and otherwise relieve the beneficiary from performing other non-executive functions. Counsel also asserts that the beneficiary has contracted the services of two additional independent contractors from Europe who will coach the two [REDACTED] trainees in the [REDACTED] method, thereby relieving the beneficiary from completing the training for the two [REDACTED] trainees in the United States. Counsel states:

It is important to note that [REDACTED] is a technique that [the beneficiary] developed and continues to improve through studies and use of the same. She is the only individual with experience and knowledge to manage the growth of the new enterprise with the primary function of promoting the use of [REDACTED] in the United States. The only other people who

know this technique are those individual[s] personally trained by her, who live in Europe and are unwilling to relocate to the United States. The two coaches hired by [the beneficiary] to train her two trainees in Florida will be doing so through tele-video conference.”

In support of the appeal, the petitioner submits copies of its employment contracts with [REDACTED], entered into on August 29, 2012, to be employed in the capacity of “ [REDACTED] for the purpose of “Conducting training of method [REDACTED]

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year.

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

In the instant matter, counsel and the petitioner have repeatedly described the beneficiary's proposed position in the United States in very broad and vague terms. With the initial petition, the petitioner described the petitioner's responsibilities as including "directing and coordinating the company's financial activities"; "overseeing the day-to-day operation and executive functioning of the company"; "the determination of the direction of the company"; "the coordination of corporate activities/investments"; and "the review and implementation of corporate objectives." Similarly, in response to the director's RFE requesting the petitioner to submit a more detailed description of the job duties of the U.S. staff, counsel described the beneficiary's duties in broad terms such as "develop a strategic plan"; "oversee company operations"; "plan, develop, and implement strategies for generating resources and/or revenues"; "direct implementation activities;" and "evaluate performance of executives." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

While several of the duties generally described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual daily

responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the nature of the petitioner's business, the petitioner's hiring plans, and other evidence that the business will support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing the nature of the beneficiary's employment capacity in the United States.

The record reflects that the petitioner intends to offer services in two different areas: personal and business services. The petitioner currently employs an office administrator, a beauty specialist, and two [REDACTED] trainees for massage services. The petitioner indicates that it intends to employ a general office manager and a marketing officer within the first year. Based upon the petitioner's actual and intended staffing within one year, the petitioner has demonstrated that it will likely have sufficient staff to perform the offered personal services such as massages, facial and body treatments, manicures, and pedicures. The petitioner has also demonstrated that it will likely have sufficient staff to relieve the beneficiary from performing general administrative tasks within the first year of operations.

However, based upon the petitioner's actual and intended staffing within one year, the petitioner failed to establish that it will have any staff - other than the beneficiary - to perform the business services the petitioner intends to offer, such as personalized analysis of the business, online and live classes to succeed in the business world, business coaching, training on the [REDACTED] technique, seminars, motivational speaking conferences and conflict resolution technique. The petitioner's business plan specifically described the two [REDACTED] trainees as licensed massage therapists whose primary job duty is to provide "a variety of massage techniques in order to promote relaxation and rejuvenation of the body and mind." The petitioner has not specifically asserted nor submitted any documentation to establish that the two [REDACTED] trainees will provide any services beyond massage-related services.<sup>2</sup> Notably, the petitioner indicated that the beneficiary has been "an emotional and business coacher and advisor" for more than 19 years. Based upon the evidence in the record, it is reasonable to conclude that the beneficiary alone will be providing the petitioner's business services. Performing these business services constitutes performing the tasks necessary to produce a product or to provide the services of the U.S. petitioner. 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).

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<sup>2</sup> The petitioner's initial job description for the [REDACTED] trainees contained the following duty: "Meet with clients to discuss the benefits and uses of [REDACTED] and when able and authorized by [the beneficiary] to do so, conduct [REDACTED] sessions with clients (20 hours a week)." This vague description alone, with no elaboration or detail regarding what the [REDACTED] sessions with clients" would consist of, is insufficient to establish that the two [REDACTED] trainees would provide the business services described in the petitioner's business plan, considering that the petitioner's other documentation specifically described them as massage therapists.

Moreover, the record indicates that the beneficiary will primarily be engaging in motivational speaking and the promotion of her [REDACTED] method around the United States. The petitioner described the beneficiary's "primary objective" in the United States as to "introduce [REDACTED] into the U.S. and Latin American Market by conducting various seminars and locating a U.S. publishing company to collaborate with in order to insert [REDACTED] written materials into the market." The petitioner indicated in its initial documentation that the beneficiary began "her tour around [the] United States as a Motivational Speaker" in 2010. The petitioner further emphasized that the beneficiary alone will be making these personal appearances, as "she developed this system and she is the only person that people want to hear from in that respect." The beneficiary's duty of personally engaging in motivational speaking and promotion of her [REDACTED] method around the United States also constitutes performing the tasks necessary to produce a product or to provide the services of the U.S. petitioner. 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; *Matter of Church Scientology Intn'l.*, 19 I&N Dec. at 604.

In response to the RFE, counsel for the petitioner asserted that "USCIS cannot claim that [the beneficiary] is not an executive simply because she personally conducts lectures, personal appearances, writes books and promotes [REDACTED] as the main public image of her foreign and U.S. subsidiary." Counsel further asserts: "To do so would be contrary to the INA, CFR and FAM." However, counsel's claims are unpersuasive and unsupported by any legal authority. Counsel cites to no provisions of the INA, CFR and FAM, or any case law, to support the assertion that the beneficiary's duties of personally conducting lectures, making personal appearances, writing books, and promoting her company are executive or managerial in nature.

The AAO acknowledges counsel's claims that in new offices such as the petitioner, it is normal for the beneficiary to conduct some non-qualifying functions. However, neither counsel nor the petitioner has ever provided any detail or explanation as to the exact amount of time the beneficiary will spend on her qualifying versus non-qualifying functions. Although the director specifically requested the petitioner to provide a breakdown of the number of hours devoted to each of the U.S. employee's job duties, the petitioner provided no such breakdown for the beneficiary. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel asserts the petitioner has relieved the beneficiary from training her U.S. staff in the [REDACTED] method by contracting out this duty to two trainers in Europe. However, the petitioner's claims and documentation, submitted for the first time on appeal, are insufficient to establish that the beneficiary will be relieved from primarily performing non-qualifying duties. The petitioner's claims and documentation submitted on appeal contradict the petitioner's repeated assertions made in support of the initial petition that the beneficiary alone will be providing "all the training and tools necessary so that all center personnel will have the knowledge required to implement these unique techniques." A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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). Here, the petitioner has failed to establish both elements of eligibility. The petitioner failed to establish that the beneficiary's duties, including providing business

consultation services and engaging in motivational speaking tours around the United States, constitute qualifying managerial or executive responsibilities as specified in the definitions. The petitioner also failed to establish that the beneficiary *primarily* performs qualifying duties and does not spend the majority of her time on non-qualifying duties. Overall, the evidence in the record prohibits a determination that the petitioner could, and would, realistically support the beneficiary in a managerial or executive position within one year. Accordingly, the appeal will be dismissed.

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.