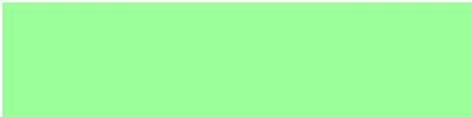




U.S. Citizenship
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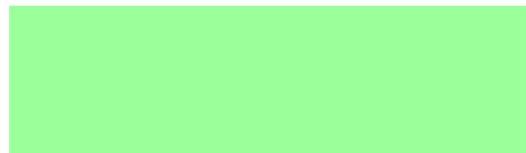


DATE: **AUG 01 2014** Office: VERMONT SERVICE CENTER FILE:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The director subsequently granted the petitioner's motion to reopen and affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129) seeking to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company doing business as [REDACTED] states it is engaged in the wholesale distribution of Hispanic food and dairy products. The petitioner claims to be a subsidiary of [REDACTED], the beneficiary's foreign employer located in Honduras. The beneficiary was previously granted one year in L-1A classification in order to open a new office and the petitioner seeks to extend his status so that he may continue to serve as its Chief Executive Officer for an additional two years.

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

On appeal, the petitioner asserts that the director erred by failing to consider the petitioner's claim that the beneficiary qualifies as a function manager. The petitioner submits a brief from counsel and additional evidence in support of the appeal.

I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

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

The regulation at 8 C.F.R. § 214.2(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.

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

- (v) 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.

II. The Issue on Appeal

The issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial capacity under the extended petition. The petitioner claims that the beneficiary will manage an essential function of the organization.

A. Facts

On the Form I-129, the petitioner stated that the beneficiary, as chief executive officer, "will manage and direct all aspects of food and dairy acquisition, marketing, and sales," and is "[r]esponsible for oversight and direction of fice [*sic*] presidents in charge of acquisition, marketing, and sales"

The petitioner stated that it had two employees as of December 6, 2011 when the petition was filed. The petitioner submitted the beneficiary's pay statements covering the period of May 15, 2011 through June 29, 2011 and a Form 941 Employer's Quarterly Federal Tax Return for the second quarter of 2011, which indicated that the company had one employee.

The petitioner's initial evidence included copies of seven sales agreements and two broker agreements between the petitioner and [REDACTED] under which [REDACTED] appointed the petitioner as its sales representative/broker for sales made to specific clients named in the agreements.

On July 17, 2012 the director issued a request for additional evidence ("RFE") instructing the petitioner to submit, among other documents, the following: (1) a letter from the petitioner with a detailed description of the beneficiary's duties with an allocation of time devoted to each duty; (2) names, job titles and duty descriptions for the employees managed or supervised by the beneficiary; and, (3) photographs of the petitioner's interior and exterior business location to demonstrate its size and location.

The petitioner retained new counsel and in response to the RFE, provided the following breakdown of the beneficiary's 45-hour work week:

1. Researching and analyzing potential companies for the purpose of engaging in new business endeavors with [the petitioner]. This role demands [the beneficiary] find two different types of companies with which to engage business:
 - a. Production companies that create the products under the strict specifications and standards of [the petitioner]; and
 - b. Distribution companies that distribute the products once [the petitioner] has arranged for suitable buyers. (35% 15.75 hours)

2. Maintains and furthers business relationships with new and existing clients. In this role, [the beneficiary] often travels around the country in representation of [the petitioner]. (20% 9 hours)
3. Works as a liaison between U.S. production plants and distribution companies in an effort to expand on existing and potential products. (10% 4.5 hours)
4. Assigns the roles and duties of other [petitioner] employees. This includes but is not limited to delegating assignments to the staff in contacting clients when new products are available. (5% 2.25 hours)
5. Oversees and approves new samples obtained from U.S. production plants. This entails constant communication with plant managers to expedite the process and distribution of the products. (5% 2.25 hours)
6. Negotiate prices with U.S. production and distribution companies. (5% 2.25 hours)
7. Assists and represents [the petitioner] in the implementation and development of market strategies from the production to the distribution stage. (5% 2.25 hours)
8. Complete oversight of budgetary decisions; accounts receivable and accounts payable. (15% 6.75 hours)

The petitioner identified the beneficiary's spouse as an administrative assistant and described her duties as follows:

1. Provide high-level administrative support by conducting research, preparing statistical reports, handling information requests. (55% 24.75 hours)
2. Performing clerical functions such as preparing correspondence, receiving visitors, arranging conference calls, and scheduling meetings. (10% 4.5 hours)
3. Resolves administrative problems by coordinating reports for the CEO, analyzing data and identifying solutions. (25% 11.25 hours)
4. Manages and maintains the CEO travel schedule. Coordinates the purchase of airline tickets and makes travel arrangements. (10% 4.5 hours)

The petitioner submitted its lease for 200 square feet of office space at \$300.00 per month from March 5, 2012 through March 5, 2013. The petitioner submitted tax documentation indicating that the company paid salaries and wages totaling \$11,238 in 2011. The petitioner also submitted the beneficiary's Form W-2, Wage and Tax Statement for 2011 indicating his earnings of \$10,000. The petitioner submitted no additional payroll documentation and did not provide any evidence of wages paid to the administrative assistant.

On November 14, 2012, the director denied the petition finding that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity. Specifically, the director stated that the petitioner's physical premises were insufficient to accommodate more than two employees and the petitioner provided no evidence to establish that the petitioner had any employees other than the beneficiary. The director found that without additional employees, the beneficiary would necessarily be performing all of the daily tasks of operating the business.

Once again, the petitioner retained new counsel and on December 17, 2012 filed a motion to reopen the director's decision. In support of the motion, counsel asserted that the attorney who filed the initial petition provided ineffective assistance due to his failure to effectively communicate with the petitioner, his failure to return the petitioner's file, and his failure to timely file this extension. The petitioner provided an affidavit and a copy of a complaint filed against counsel with the Florida State Bar with this motion in accordance with *Matter of Lozada*, 19 I&N Dec. 637, 639 BIA 1988) *aff'd* 857F.2d 10 (1st Cir. 1988). Counsel stated that the petitioner anticipated that the Florida Bar would notify counsel of the complaint. Therefore, the petitioner requested that the director exercise his discretion and reopen the matter.

On motion, the petitioner focused mainly on the detrimental effect of the late filing; however, counsel also stated that formal counsel's ineffective assistance resulted in "severe deficiencies in their filings." Specifically, counsel asserted that the director's determination that the beneficiary would not be engaged in a primarily managerial or executive capacity is erroneous and that the director's adverse finding was based on the original counsel's "ineffective assistance . . . in his proffered characterization of the Beneficiary's role and duties. . . which in truth is the capacity of a 'Functional Manager.'"

Counsel stated that the beneficiary would be "managing the central, highly specialized function of the company's operations which is to bring Central American cheese products to U.S. market for Central American consumers' consumption." Counsel further stated that the beneficiary is responsible for four components of the business function, specifically: 1) market management; 2) product management; 3) branding management, and 4) new business venture development. Counsel described these duties, in part, as follows:

1. Market Management Component:

[The beneficiary] manages the analysis of the U.S. market to determine where populations of Central Americans reside across different U.S. regions, and the extent of those populations. A sub-component in this regard is the analysis of Central American customer demographics, preferences, needs, and buying habits to identify potential markets and to determine the contributing factors that affect cheese product demand. This requires assessing social, economic, and cultural factors in order to accurately determine where markets may exist that [the petitioner] should consider entering.

Further, this requires him to evaluate available distribution patterns so that he can ascertain which manufacturing companies the company should corroborate with in specific regions to manage costs of distribution and transportation against profits that will be realized from sales to those regions within markets which he has chosen for the company to enter. . . .

2. Product Management Component:

[The beneficiary] is also responsible for the component of the company's function that is product management, through which he identifies cheese products available in the U.S. that need to be modified to meet Central American consumers preferences, as well as products that are not yet available in the U.S. that Central American consumers would like, and working with U.S. manufacturers to develop or create such products for distribution and sale here in the U.S.

Specifically, when a cheese product that is available in the U.S. market does not satisfy the taste, color, texture and smell preferences of Central American consumers, the Beneficiary [the beneficiary] is in charge of the modification or alteration of the product to make it into one that would be accepted by the Central American community. He thus manages the component of identifying cheese products that are already manufactured in the U.S., and advising those products' manufacturers on the modification or alteration of their products to make them acceptable, and therefore marketable, to Central American consumers. Such alteration and enhancement is a critical, sophisticated sub-component that requires a high level of unique knowledge, which [the beneficiary] indeed possesses. He manages such alteration through working with chosen manufacturers in their experimenting with variations in the levels of salt and types of cultures, and in processes including cooking, setting, pressing, and cutting. The modification of levels of salt and types of cultures used changes the taste and smell of the cheese, while the cooking, setting, pressing and cutting processes modify the color, texture and the appearance of the cheese product.

Additionally, [the beneficiary] performs product management by identifying Central American cheese products that are not yet available in the U.S. market and locating U.S. manufacturers willing to work with him in the development of these products for distribution in the U.S.

* * *

[The beneficiary] . . . exercises full discretion over the daily operations and has full range of authority in determining what modifications are necessary for each product and in experimenting with different processes to achieve the modifications or new products required.

3. Branding Management Component:

Aside from meeting Central American consumers' preferences in terms of quality of cheese products, the products developed must also be presented and advertised in an attractive fashion for the Central American consumers to ensure successful sales from a financial standpoint for [the petitioner] and its business ventures. That is, for all cheese products developed through [the beneficiary's] skillful management, be it creating products anew if not previously available in the U.S. or modifying those available to meet Central American consumer needs, the product that satisfies the

taste, color, texture and scent preferences of the Central American consumers must be uniquely branded and marketed to be successful.

[The beneficiary] manages the component that is the cultural branding of the cheese products to assure that the shape, name, packaging and portion size of the product are in accordance with the demands of the Central American consumers. This task requires the creation of names, labels, designs, and packaging that both compliments the product and attracts the desired consumers.

4. New Business Venture Development Component:

A goal of [the beneficiary's] management of market and product analysis and cultural branding is to identify U.S. manufacturers and distribution companies willing to defer to his expertise in this specialized area and enter into business ventures with [the petitioner]. [The beneficiary] in his capacity as functional manager thus identifies pursuable opportunities with U.S. companies and negotiates deals according to those manufacturers' existing products. This is accomplished through [the beneficiary's] direct coordination with U.S. cheese producers to identify those that develop products his company his company can modify as well as those that are willing to develop new products specialized to satisfy Central American consumers. . . .

. . . [T]he beneficiary] develops new business ventures on a consistent basis, and negotiates contracts with those manufacturers to carry out the highly specialized function that is [the petitioner's] operation. He therefore wields a great deal of discretion in strategically choosing business ventures and therein is responsible for the Petitioner's operations and viability in terms of potential profits and losses.

The petitioner also submitted a letter dated December 13, 2012, from its president which reiterated these duties and stated that the beneficiary allocates 35% of his time to marketing management, 35% of his time to product management, 10% of his time to branding management, and 20% of his time to business venture development.

Counsel stated that the beneficiary has entered into business relationships with four U.S. cheese producers and "has contributed in the production, branding and distribution of approximately ten different cheese products that constitute the majority of the products represented by [the petitioner]." Thus, counsel reiterated "the function that [the beneficiary] manages is the central source of the operations and financial viability of the Petitioner's business."

Counsel asserted that due to the nature of the beneficiary's employment as a function manager, there is no need for additional employees under the beneficiary's responsibility.

In support of the motion, the petitioner provided an un-signed letter attributed to [redacted] of [redacted] who states that the beneficiary has consulted with [redacted] on the development of Hispanic cheeses for the U.S. market. He stated that the petitioner's sales of [redacted] products totaled nearly \$320,000 in 2012.

The director granted the petitioner's motion to reopen the decision and on May 22, 2013, affirmed the denial of the petition. The director determined that the petitioner failed to overcome the grounds of denial. The director noted that the motion failed to address the nature of the petitioner's physical premises, the beneficiary's daily duties, or the low wages indicated on the petitioner's tax returns.¹

On appeal, counsel asserts the director's decision is erroneous and that she failed to consider the petitioner's claim that the beneficiary qualifies as a function manager. Counsel states that the director relied upon "conventional and common adjudicatory methods" and incorrectly based her decision on "staffing levels, office size, and non-managerial duties." Counsel requests that the motion and corroborating evidence be incorporated and considered as part of this appeal. Counsel submits a brief and additional evidence.

B. Analysis

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity.

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(1)(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.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, while the beneficiary exercises the appropriate level of authority over the business as its CEO, the evidence of record does not support the petitioner's claims that the beneficiary's actual duties will be primarily managerial in nature.

On the Form I-129, the petitioner stated that the beneficiary would manage and direct all aspects of food and dairy acquisition, marketing and sales as a wholesale distributor of Hispanic food and dairy products. Although counsel indicates that former counsel mischaracterized the nature of the beneficiary's position at the time of filing, the initial evidence included no other description of the beneficiary's duties.

In response to the director's RFE, the petitioner provided a more detailed description and a percentage of time and allocation of hours that the beneficiary would spend on each of eight different areas of responsibility. The beneficiary's responsibilities, however, included duties such as

¹ Counsel asserted on motion that due to the nature of the beneficiary's duties as a functional manager and the nature of the business, the beneficiary did not require employees or larger premises. Since the motion did address the issues related to employee support, the director's statement that the "motion does not address these concerns" will be withdrawn.

researching and analyzing potential production and distribution companies with which to engage, maintaining relationships with clients, liaising with U.S. production and distribution companies, approving product samples, negotiating prices, and budgetary responsibilities including accounts receivable and accounts payable. While the job description conveys that the beneficiary has decision-making authority in business matters, it also reflects that the beneficiary, as the sole employee, is involved in many day-to-day, non-managerial functions of the business.

For example, the petitioner indicates that the beneficiary allocates 35% of his time to researching and analyzing companies who will create products according to the petitioner's standards and specifications, and distribution companies who handle distribution after the petitioner identifies suitable buyers. However, the petitioner has not identified who, if not the beneficiary, would be involved in developing and communicating the petitioner's specifications or identifying suitable buyers. The petitioner does not have product specialists, quality control or sales staff and instead requires the beneficiary to directly perform many operational functions for the company. Further, as noted above, the petitioner submitted evidence that it is a party to nine different sales or broker agreements, a fact which further supports a finding that the beneficiary, as the petitioner's only employee, is involved in product sales.

The evidence submitted was therefore insufficient to establish that the beneficiary would primarily perform duties that fall within the statutory definition 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In response to the RFE, the petitioner stated that the beneficiary allocates 5% of his time to delegating assignments to staff, and provided a duty description for administrative assistant, [REDACTED] Ms. [REDACTED] duties included such tasks as conducting research, preparing reports, performing clerical functions, analyzing data, identifying solutions, and managing the beneficiary's travel schedule. The petitioner submitted the beneficiary's Form W-2 but submitted no evidence of wages paid to the administrative assistant or to any other employees who would relieve the beneficiary from primarily performing non-managerial duties.

As part of the motion to reopen, the petitioner submitted an entirely new duty description for the beneficiary and asserted that the beneficiary is a function manager who "functions at a senior level and exercises full discretion on decisions for daily operations of the components of the critical function, which are market research, product research, branding, and developing and maintaining new business ventures." Counsel stated that due to the "nature of his employment as a functional manager" the beneficiary has "no need for additional employees under his area of responsibility." Counsel further stated that, due to the ineffective assistance of the attorney that filed the petition in describing the beneficiary's role and duties, "[t]he Service has not yet been apprised of the true circumstances associated with this case." However, counsel does not allege that the job description submitted by petitioner's other previous counsel in response to the RFE was incorrect or otherwise inaccurate. The record reflects that the petitioner and former counsel had sufficient time to prepare a

detailed duty description in response to the RFE and there is no support for counsel's assertion that the "true circumstances" of the beneficiary's employment were not conveyed at that time.

The RFE response, which included the beneficiary and the administrative assistant's duty descriptions, is in conflict with the duty description and function manager claims made for the first time on appeal. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Nevertheless, the latest iteration of the beneficiary's duties also reflects his significant involvement in non-managerial duties. For example, the petitioner states that the beneficiary allocates 35% of his time to "market management" which includes managing market analysis and evaluating available distribution patterns. While the petitioner indicates that the beneficiary "manages" this component of the business, the beneficiary is the only person available to collect and analyze market information, duties that are not managerial in nature. The beneficiary clearly has the authority to make business decisions based on his analysis, but the petitioner has not established that his duties associated with this responsibility are primarily managerial in nature. Similarly, the beneficiary's responsibility for "product management," which requires another 35% of his time, requires additional research of the U.S. market and application of his technical expertise in cheese production, as he consults with U.S. manufacturers on product recipes and production methods requiring his "unique knowledge." As such, the beneficiary's responsibility for product management involves both managerial and non-managerial tasks which have not been sufficiently detailed. Even if the petitioner had established that the position description submitted on motion and appeal is the sole representation of the "true circumstances" of the beneficiary's employment, it does not support a finding that the beneficiary's would be primarily performing managerial duties.

Counsel's primary contention on appeal is that the director failed to consider the petitioner's claim that the beneficiary qualifies as a function manager. 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.

Counsel asserts that the beneficiary's function is "to manage U.S. manufacturers' cheese alterations and branding to satisfy cheese characteristics demanded by Latin consumers such as taste, color, texture, smell, and packaging" and to "assure U.S. cheese manufacturers are able to deliver cheese products which have distinctive features like being bitter, salty, less moist, and correctly textured."

Counsel asserts that the beneficiary is managing this function by consulting, advising and directing various U.S. manufacturers who actually perform the functions of altering and producing the cheeses. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) to support this assertion since the beneficiary in the cited case "spent most of his time performing audits, not directing others in the preparation of audits . . ." However, we note that in *National Hand Tool Corp.*, the beneficiary supervised several employees who worked for him in his department whereas the beneficiary in this matter has no employees and supervises no employees. The court in *National Hand Tool Corp* emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity and USCIS interprets the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the petitioner must establish that the beneficiary's position consists of primarily managerial or executive duties and that someone other than the beneficiary performs the administrative and operational tasks associated with the function. Like the court in *National Hand Tool Corp.*, and as further discussed below, we emphasize that our finding is based on the conclusion that the petitioner did not establish that the beneficiary will be primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Counsel's assertion that the beneficiary "enjoys indirect management authority" over others is not supported by the evidence of record. The scenario presented by the petitioner appears to cast the beneficiary as a consultant to various cheese manufacturers and not a function manager directly or indirectly managing other companies' employees. The petitioner has not submitted copies of any agreements with cheese manufacturers defining the beneficiary's roles and responsibilities with respect to their employees. The only agreements provided for review indicate that the petitioner acts as a sales representative for [REDACTED] with respect to specific customers.

Counsel asserts that the director erroneously relied upon payroll and the petitioner's leased square footage to determine that the petitioner's staffing levels and office size were insufficient to satisfy the requirements of this petition. Counsel states that "the staff of cheese manufacturers is of course not on [the petitioner's] payroll and their daily management is by no means [the beneficiary's] responsibility." But, counsel asserts "he (the beneficiary) consults / advises / directs them in the proper manufacture of Latin-like cheeses and it is this staffing management which is compatible with the reasonable needs of [the petitioner]." The petitioner's overall purpose is not to manufacture cheese. In fact, there is insufficient evidence that the petitioner sells any products under its own name. Therefore, an analysis of the nature of the petitioner's business undermines counsel's assertions that the beneficiary manages a function rather than performs a function. The petitioner asserts that the beneficiary is a function manager of a function that the petitioner does not perform. The petitioner asserts that it is a wholesale distribution company but the petitioner also asserts that its sole employee, the beneficiary, primarily consults with U.S. manufacturers to develop cheese. It is reasonable to question who actually performs the duties associated with sales and distribution, if not the beneficiary.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational

manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *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). In addition, in the present matter, the evidentiary requirements for the extension of a "new office" petition 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. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

Although the beneficiary may not directly perform the day-to-day production tasks associated with manufacturing cheese, the petitioner does not claim to be a cheese producer, but rather a distributor and wholesaler. It has not identified anyone who assists the beneficiary with performing other non-managerial duties associated with the petitioner's business, such as routine administrative and clerical work, sales, technical and brand consulting with clients, invoicing, and handling accounts payable and receivable. The beneficiary exercises discretion over the petitioner's business as its sole employee and has the authority to make key decisions. However, the record does not support a finding that his duties are primarily managerial in nature.

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

Based on the foregoing, the petitioner has not established that the petitioner will employ the beneficiary in a qualifying managerial capacity. Accordingly, the appeal will be dismissed.

III. Conclusion

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.