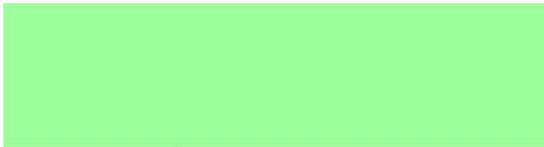




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **NOV 03 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a Form I-129 Petition for a Nonimmigrant Worker seeking to extend the beneficiary's status 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 New York corporation established in 2012, states that it operates as a systems and technical employment search consultant. The petitioner indicates that it is an affiliate of the beneficiary's foreign employer, [REDACTED] located in the United Kingdom. The beneficiary was previously granted one year as an L-1A intracompany transferee in order to open a "new office" in the United States as the petitioner's [REDACTED]. The petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition, concluding that the petitioner did not establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner contends that the director erred in concluding that the beneficiary will not be relieved from primarily performing non-qualifying duties and asserts that the beneficiary qualifies 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, Petition for a Nonimmigrant Worker, 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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a "new office" petition must submit the following:

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

## II. THE ISSUES ON APPEAL

### A. MANAGERIAL CAPACITY (UNITED STATES)

The sole issue addressed by the director is whether the petitioner has established that the beneficiary will be employed in a qualifying managerial capacity. The petitioner has not claimed that the beneficiary would 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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

#### 1. Facts and Procedural History

The petitioner filed the Form I-129 on December 12, 2013. In a support letter submitted with the petition, the petitioner indicated that it was established as the U.S. office of the London-based foreign entity that operates as a "boutique international search consultant." The petitioner stated that it and the foreign entity "provide services to over 120 corporations in the fields of technical infrastructure; banking and finance, insurance; energy; and a broad area of commercial IT users." The petitioner stated that the foreign entity earned \$35 million in revenue in 2012 and that more than half of its clients are based in New York and Chicago. In the Form I-129, the petitioner specified that it employed four employees during its initial year of operation and that the foreign entity employs 51 individuals.<sup>1</sup> The petitioner further stated that the petitioner earned approximately \$176,000 in revenue from January through October 2013.

The petitioner explained that the beneficiary will act as the [REDACTED] where the client base "consists of investment banks, hedge funds and proprietary houses, giving [the petitioner] access to the most exciting job opportunities," and that it has built "an extensive network of investor clients and highest caliber of trading talent" to fill these positions. The petitioner stated that it currently employs two "qualified professionals" and that it continues to be on target with its business plans. The petitioner indicated that the beneficiary is exclusively responsible for establishing the petitioner's [REDACTED] by supporting and growing its client base in the banking and financial services industry sector. The petitioner explained that the beneficiary had two direct reports, an inside sales consultant with a bachelor's degree in business administration and a senior head hunter with a bachelor's degree in commerce and human resource management, but that the former left the company in May 2013 and the latter in November 2013. The

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<sup>1</sup> The petitioner subsequently submitted an IRS Form 941 Employer's Quarterly Federal Tax Return for the fourth quarter of 2013 which indicated that it had two employees at the time of filing.

petitioner indicated that it was looking to fill these positions and that the beneficiary has the authority hire, fire, and supervise these employees.

Further, the petitioner listed the beneficiary's duties as follows:

- Overseeing the operations of the [REDACTED] desk; training and mentoring staff; forecasting sales revenue against budgets to the CEO in London; managing the [REDACTED] cost center; and setting Key Performance indicators for sales and client meetings (*estimate 10 hours/week*);
- Interviewing and hiring subordinate staff. Setting up recruitment to recruitment suppliers. Agreeing on fee and compensation structure with clients. Agreeing on rebate structure with all suppliers (*estimated 8 hours/week*);
- Handling existing U.S. clients (ensuring all clients have issue resolution process in place, ensuring our inside sales staff are selling staff/solutions we can deliver against) (*estimated 6 hours/week*) [...]
- Managing client relationships in the U.S. Specializing on filling positions for Quantitative Analysts, Independent Traders and Algorithmic Traders (*estimated 4 hour/week*);
- Signing terms of business and committing [the petitioner] to contracts with investment banks, hedge funds and proprietary trading houses (*estimated 4 hours/week*);
- Managing the end-to-end recruitment process for outsourcing [REDACTED] clients (and taking full responsibility for deliverables and results. Conducting the first round of interviews on behalf of the clients (*estimated 4 hours/week*);
- Resolving issues for outsourcing and [REDACTED] clients in relation to recruitment and human resources management (*estimated 2 hours/week*); and
- Serving as a key point of contact within the specific [REDACTED] Accounts for business for issue resolution. Assuming accountability for each client (*estimated 2 hours/week*)[.]

The petitioner stated that the beneficiary will hold signatory authority, sign off on payables, and implement and oversee all strategic objectives. The petitioner indicated that the beneficiary would be responsible for filling the inside sales consultant and senior head hunter positions by the end of 2013 or early 2014, and manage the performance of these employees once hired. Further, the petitioner explained that the beneficiary will develop, maintain and lead new business through "appropriate initiatives" and act as a mentor and point of contact on all local business issues.

The petitioner submitted its organizational chart indicating that the beneficiary would oversee the aforementioned inside sales consultant and senior head hunter and three other positions targeted for 2014, 2016 and 2017 respectively. This chart reflected that the petitioner had two other employees acting at the same level in the hierarchy as the beneficiary, specifically a vice president of finance and a head of key accounts, neither of which were shown to have any subordinates. The petitioner provided a second organizational chart including the names of former employees who had held the positions of inside sales consultant and head hunter earlier in 2013.

The petitioner submitted a business plan with the beneficiary's biography, which states that "since 2011 [the beneficiary has] been dealing with "C level" contacts in the cities of London, New York and Chicago and has excelled at introducing his large network of key players to grateful hedge funds and prop shops and finding appropriate niches for independent traders with funds." The business plan indicated that the petitioning company was established to support clients based in the United States and to develop new relationships with clients. Projections in the business plan reflected that the petitioner estimated that it would employ six people and earn over \$700,000 in revenue during 2013.

The director later issued a request for evidence (RFE) stating that the petitioner had not submitted sufficient evidence to establish that the beneficiary will act in a qualifying managerial capacity. The director requested that the petitioner submit a statement describing the beneficiary's duties during the first year and those he will perform under the extended petition, along with evidence to support these stated duties. Further, the director asked the petitioner to submit evidence relevant to the financial status of the company, including income tax returns, audited financial statements, balance sheets and/or bank statements.

In response, the petitioner stated that it and the foreign entity specialize in professional placement in nine separate industry sectors, including the [REDACTED] segment headed by the beneficiary. The petitioner emphasized that this "requires our staff have unique specialized skills and knowledge related to that particular industry." The petitioner explained that they typically have managers responsible for each of these departments with one to six subordinate professionals below each manager. The petitioner indicated that the beneficiary's department in the United States had generated \$73,300 in revenue during 2013 and was projected to produce \$1 million in revenue in 2014. The petitioner stated that they anticipated continued growth and "the hiring of professional US staff," but that "additional support can and is provided by our UK back office team."

The petitioner asserted that the beneficiary does not perform any non-managerial duties. The petitioner explained the beneficiary's duties over the previous year as follows:

During the past year, [the beneficiary] has been able to focus on the essential managerial duties for our [REDACTED] department and is responsible for: preparing and executing the candidate/client contracts; handling candidate's paperwork; and preparing client proposals for our [REDACTED] division. He has exclusive authority in the U.S. for handling this essential business function of our company. [The beneficiary] deals with all aspects of our US [REDACTED] department and is our senior most [REDACTED] representative in the US, ensuring that our clients are serviced properly, including the interviewing and hiring of staff as we continue these efforts. [The beneficiary] is also the main interface with Metis, our accountants, and is responsible for all US advertising agreements. He is the authorized signatory of the company bank accounts and administers and oversees staff expense payments.

The petitioner reiterated that the beneficiary was responsible for supervising an inside sales consultant and a senior head hunter, both of which had left their positions before the end of the year. However, the petitioner stated that it offered the position of senior consultant to a prospective employee who had accepted the position and would begin employment in February 2014. The petitioner indicated that it had unexpected

difficulty locating and retaining professional subordinates for the beneficiary, but that it was now "seeking and interviewing less experienced U.S. staff to fill job positions," including "U.S. graduates with little practical experience." The petitioner submitted an employment agreement dated February 24, 2014 relevant to its newly hired senior consultant that was left unsigned. Further, the petitioner provided a balance sheet indicating that it had earned \$176,283.13 in revenue and paid \$161,727.82 in payroll expenses from January through October 2013.

In denying the petition, the director noted that the petitioner has only three to four employees all holding executive or managerial positions and that these employees have no subordinate employees to perform the non-qualifying operational duties of the business. The director found that this lack of operational staff suggested that the beneficiary is primarily engaged in the performance of non-qualifying duties. Further, the director concluded that the petitioner did not establish that the beneficiary is managing an essential function of the business, noting that the revenue generated by the beneficiary's department represents only a small portion of the foreign entity's overall revenue. The director stated that the petitioner had failed to submit evidence to establish sufficient staffing after one year to support the beneficiary in a qualifying managerial capacity.

On appeal, counsel contends that the petitioner's staffing levels should not be the sole determining factor as to whether the beneficiary acts in a qualifying managerial or executive capacity. Counsel asserts that the beneficiary is relieved from primarily performing non-qualifying operational duties by an independent contractor engaged at the petitioner's office location that handles administrative and secretarial duties. Counsel states that the director concluded in error that the petitioner employs only executive and managerial staff and that the beneficiary does not manage an essential function. Counsel also asserts that the director applied an incorrect standard in determining whether the beneficiary manages an essential function by requiring the petitioner to demonstrate that the company would not exist if not for the beneficiary's management of his function.

In addition, counsel contends that the positions subordinate to the beneficiary should not be excluded from consideration based on the fact that they happened to be vacant at the time the petition was filed.

The petitioner also submits additional evidence on appeal. The petitioner provides "new hire expectations forms" for the proposed positions that will report to the beneficiary, including front office recruiter, trading sales consultant and quant recruiter. The forms reflect that the beneficiary's proposed subordinates would be responsible for garnering sales contacts and generating new business. The petitioner submitted an updated organizational chart reflecting that the beneficiary was now acting at a higher level in the organizational hierarchy as a senior vice president supervising a manager, cyber security (listed as "role offered") and a manager, IT infrastructure (listed as "transfer date TBC"). The updated organizational chart further indicates that the senior consultant previously referenced on the record, along with a graduate sales associate, would report to the new manager, cyber security and another graduate sales associate would report to the manager, IT infrastructure.

2. Analysis

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 in a qualifying managerial or executive 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(l)(3)(ii). 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).

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 company'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 business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The petitioner has submitted duties reflecting that the beneficiary will more likely than not primarily perform non-qualifying operational duties. The beneficiary's duty description indicates that he will set up recruitment suppliers, handle all existing U.S. clients relevant to his department, fill positions requested by clients, recruit professionals to fill client positions, conduct interviews for clients, and resolve client issues. According to the petitioner's hourly breakdown of the beneficiary's duties, these non-qualifying duties will require nearly half of his time. Further, some of the beneficiary's claimed managerial duties were poorly defined and did not clearly reflect qualifying duties. For example, the petitioner stated that the beneficiary is responsible for "managing client relationships in the U.S.," but elaborated that this duty includes "filling positions for Quantitative Analysts, Independent Traders and Algorithmic Traders." The petitioner also indicated that the beneficiary is tasked with "managing the end-to-end recruitment process" and "conducting the first round of interviews." Finally, the petitioner stated that the beneficiary is responsible for "signing terms of business and committing [the petitioner] to contracts." However, the contracts submitted as supporting evidence were signed on behalf of the petitioner by higher-level employees. Further, the petitioner's business plan reflects that the beneficiary's primary function since being employed with the petitioner has been to introduce hedge funds and "prop shops" to "his large network of key players."

In addition, the beneficiary's duties indicate that he will spend a significant amount of time, approximately eighteen hours per week, hiring, firing, mentoring and training subordinate staff. However, the beneficiary has no subordinate staff as of the date of the filing of the petition, thereby leaving question that he would spend eighteen hours a week on these duties. 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).

Although the petitioner indicates that it hired a senior consultant subordinate to the beneficiary in February 2014 and that it has hired other additional employees after the filing of the petition, such hiring is not relevant to establishing that the beneficiary has sufficient subordinates to relieve him from primarily performing non-qualifying operational duties as of the date of the filing of the petition in December 2013. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). 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). Further, the petitioner submitted copies of three employment agreements for the beneficiary's claimed subordinates hired in 2013 and early 2014. All three agreements state: "Employee shall report to and be subject to the oversight of [REDACTED]" This evidence undermines the petitioner's claim that the beneficiary was to be the immediate supervisor of these employees.

Counsel asserts on appeal that a contractor engaged at the petitioner's office location relieves the beneficiary from performing certain administrative and secretarial tasks. However, this assertion does not account for the apparent primacy of other operational tasks in the beneficiary's duties reflecting his direct provision of services to clients and his responsibility for marketing the petitioner's services to clients. In sum, the evidence as a whole supports a finding that the beneficiary will primarily act as a recruiter fulfilling customer position requirements and primarily engaged in the direct provision of services to clients. 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). His role may in fact be senior within the U.S. company and involve some discretion over his assigned [REDACTED] area, but the evidence must support a finding that he would perform primarily managerial duties as of the date of finding.

Counsel contends that the director inappropriately denied the petition based solely on the petitioner's number of employees and the size of the business. Counsel's assertion is not persuasive. Counsel accurately states 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, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The evidentiary requirements for the extension of a "new office" petition require USCIS to examine the organizational structure and staffing levels of the petitioner.<sup>2</sup> *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). If the business does not have sufficient staffing after one

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<sup>2</sup> Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. *See* 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose

year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Further, 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).

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

As previously discussed, the petitioner has not established that the beneficiary has sufficient subordinates to primarily relieve him from marketing and providing services to clients in the [REDACTED] sector. The petitioner's imminent plans on hire three employees to perform some of these duties does not change the fact that the beneficiary has been, and still is, fulfilling these duties as the head of the quants and traders department. On review, the evidence suggests that the petitioner has had difficulty maintaining staff subordinate to the beneficiary to relieve him from performing these sales and service tasks, leaving question as to whether the petitioner has developed sufficiently after one year to support the beneficiary in a qualifying managerial capacity. Indeed, the petitioner's projections indicate that it expected to earn over \$700,000 in revenue and pay approximately \$360,000 in wages and commissions during the first year. However, the petitioner's balance sheet reflects that the petitioner earned just over \$176,000 during the first ten months of operation and that it paid approximately \$160,000 in wages and salaries during this time. In addition, the petitioner's business plan reflected the expectation that it would have six employees by the end of the first year of operation, but the record as of the date of the filing the petition indicates that it only has two employees, including the beneficiary. Therefore, the petitioner's claim that it is meeting its business plans after the first year is not supported by the evidence submitted on the record. In fact, the evidence suggests that the petitioner has not developed to the extent projected or to the point where it can support the beneficiary in a qualifying managerial capacity after one year as required by 8 C.F.R. § 214.2(l)(14)(ii)(D).

Furthermore, counsel suggests on appeal that the beneficiary qualifies as a function manager by virtue of his oversight of an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e.

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to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In this matter, the petitioner has not established that the beneficiary manages an essential function. As noted above, an employee who primarily performs tasks specific to the provision of goods and services is not considered to act in a qualifying managerial or executive capacity. As discussed, the preponderance of the evidence indicates that the beneficiary is primarily performing the non-qualifying duties of a recruiter providing services directly to the petitioner's clients and that he is also responsible for obtaining new clients. The beneficiary may exercise authority over the [REDACTED] department, but the petitioner must still establish that someone other than the beneficiary performs the services offered by that department or function, as well as other non-managerial tasks associated with it. While performing non-qualifying tasks 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.

For the reasons set forth above, the petitioner has not demonstrated that the beneficiary will be employed in a qualifying managerial or executive capacity. Therefore, 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.