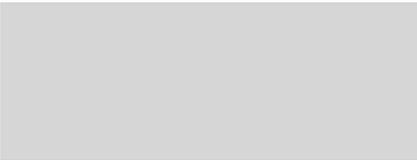




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 18 2015**

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
 Beneficiary: [REDACTED]

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:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 on appeal. The appeal will be dismissed.

The petitioner filed a Petition for a Nonimmigrant Worker (Form I-129) seeking to extend the beneficiary's status as an L-1A intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner states that it is engaged in the import, export, and sale of farm and construction machinery. The petitioner indicates that it is a wholly owned subsidiary of [REDACTED], located in Venezuela. The beneficiary was previously granted one year in L-1A status in order to open a "new office" in the United States as the petitioner's general manager. 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 the beneficiary is employed in a qualifying managerial or executive capacity.

On appeal, the petitioner contends that it employs sufficient employees and professionals to support the beneficiary in a qualifying managerial and executive capacity.

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. ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner has established that the beneficiary is employed in a qualifying managerial or 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.

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.

A. Facts and Procedural History

The petitioner filed the Form I-129 on September 13, 2013. The petitioner states that it was established in the United States to sell and rent "heavy equipment such as dozers, backhoes, excavators, and trenchers as well as small home use and construction equipment such as tillers, augers, and chain saws." The petitioner indicated that it employs six individuals and that it earned nearly \$397,000 during the first eight months of 2013.

The petitioner stated in a support letter that the beneficiary acts as general manager "with authority to hire and fire employees and to develop and expand policies for the company as he finds them necessary." The petitioner indicated that the beneficiary is also responsible for "overseeing the whole operation," "the implementation of our new operations," and taking care of "the licensing and processing of proper documentation." The petitioner further explained that the beneficiary "reviews new contracts with our clientele, establishes the budget, and directs the departments financially and administratively, having the full and sole authority of the management of the company."

The petitioner provided a business plan indicating that the petitioner projected it would hire four individuals responsible for maintenance, repair, and delivery to "enable [the beneficiary] to focus on the core of the business." A projected personnel plan indicated that the petitioner would hire three sales/rental associates in 2013 and a maintenance/technician in 2014. The plan further explained that the beneficiary "will make all decisions concerning equipment purchases," "be in charge of obtaining all equipment for sales and rentals," and responsible for "completing contracts, working up quotes, setting up delivery of merchandise, arranging financing as needed, contacting customers, and verifying pickup and delivery." The petitioner stated that "future plans call for the hiring of a mechanic and shopman with hopes of adding a truck and delivery driver shortly thereafter...with additional office/shop personnel to be added as needed."

The petitioner submitted a profit and loss statement for the first eight months of 2013 reflecting that the petitioner had earned nearly \$397,000 in revenue and that it paid \$49,665.21 in salaries and wages during this time. The petitioner provided an IRS Form 941 from the second quarter of 2013 reflecting that it employed six individuals and that it paid \$22,300 in wages during this quarter. The petitioner submitted internal bi-weekly payroll documentation dating from February 28, 2013 through August 31, 2013. The most recent payroll listing indicated that the petitioner employed the following persons at the listed bi-weekly amounts: the beneficiary (\$1,500), [REDACTED] (\$0),¹ [REDACTED] (\$600), [REDACTED] (\$600), and [REDACTED] (\$650).

The director later issued a request for evidence (RFE) requesting that the petitioner submit a letter further describing the beneficiary's typical managerial duties, including the percentage of time he spends on each task. The director noted that the description of the beneficiary's duties lacked sufficient detail and that the petitioner could submit evidence to support the beneficiary's stated duties. The director asked the petitioner to clarify whether the petitioner supervises and controls the work of other supervisory, managerial or professional employees. Further, the director requested that the petitioner provide an organizational chart including the names and titles of each employee and their duties and salaries. Finally, the director asked that the petitioner submit quarterly wage reports for the third and fourth quarters of 2013.

In response, the petitioner indicated that the beneficiary "oversees the entire operations in [the petitioner]," and listed the following duties:

- Establish policies and expand them if necessary.
- Manage customers accounts
- Prepare new clients sales or consignment contracts
- Hire and train new employees
- Ensure the company complies with all the state regulations.
- Implement new projects.
- Prepare reports for the foreign entity's records.
- Direct and other departments financially and administratively
- Establish budge[t]s for each area of the company.
- Hold monthly employee meetings.
- Creation and implementation of company business plan.
- Meeting revenue targets through management of tasks and personnel.
- Explore ways to promote the range of products to current and new customers.
- Continuously improve and update personnel knowledge with respect to product development and technical innovation.
- Establish a strong relationship with customers as well as with our suppliers to achieve optimum quality of service and vendor response to our needs.
- Analyze and control expenditures of heavy equipment to confirm budget requirement.
- Make strategic decisions to ensure profitability of inventory.

¹ The record shows that Mr. [REDACTED] was paid \$1,000 for several bi-weekly periods prior to the most recent payroll statement dated August 31, 2013.

- Directly supervise and carry out performance appraisal.
- Hire, train and fire employees when necessary.

In addition, the petitioner submitted a second support letter indicating that the beneficiary performs the following duties:

- Administration of activities for agreements with government entities, from the state and city council.
- Diverse operations in the financing, loans and credits associated with the organization needs.
- Interaction with banking entities, commercial accounts and private organizations.
- Interaction with direct and indirect clients regarding services and operations of the organization.

The petitioner further noted that the beneficiary "takes care of licensing and administrative and processing of proper documentation necessary under the regulations of the Venezuelan Government and U.S. Government." The petitioner explained that the beneficiary "implements the projects that are forecast for the market requirement," "reviews the contracts, confers with companies that are key to our business, establishes the budget, and directs the department financially and administratively, having full authority of the structural organization of the company." The petitioner stated that the beneficiary devotes 70% of his time to these tasks and spends the remaining part of his weekly time to "non-executive functions."

The petitioner provided titles and duties for each employee. The petitioner indicated that the purchasing manager is responsible for "overseeing the acquisition of products," preparing "reports regarding market conditions and merchandise cost," and directing and coordinating "activities of personnel engaged in buying, selling, and distributing materials, equipment, machinery and supplies." The petitioner stated that the warehouse foreman is tasked with filling and preparing customer orders and logging transactions, and the import/export agent coordinates "air freight and/or ocean shipment with clients," coordinates "shipping with customs agents for clearance," and analyzes quotes from shipping vendors. Further, the petitioner explained that the administrator "implements decisions of the [beneficiary]," and "maintains the company financial reports," and that the office coordinator is responsible for "secretarial and clerical functions."

The petitioner submitted a supporting organizational chart indicating that the beneficiary directly supervises the purchasing manager, the import/export agent, the administrator and the office coordinator. The chart indicates that the warehouse foreman reports to the purchasing manager. The petitioner provided its most recent IRS Form 941, Employer's Quarterly Federal Tax Return, from the fourth quarter of 2013 reflecting that it had paid \$18,150 in wages to six employees.

In denying the petition, the director found that there was insufficient evidence that the petitioner has grown sufficiently during the first year to allow the beneficiary to primarily perform qualifying executive or managerial duties. The director noted that the submitted payroll evidence did not establish that the beneficiary's subordinates are full-time employees. Further, the director found that the evidence provided did not demonstrate that the beneficiary had professional subordinates, as defined by the regulations. Finally, the director stated that the beneficiary's duties failed to identify the beneficiary's actual day-to-day

managerial tasks. The director concluded that given the petitioner's staffing levels it was likely that the beneficiary was, and would continue to be, primarily engaged in providing goods and services to the petitioner's customers.

On appeal, the petitioner asserts that the beneficiary has successfully expanded the business to two additional "DBAs." The petitioner states that the beneficiary is clearly not a mere first-line supervisor. The petitioner contends that it is not required to demonstrate that the beneficiary's subordinates are professionals, but asserts that nonetheless, they are indeed professionals as defined by the regulations. The petitioner explains that its employees' lower salaries can be attributed to them accepting these salaries based on the petitioner's status as a start-up company and their desire to work for the company. The petitioner states that the beneficiary's position is "completely executive" and asserts that the beneficiary is involved in "training personnel and financing." Furthermore, the petitioner provides additional evidence on appeal, including payroll documentation for the period April 15, 2014 through August 15, 2014, and evidence that the company's purchasing manager earned a Bachelor of Science degree in legal studies.

B. 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 under the extended petition.

When examining the executive or managerial capacity of the beneficiary, we 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).

In the current matter, the petitioner has provided shifting duty descriptions for the beneficiary that leave questions as to the actual tasks he performs on a day-to-day basis. For instance, in support of the petition, the petitioner described the beneficiary's duties in overly broad terms, noting that he is responsible for "overseeing the whole operation," "the implementation of our new operations," and taking care of "the licensing and processing of proper documentation." The petitioner's business plan reflected that the beneficiary is responsible for a number of operational duties including making all decisions concerning equipment purchases, obtaining all equipment for sales and rentals, working up quotes, setting up delivery of merchandise, contacting customers, and verifying pickup and delivery. Therefore, the initial evidence suggested that the beneficiary likely performs a combination of non-managerial and managerial duties, but offered little insight into how he allocates his time among them. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In response to the director's RFE, the petitioner provided two additional duty descriptions that failed to provide further specificity to the duties described at the time of filing. Further, the job descriptions provided in response to the RFE were not clearly consistent with those provided at the time of filing. One of the new job descriptions provided a list of overly general duties that could apply to any executive or manager with any company in any industry, while the second duty description set forth duties not provided in the former, such as administering agreements with government entities, interacting with banking entities, commercial accounts and private organizations, and taking care of licensing and administrative processing of customs documentation. Indeed, the petitioner otherwise makes no reference to contractual relations with governmental entities on the record and elsewhere on the record it asserts that one of the beneficiary's subordinates is responsible for processing customs documentation. In sum, the petitioner has provided a muddled picture of the beneficiary's duties leaving a conclusion as to his actual day-to-day tasks difficult.

In an effort to better understand the beneficiary's duties, the director requested that the petitioner specify the percentage of time the beneficiary spends on each of his tasks, submit examples of specific managerial decisions made by him, and provide other evidence to substantiate his asserted duties. However, the petitioner failed to provide this evidence. 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). In response to the RFE, the petitioner provided only vague statements as to the beneficiary's general responsibilities and loosely assigned 70% of his time to a number of ambiguous duties, noting that the beneficiary spends the other 30% of his time on "non-executive functions."

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 duties offered for the beneficiary in his capacity in the United States, such as establishing policies, managing customer accounts, hiring and training employees, implementing new projects, directing departments administratively and financially, establishing budgets, exploring ways to promote the range of products, focusing on product development and technical innovation, and establishing a strong relationship with customers are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The evidence of record includes no specific examples or documentation to substantiate the beneficiary's proposed duties. For instance, the petitioner provides no specific examples of policies he established, customer accounts he manages, employee trainings he led, new projects he implemented, budgets he established or products he developed. Indeed, the reference to product development and technical innovation in the beneficiary's duties appears incongruent to the petitioner's stated business, which is focused on selling and renting equipment and machinery manufactured by other companies. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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).

Beyond the required description of the job duties, United States Citizenship and Immigration Service (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.

In the current matter, the totality of the evidence reflects that the petitioner has not developed sufficiently during the first year to allow the beneficiary to primarily focus on qualifying managerial or executive duties. The petitioner's payroll documentation dated most recently to the filing of the petition, from the second half of August 2013, reflects that the petitioner's employees earned a total of \$8,700 during that month, or \$26,100 per quarter. However, the petitioner's IRS Form 941 from the fourth quarter of 2013 indicates that the company paid only \$18,150 in wages and its IRS Form 941 for the first quarter of 2014 reflects that it paid \$17,500 in wages. The petitioner did not provide an explanation for this decline in wages.

We acknowledge that the petitioner has provided substantial payroll documentation for 2014, and its claim that it employed 13 staff and operated three separate businesses as of September 2014. However, this evidence is not probative towards demonstrating that the petitioner employed sufficient operational employees as of the date of the petition to support the beneficiary in his claimed managerial or executive capacity. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner submits an organizational chart reflecting that the beneficiary supervises a subordinate purchasing manager and asserts that he oversees several professionals, thereby indicating it believes that the beneficiary qualifies as a personnel manager. The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner has not provided sufficient evidence to establish that the beneficiary acts primarily as a personnel manager. As noted, the petitioner's organizational chart reflects that the beneficiary supervises [REDACTED] whose title is listed as "purchasing manager." However, on appeal the petitioner refers to Mr. [REDACTED] as its "import/export agent." Regardless, the petitioner does not provide adequate evidence to substantiate that Mr. [REDACTED] is employed by the company in a supervisory capacity. For instance, the most recent payroll documentation reflects that Mr. [REDACTED] was not being paid by the company as of August 2013, although we note that he appears to have earned \$8,000 in the first eight months of 2014. It is unclear whether he was employed as of the date of filing. In addition, Mr. [REDACTED] stated duties include supervising "activities of personnel engaged in buying, selling, and distributing materials, equipment, machinery and supplies." However, the petitioner's organizational chart does not indicate that Mr. [REDACTED] supervises multiple purchasing employees as asserted, as the sole subordinate employee listed is a

warehouse foreman. Again, 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). For these reasons, the petitioner has not established that the beneficiary qualifies as a personnel manager through his oversight and control over other managerial and supervisory subordinates.

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

Here, the petitioner has not demonstrated that the beneficiary has professional subordinates as necessary to qualify him as a personnel manager. This evidence consists of a copy of Mr. [REDACTED] degree in legal studies. However, the petitioner has not established that his position, which has been identified as either "purchasing manager" or "import/export agent," actually requires a bachelor's degree in a specific field. The petitioner has also provided no evidence to indicate that any of the beneficiary's other subordinates, which include an administrator, an office coordinator, and an import/export agent, are professionals. Regardless, even when considered, the duties of the beneficiary's other subordinates do reflect those of a professional level as explained in the regulations and case law. Therefore, the petitioner has not established that the beneficiary oversees and controls professional subordinates to qualify as a personnel manager.

Lastly, the petitioner states on appeal that the beneficiary's role is "completely executive." The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The petitioner has not established with sufficient evidence that the beneficiary acts in a qualifying executive capacity. As previously discussed, the petitioner has submitted vague and contradictory duty descriptions for the beneficiary that do not adequately specify his day-to-day executive actions and tasks. Indeed, to the

extent the petitioner provides specifics regarding the beneficiary's duties, such as those listed in its business plan, these reflect that the beneficiary is engaged in non-qualifying operational duties such as making all decisions concerning equipment purchases, obtaining all equipment for sales and rentals, working up quotes, setting up delivery of merchandise, contacting customers, and verifying pickup and delivery. Again, a petitioner cannot establish a beneficiary as a qualifying executive merely because they have an executive title, because they direct the enterprise as the owner or sole managerial employee, or by reiterating the regulatory definition of an executive. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D).² 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.

In the instant matter, the petitioner has submitted little evidence to substantiate that the beneficiary is primarily engaged in qualifying managerial or executive level duties or that the petitioner has developed sufficiently to supply the beneficiary with more than first-line operational subordinates. Further, we note that the petitioner's business plan indicated the company's intent to hire sales/rental representatives and a maintenance technician during the first year of operations. While the record confirms that the petitioner has hired five employees, it has not filled any of the positions mentioned in its business plan and the petitioner has not explained who is performing these duties, nor has it stated that it has veered from its original plans. In short, the evidence indicates that the petitioner has not grown to the point where it can support the beneficiary in a qualifying managerial or executive position.

Again, 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. Therefore, as noted above, we cannot consider the petitioner's expanded business activities and staffing levels as of September 2014 in determining whether the petitioner met the requirements for an extension of a petition that expired in

² 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 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).



October 2013. However, the petitioner is not precluded from filing a new petition with a new fee and all required initial evidence.

Based on the foregoing, the petitioner has not established that the beneficiary is employed in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

III. CONCLUSION

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.