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U.S. Citizenship
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Services

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File: EAC 07 071 52607 Office: VERMONT SERVICE CENTER Date: DEC 04 2007

IN RE: Petitioner:
Beneficiary:



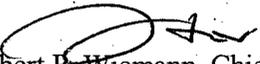
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager 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 California corporation, operates as an importer and wholesaler of lighters and power accessories. The petitioner claims to be a subsidiary of [REDACTED]. The beneficiary was previously granted L-1A classification in order to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director abused her discretion in concluding that the beneficiary performs primarily non-managerial duties and by assuming that the beneficiary does not manage other managers or professionals. Counsel asserts that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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.

The sole issue addressed by the director is whether petitioner established that the beneficiary would be employed in a managerial or executive capacity under the extended petition.

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.

The nonimmigrant petition was filed on January 16, 2007. In a letter dated December 26, 2006, counsel for the petitioner indicated that the beneficiary would perform the following duties as general manager of the U.S. company:

1. He will determine company's policies and establish business goals. With business nature in mind, he will take into consideration the company's marketing capability, financial capability and human resource. He will also consider competitors' advantages and disadvantages of marketing and financial capabilities and human resource. Furthermore, he will take into consideration the social and economic environment here in the United States. Based upon all the above, he will determine and formulate the company's policies: product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy. And he will set forth the company's business goals, including market share and revenue and profit.
2. He will direct the subordinate management. He will assign authorities and responsibilities to the subordinate management. They will establish their own objectives, working procedures and evaluation systems. He will review marketing and financial reports to ensure that the company's objectives are achieved. He will also analyze operations to evaluate company's performance and to determine areas of cost reduction and program improvement. He will direct financial and budget activities to fund operations and increase efficiency. He will demand periodical written reports and routine oral reports from the subordinate management.
3. He will exercise his discretionary authority in decision-making. If the marketing environment greatly changes, he will make resolution to change the company's business orientation or adjust the business goals. He will also decide on the adjustment of product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy.
4. He will periodically report to the parent company in China. He will report about the performance of the US subsidiary and business opportunities here in the United States. Also, he will receive information and instructions from the parent company.

The petitioner stated on Form I-129 that the U.S. company had four employees as of the date of filing. The petitioner's quarterly wage reports and tax returns through the third quarter of 2006 confirmed the employment of three employees, including the beneficiary.

On January 23, 2007, the director issued a request for additional evidence. The director instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's duties and an explanation as to how they will be managerial or executive in nature; (2) names, position titles, and complete position descriptions for all U.S. employees, to include a breakdown of the number of hours devoted to each employee's job duties on a weekly basis; (3) payroll records for the months of November and December 2006; (4) copies of IRS Forms W-2 and 1099 issued in 2006; and (5) a copy of the petitioner's IRS Form 941 for the fourth quarter of 2006.

In a response dated April 12, 2007, counsel stated that the beneficiary will serve as the petitioner's president, and as such "is the number one executive of the company and manages other managers and executives."

In an attached statement, the petitioner provided the following description of the beneficiary's duties:

- (1) Develop and formulate the policies, plans and objectives of the company.
- (2) Design and formulate the fiscal policies of the company.
- (3) Direct and manage the overall operation of the company with discretionary decision-making power over all aspects of company's operation including authority over the personnel matters of the company and report only to the board of directors.
- (4) Supervise mid-level managers who are in charge of directing and managing the daily operation of each of divisions, and supervise the performance of professionals such as sales specialists and accounting specialists.
- (5) Plan and design all the new business and new investments.

The petitioner indicated that the beneficiary manages a sales manager, who possesses a master's degree and is responsible for: (1) preparing an annual marketing plan and developing sales and marketing strategy; (2) managing daily sales, contacting customers and taking orders; (3) arranging all shipping and receiving; (4) soliciting and evaluating new customers; (5) developing e-business and updating the company website; and (6) planning and attending business trade shows.

The petitioner stated that the beneficiary also supervises an accounting assistant who possesses a "college degree" and is responsible for basic accounting transactions, preparing sales invoices and payment checks, bookkeeping, controlling inventories, managing accounts payable and receivable, and recruiting office and warehouse temporary workers. Finally, the petitioner indicated that it employs a "2007 newly hired" warehouse manager who supervises shipping/receiving, follows up on orders and shipments with customers and the factory, manages physical inventory, maintains a database, supervises warehouse workers, and arranges transportation/trucking.

The petitioner also provided an organizational chart, which shows that the sales manager supervises independent sales representatives from Teichman Marketing, Christen Company and Momentum Marketing,

while the warehouse manager supervises "temporary labor from Labor Ready." The chart also identifies employees to be hired in 2007, which include an office manager, two sales assistants, and three additional independent sales representatives. Counsel stated in his letter dated April 12, 2007 that the petitioner intends to hire ten employees and 20 independent sales representatives in the coming year.

The petitioner provided copies of its Forms W-2 and 941 confirming that the beneficiary, the sales manager and the accounting assistant were employed on a full-time basis as of December 31, 2006. The petitioner did not provide copies of IRS Forms 1099 or other evidence of payments to the claimed contract labor and independent sales representatives, nor did it provide evidence of wages paid to the warehouse manager, whose exact hire date has not been identified. The petitioner did provide a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2006, which did not indicate any commission payments or payments to contractors during the year preceding the filing of the petition.

The director denied the petition on April 24, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director found that the duties outlined for the beneficiary do not specify what he would be doing within the context of the petitioner's current staffing arrangement, and observed that the petitioner had not explained why the beneficiary's job title was changed from "general manager" to "president" subsequent to the filing of the petition. The director also noted a discrepancy between the organizational chart and the number of employees reported on the petitioner's quarterly payroll records¹. The director acknowledged the petitioner's claim that two of its employees have college degrees but found insufficient evidence to establish that they work in professional positions. The director also determined that while one employee holds the title of "sales manager," he appears to be performing the routine sales duties of the company, not performing managerial or supervisory duties.

The director acknowledged that the petitioner achieved sales of \$838,077 in 2006 and questioned whether a single sales employee could plausibly relieve the beneficiary from involvement in the sales function. The director concluded that the beneficiary would not be relieved from primarily performing non-qualifying duties for the U.S. company.

On appeal, counsel for the petitioner asserts that the beneficiary is employed in a primarily managerial capacity as he operates at a senior level within the petitioner's organizational hierarchy and exercises discretion over the company's functions. Counsel emphasizes that the petitioner has hired "a number of employees" and achieved significant sales during its first year of operations. Counsel contends that the director did not consider the petitioner's staffing levels in light of its overall purpose and stage of development. Counsel emphasizes that while the company's staff size is small, it has hired three independent contractors as sales agents "to handle its marketing and sales," and three staffing companies to provide laborers and other workers for short terms. Counsel asserts that the U.S. company is still relatively new and

¹ The director concluded that the petitioner's accounting assistant was employed on a part-time basis during 2006, based on her gross wages of \$9,000 for the year. A review of all of the payroll documentation submitted shows that this employee was hired mid-year in 2006 and did in fact earn wages commensurate with full-time employment.

will hire additional employees as it expands. Counsel concludes that the director erred in assuming that the beneficiary would perform primarily non-managerial duties, and in concluding that the beneficiary will not supervise other managers and professionals.

Counsel also refers to an unpublished AAO decision in which the AAO approved an L-1A petition for a general manager of a small international trading company, and provides a copy of the decision for the record.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner's initial description of the beneficiary's duties was vague and general and failed to convey any understanding of what tasks the beneficiary performs on a day-to-day basis. For example, the petitioner indicated that the beneficiary determines, formulates and adjusts as necessary the company's policies and goals regarding products, pricing, distribution, promotion, finances and human resources. The AAO acknowledges that responsibility for establishing a company's goals and policies is typically considered an executive-level responsibility. *See* section 101(a)(44)(B) of the Act. However, the petitioner did not describe the policies developed, the amount of time the beneficiary allocates to policy-making, or enumerate the specific tasks he performs to develop and implement policies. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner further indicated that the beneficiary "reviews [the] company's business reports to ensure that the company's objectives are achieved," "analyzes operations to evaluate company's performance," and "considers the social and economic environment" in developing policies and goals. The petitioner did not, however, explain the types of reports the beneficiary reviews, or indicate who performs non-managerial duties associated with collecting data or preparing reports. Nor did the petitioner explain what specific tasks the beneficiary performs to "analyze operations" or indicate who performs research regarding the U.S. "social and economic environment. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Upon review of the vague job description submitted, the director requested a comprehensive description of the beneficiary's duties. The petitioner's response did not assist in establishing the nature of the beneficiary's actual duties and the amount of time he allocates to managerial or executive duties. Rather, the petitioner inexplicably changed the beneficiary's job title from "general manager" to "president" and submitted an even less detailed description, much of which merely paraphrased the statutory definitions of managerial and

executive capacity. See sections 101(a)(44)(A) and (B) of the Act. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. The petitioner's statements that the beneficiary will "develop and formulate the policies, plans and objectives of the company," "direct and manage the overall operation of the company," and exercise "discretionary decision-making power" over the company, fall significantly short of satisfying the director's request for a "comprehensive description" of the beneficiary's duties. Any 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).

Furthermore, the petitioner's statement that the beneficiary will supervise "mid-level managers" who manage their own "divisions" appears to be speculative at best. The only "manager" employed by the petitioner at the time of filing was a sales manager whose actual duties including taking orders and soliciting customers, rather than managing a division of the company and lower-level personnel.

The definitions of executive and managerial capacity have two separate requirements. 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).

Overall, the record suggests that the beneficiary exercises the appropriate level of authority over the U.S. company and performs some duties which would be considered managerial or executive in nature. However, based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary is primarily engaged in non-qualifying administrative or operational duties. Moreover, the director specifically requested a breakdown of the number of hours devoted to each employee's job duties on a weekly basis. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Although the director specifically addressed the deficiencies of the position description submitted for the beneficiary, counsel does not address the director's findings or the beneficiary's actual job duties on appeal. Instead, counsel reiterates that the beneficiary is employed in a primarily managerial or executive capacity because he "operates at a senior level within the organizational hierarchy" and "exercises discretion over the day-to-day operations." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbená*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record remains devoid of any detailed description of the beneficiary's actual duties.

On appeal, counsel asserts that the director erred by finding that the beneficiary would not supervise managers or professionals. Although the beneficiary is not required to supervise personnel, if it is claimed that he is a

manager because his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner indicates that account assistant has a "college degree" while the sales manager has either a master of science or an M.B.A. The petitioner has not identified whether either employee completed studies in a specific specialty relevant to their respective positions. Regardless, the descriptions of the subordinates' duties, considered in light of the nature of the petitioner's business as an importer and distributor of lighters, does not establish that the beneficiary's subordinates would be performing in a professional capacity.

Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although the petitioner's organizational chart for the sales manager suggests that he supervises contracted or commissioned sales agents, the petitioner's description of this position does not indicate any supervisory authority. Furthermore, the job description includes such routine tasks as contacting customers, taking orders, arranging shipping and receiving and soliciting new customers. Moreover, the record does not establish that the company actually utilized the services of the independent sales representatives identified on the organizational chart. The petitioner declined to respond to the director's request for evidence of payments to contract employees, and the petitioner's 2006 corporate tax return suggests that no such payments were made through December 31, 2006, approximately two weeks before the petition was filed. The petitioner also claims to employ a warehouse manager who supervises temporary laborers, but the petitioner has not submitted documentary evidence to corroborate the employment of either the manager or the contract labor. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not shown that the beneficiary's subordinate employees are supervisors, professionals or managers, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel further argues that the director did not take into consideration the reasonable needs of the petitioning entity in determining whether the beneficiary would be employed in a primarily managerial or executive

capacity. As required by section 101(a)(44)(C) of the Act, 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 provide strict evidentiary requirements for the extension of a "new office" petition and 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 CIS 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 not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner is a one-year-old company operating as an importer and wholesaler of lighters manufactured in China. It achieved gross sales of \$838,077 in 2006. The petitioner claims to employ a total of four employees, three independent sales representatives, and temporary warehouse labor. However, the documentary evidence submitted by the petitioner corroborates the employment of only the beneficiary, the sales manager and the accounting assistant. The AAO acknowledges that it is possible that the warehouse manager was hired during the first few weeks of 2007; however, the petitioner has had ample opportunity to provide evidence of his employment, particularly as the director specifically addressed this deficiency in her decision. The director also specifically addressed the petitioner's apparent lack of warehouse space, based on the photographs submitted by the petitioner. Counsel does not address the director's comments on appeal. The AAO must conclude that the petitioner did not employ the warehouse manager at the time the petition was filed.

As an import and wholesale company, the petitioner reasonably requires employees to perform market research, to market, advertise and sell its products in the United States, to discuss orders with customers, to respond to product inquiries, to coordinate shipments with the Chinese manufacturer and monitor production and delivery schedules, to interface with international freight forwarders, import/export agents, and domestic trucking and distribution companies, to monitor inventory, to receive deliveries, to coordinate warehouse operations, to perform day-to-day functions associated with the company's finances and administration, and to perform various other non-managerial, non-executive duties associated with the operation of an import and wholesale business. Based on the record of proceeding, the petitioner has not established that the petitioner's current subordinate staff of two people would relieve the beneficiary from engaging in the day-to-day non-managerial functions of the company. Considering the nature of the petitioner's business, its organizational structure, and the volume of sales it is conducting, it is reasonable to conclude that the beneficiary is required to perform some portion of the company's day-to-day functions in order to meet the company's reasonable needs.

Furthermore, 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)(A) and (B). As discussed above, the petitioner has not established this essential element of eligibility due to its failure to provide a detailed description of the beneficiary's duties.

Although the director clearly noted the lack of employees to relieve the beneficiary from performing non-qualifying duties, counsel does not address the director's findings on appeal or otherwise attempt to clarify who would relieve the beneficiary from performing these tasks. Instead, counsel insists that the undocumented independent sales representatives and temporary labor, along with the beneficiary's subordinates, perform all the non-qualifying duties of the company. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Collectively, the lack of specifics in the beneficiary's job description and the absence of subordinates to perform many of the duties that are reasonably required in the daily operation of this type of business raises questions as to how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, as noted above, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d at 177. Given the lack of these percentages, the petitioner's job description does not demonstrate that the beneficiary will function primarily as a manager or executive. While the petitioner indicates that it intends to hire additional staff in the future, 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. 1978).

Counsel further 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 CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the evidence of record, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.