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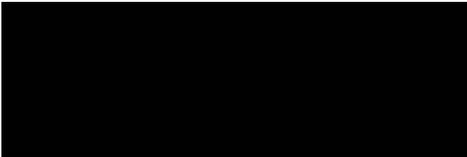
**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
*Office of Administrative Appeals*, MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
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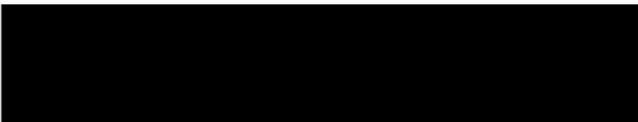
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**NOV 18 2009**

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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
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 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 Florida corporation, is an importer and distributor of specialty foods. It claims to be a subsidiary of Precocinados Corella, S.A., located in Spain. The beneficiary was previously granted L-1A classification for one year in order to open a new office in the United States and the petitioner now seeks to extend his status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily 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 for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity, and suggests that the director erred by applying the statutory criteria pertaining to managerial capacity. Counsel further contends that the director misinterpreted the submitted evidence, resulting in erroneous conclusions regarding the scope of the petitioner's business and the nature of the beneficiary's duties. Counsel submits a brief and additional documentary evidence in support of the appeal.

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

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

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

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

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Counsel objects to the director's application of the statutory definition of "managerial capacity" to the facts of this case and contends that the petitioner seeks to employ the beneficiary solely in an executive capacity.

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 petitioner filed the nonimmigrant visa petition on July 8, 2008. The petitioner indicated on Form I-129 that the U.S. company has two employees. In a letter dated July 2, 2008, the petitioner described the beneficiary's duties as general manager as the following:

In the past year the beneficiary has been responsible for: directing the management of the US company, establishing its goals and policies and exercising wide latitude in decision making while receiving only general guidance and supervision from the parent company in Spain.

In a typical week [the beneficiary's] duties include the following: processing funds requests to the parent office in Spain; monitoring Cash flow, invoicing and accounts receivable and payable; Reviewing profit and loss statements for variances from budgeted amounts; Reviewing write offs, aging reports, earnings/extract reports, receivables, and monthly bad debt for accuracy; communicating and finalizing weekly closings with [REDACTED] (certified public accountants); communicating with home office in Spain every Monday thru video conference (Skype) in order to keep home office updated on weekly operations, specifically, payment issues; overseeing procedures to insure Federal/State laws are being followed; completing and submitting to home office in Spain reports form [sic] Peachtree Account all while ensuring adaptability to the Spaniard accounting system; ensuring US office is in compliance with goals set; scheduling and approving weekly tastings/product demos for Mi Conserva Brand in Publix Supermarkets (65 Publix in South Florida Area) and 6 Sedanos supermarkets; reviewing weekly invoices and ensuring prompt payment; overseeing warehousing/receiving process; reviewing weekly inventory reports in order to ensure balanced product supply; ensuring inbound shipments from home office in Spain are received in a timely fashion; overseeing security measures in order to minimize shrinkage and breakage of products; develop and execute sales program and ensure compliance with home offices [sic] requirements; ensuring development of network Independent Distributors in Florida, Georgia, New York, New Jersey, Massachusetts, Pennsylvania, Rhode Island and Illinois.

In support of the petition, the petitioner submitted an organizational chart for the U.S. company, which depicts the beneficiary as general manager supervising [REDACTED] Mr. [REDACTED] job title is '[REDACTED]' and, according to the information on the chart, he is responsible for "warehousing (shipping and receiving)," and "tasting/sampling Publix Supermarkets, [REDACTED]". The petitioner also indicated that the beneficiary supervises "[REDACTED]" and a general assistant located in Spain.

The petitioner submitted copies of three IRS Forms 1099, Miscellaneous Income, issued by the U.S. company in 2007. The petitioner paid \$7,718 in nonemployee compensation to its CPA, \$6,410 in nonemployee compensation to [REDACTED] and \$44,312 in nonemployee compensation to the beneficiary. The petitioner also submitted its income statement for the first five months of 2008, which indicates that the company paid no salaries, wages or subcontractor expenses. The petitioner reported expenses of \$4,619 for "casual labor."

The director found the initial evidence insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, on August 25, 2008, the director issued a request for

additional evidence in which he instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's proposed duties; (2) a list of the U.S. company's employees which includes each employee's name, position title, complete position description, and breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; and (3) additional evidence showing the management and personnel structure of the U.S. company, including the number of subordinate supervisors managed by the beneficiary, the amount of time the beneficiary allots to executive/managerial duties, and the degree of discretionary authority the beneficiary has over the company's day-to-day operations.

In response to the RFE, the petitioner submitted the following position description for the beneficiary's position:

1. Processing funds requests to the parent office in Spain; (2hrs/wk);
2. Reviewing cash flow, invoicing and accounts receivable and payable; (3hrs/wk);
3. Reviewing profit and loss statements for variances from budgeted amounts; (2hrs/wk)
4. Reviewing write offs, aging reports, earnings/extract reports, receivables, and monthly bad debt for accuracy; (2 hrs/wk)
5. Communicating and finalizing weekly closings with [REDACTED] (certified public accountants); (2 hrs/wk)
6. Communicating with home office in Spain every Monday thru video conference (Skype) in order to keep home office updated on weekly operations, specifically payment issues; (4 hrs/wk)
7. Overseeing procedures to insure Federal/State laws are being followed; (1hr/wk)
8. Submitting to home office in Spain reports form [*sic*] Peachtree Account all while ensuring adaptability to the Spaniard accounting system; (3hrs/wk)
9. Ensuring US office is in compliance with weekly goals set; (2hrs/wk)
10. Approving weekly tastings/product demos for Mi Conserva Brand in Publix [and Sedanos] Supermarkets. . . (2 hrs/wk)
11. Reviewing weekly invoices and prompt payment; (2hrs/wk)
12. Overseeing warehousing/receiving process; (2hrs/wk)
13. Reviewing weekly inventory reports in order to ensure balanced product supply; (4 hrs/wk)
14. Ensuring inbound shipments from home office in Spain are received in a timely fashion; (1hr/wk)
15. Overseeing security measures in order to minimize shrinkage and breakage of products; (1hr/wk)
16. Developing and executing sales program and ensuring compliance with Spanish home office requirements; (3 hrs/wk)
17. Ensuring development of network Independent Distributors in Florida, Georgia, New York, New Jersey, Massachusetts, Pennsylvania, Rhode Island and Illinois. (4hr/wk)

The petitioner further stated that "out of the 17 duties the beneficiary performs on a weekly basis 13 of them are executive in nature while only 4 are non executive in nature.<sup>1</sup> The petitioner indicated that 76 percent of the beneficiary's time is spent on executive duties, while 24% is spent on non-executive duties.

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<sup>1</sup> The petitioner listed the beneficiary's 17 job duties and identified each as "executive" or "non-executive." The petitioner indicated that all of the listed duties are executive with the exception of ## 1, 12, 14 and 15.

The petitioner re-submitted its organizational chart, on which it revised the beneficiary's subordinate's title to "assistant manager." The petitioner stated that the assistant manager performs the following duties:

1. Preparing weekly cash flow, invoicing and accounts receivable and payable reports; (3 hrs/wk)
2. Preparing profit and loss statements (2hrs/wk)
3. Preparing write offs, aging reports, earnings/extract reports, receivables, and monthly bad debt reports; (3hrs/wk)
4. Preparing weekly closings with [REDACTED] (certified public accountants); (2hrs/wk)
5. Preparing Peachtree reports for General Manager in order to submit to home office in Spain (2 hrs/wk)
6. Scheduling and preparing weekly tastings/product demos for Mi Conserva Brand in Publix [and Sedanos] Supermarkets. . . (5 hrs/wk)
7. Preparing weekly invoices; (3 hrs/wk)
8. Preparing weekly inventory reports in order to ensure balanced product supply; (5 hrs/wk)
9. Preparing inbound inventory shipment reports from home office.
10. Preparing outbound shipments to supermarket chains; (5 hrs/wk)
11. Receiving incoming calls/mail from clients/potential clientele. (10 hrs/wk)

The petitioner emphasized that, since the beneficiary holds an executive position, "it is not necessary for him to supervise subordinate superiors." The petitioner nevertheless indicated that it intends to hire a Distribution Warehouse Manager and an Administrative Assistant in the upcoming fiscal year, and provided descriptions for both proposed positions.

The director denied the petition on October 30, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director found that the beneficiary would be performing a mix of managerial/executive and non-qualifying duties, and that the evidence was insufficient to establish that the beneficiary's primary duties would in fact be managerial or executive. Rather, the director determined that, with only one subordinate employee and no administrative staff, the beneficiary would perform many of the day-to-day non-managerial duties of the company himself. The director specifically noted that the petitioner submitted photographs which appear to depict the beneficiary giving food tastings in various locations.

On appeal, counsel for the petitioner asserts that the extension of the beneficiary's L-1A status was requested based on his employment in an executive capacity, not in a managerial capacity. Counsel asserts that there is no need for the general manager, as an executive, to control or supervise any other employees. Nevertheless, counsel claims that the assistant manager prepares/performs "most of the duties of the U.S. entity," including those normally performed by a secretary or administrative assistant, and the beneficiary only supervises and reviews the work the assistant manager performs. Counsel further emphasizes that, while the petitioner's business has not grown at the rate initially anticipated, the beneficiary's position comprises executive duties requiring 76 percent of his time.

Counsel also objects to the director's finding that the petitioner submitted photographs of the beneficiary giving food tastings in various locations. Counsel asserts that the photographs actually depict the beneficiary at the U.S. offices of the company at a tasting given to potential franchisees. Counsel states that the potential customers are comprised mostly of executives from supermarket chains that are interested in carrying the petitioner's line of products. Counsel further states that the tastings that are held in retail locations are contracted out to a sampling and tasting company called "Sample It." The petitioner submits copies of invoices and supermarket demo reports from Sample It in support of the appeal.

Upon review, and for the reasons discussed herein, 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 proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* The AAO will then consider this information in light of the petitioner'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 petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

In addition, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The AAO acknowledges that the petitioner has submitted a lengthy description of the beneficiary's duties and indicated the number of hours the beneficiary will devote to such duties on a weekly basis. However, the AAO does not concur with the petitioner's assertion that the beneficiary's duties will be primarily executive in nature. Moreover, the AAO notes that the petitioner has repeatedly submitted the same list of 17 duties for the beneficiary even after the director reviewed the duties, found them to be insufficient, and requested a "comprehensive description" of the position. 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). As discussed further below, some of the duties attributed to the beneficiary, particularly those related to the sales and marketing functions, remain inadequately defined.

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 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 indicates that the beneficiary devotes approximately 20 hours per week to reviewing and reporting on the company's financial activities. Specifically, his duties include processing funds requests, reviewing cash flow, invoicing and accounts payable and receivable, and other financial reports, communicating with the company's C.P.A., keeping the parent company updated with regard to payment issues, submitting accounting reports to the home office, reviewing invoices and ensuring prompt payment of invoices. The AAO does not doubt that the beneficiary exercises some discretion over the petitioner's day-to-day finances and is responsible for monitoring such activities; however, the petitioner has not established that his duties in this regard rise to the level of an employee acting in an executive capacity. The petitioner has indicated that the beneficiary has the authority to determine payment terms for customers, but there is no evidence that the beneficiary is primarily concerned with the company's broad goals and policies with respect to the financial function.

The petitioner further indicates that the beneficiary devotes three hours on a weekly basis to "developing and executing" the petitioner's sales program. The beneficiary is also responsible for "ensuring development of [a] network of independent distributors," and devotes four hours per week to this function. The petitioner does not employ a sales or marketing staff or claim that the beneficiary's sole subordinate, the assistant manager, performs sales or marketing tasks. Absent additional explanation regarding the specific tasks the beneficiary performs, the AAO cannot distinguish "developing and executing a sales program," and "ensuring development" of a distribution network from the routine sales and marketing tasks inherent to operating a wholesale distribution company. 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). Given the absence of any subordinate sales or marketing staff, the AAO finds it reasonable to question whether the beneficiary devotes only seven hours to such tasks on a weekly basis. Regardless, the AAO cannot affirmatively determine that the beneficiary's duties associated with "developing" the petitioner's sales program and distribution network are executive in nature.

The petitioner concedes that the beneficiary's duties associated with overseeing the warehousing/receiving process, ensuring timely receipt of inbound shipments from Spain, and overseeing security measures are non-executive in nature, but indicates that he devotes only four hours per week to such duties. The petitioner occupies approximately 5,000 square feet of warehouse space, and employs no dedicated warehouse, import or distribution staff. While the beneficiary's sole subordinate is claimed to devote a total of approximately 10 hours per week to preparing inventory reports and preparing outbound shipments, the petitioner has not adequately addressed who is currently responsible for the day-to-day activities associated with the warehouse and distribution functions. In addition, while the petitioner concedes that the beneficiary performs non-qualifying duties associated with warehouse/receiving, security, quality control and receipt of inbound shipments, these responsibilities are poorly defined and it is difficult to discern whether such non-executive tasks would reasonably require the beneficiary's attention for only the stated four hours per week.

Overall, the petitioner's description of the beneficiary's duties is insufficient to establish that the beneficiary will be performing primarily executive duties under the extended petition. While some of the beneficiary's tasks might be qualifying, the petitioner has the burden of establishing that a majority of the beneficiary's time on a day-to-day basis would be allocated to the claimed executive functions. This determination cannot be based on the beneficiary's job title, the fact that he is the senior member of the petitioner's two-person staff, or a job description that is only partly comprised of specific daily tasks. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

As noted above, when examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature and scope of the petitioner's business, and any other factors contributing to a complete understanding of a beneficiary's actual role in a business.

Here, the petitioner's claim that the beneficiary is employed in a primarily executive capacity is predicated on counsel's assertions that the beneficiary's sole subordinate employee, the "assistant manager," performs substantially all of the non-qualifying duties associated with operating the petitioner's import and wholesale distribution business. 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, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, 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. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Moreover, in the present matter, 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 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.

At the time of filing, the petitioner was a two-year-old import and distribution company, which employed the beneficiary as its general manager and an assistant manager who is paid as an independent contractor. The petitioner also utilizes the services of an accountant and provided evidence that it outsources product demonstrations at the retail level to an external service provider. While the petitioner indicates that the

assistant manager issues invoices, prepares all inventory and financial reports, prepares products for shipment to supermarkets, and essentially performs the role of a secretary or administrative assistant, the AAO is not persuaded that these tasks comprise the majority of the day-to-day non-executive duties associated with operating the petitioner's business, or that one person could feasibly perform all of these functions on a day-to-day basis. One of the major objectives of the company is to continue to widen its distribution network, and, as discussed above, the beneficiary himself appears to be solely responsible for performing all sales, promotional and marketing tasks that accompany the ongoing launch of the company's product line in the United States. Most importantly, in order to reach a conclusion that the beneficiary is performing primarily executive duties, the petitioner would have to demonstrate how the assistant manager is simultaneously able to perform all non-qualifying functions associated with operating the business, including importing, warehousing, distribution, day-to-day administration and record-keeping, bookkeeping, sales, marketing, and so on. The petitioner indicates that the assistant manager allocates 15 hours per week to financial reporting alone, and an additional 5 hours per week preparing weekly tastings and product demonstrations at Florida supermarkets. The petitioner's claim that the beneficiary's subordinate is able to single-handedly operate the business on a day-to-day basis with minimal involvement from the beneficiary is simply not plausible.

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager who performs primarily executive duties and one subordinate employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Even though the enterprise is in a preliminary stage of organizational development and anticipates additional growth in the coming year, the petitioner is not relieved from meeting the regulatory requirement that the beneficiary be relieved from performing primarily non-qualifying duties at the time it petitions for an extension of its new office petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly executive position. 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.