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File: WAC 04 246 53103 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2006**

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 president 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 is a California corporation that claims to be engaged in real estate management and investment. The petitioner claims that it is the subsidiary of Samheung Development Ltd. (formerly Samji Development Ltd.), located in Korea. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition concluding that petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity with the United States entity.

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 erroneously based his decision solely on the type of employees supervised by the beneficiary, and on an erroneous conclusion that the beneficiary would be directly providing the services of the business. Counsel asserts that the position description submitted by the petitioner is sufficiently detailed to establish that the beneficiary will be employed in an executive capacity, and notes that the statutory definition of "executive capacity" makes no reference to the supervision of subordinate employees. Finally, counsel asserts that the director approved the beneficiary's previous L-1A petition based on the same job description. Counsel submits a brief 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 primary issue in the present matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily 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.

The nonimmigrant petition was filed on September 9, 2004. In an August 30, 2004 letter submitted in support of the petition, the petitioner provided the following description of the beneficiary's role as president of the U.S. company:

In her executive capacity [the beneficiary] will continue to be responsible for all executive level decisions of the business and will accordingly continue to attend to the establishment of the business, its direction, guidance, coordination and development. She will continue to be responsible for our policies, strategies and philosophy for implementation by managerial and other employees.

More specifically [the beneficiary] as President, will be ensuring that the Department managers and/or supervisors implement [the beneficiary's] executive level decisions, policies, strategies and business philosophy. She is furthermore be [sic] the individual responsible for establishing guidelines and direction for the promotion/development of our business.

[The beneficiary] will continue to give instructions, advice, guidance and direction to the General Managers and the latter will in turn instruct, manage and guide employees. [The beneficiary] will continue to be responsible for setting all guidelines and parameters within

which the business will conduct its operations and all directives, strategy and policies will continue to be in the sole discretion of [the beneficiary].

More specifically [the beneficiary] shall set the overall policy, strategy & philosophy of our business. She will study all aspects reflecting on the aforementioned matters. Further [the beneficiary] will meet on a regular basis with the General Manager to discuss developments of the business and to ensure that [the beneficiary's] instructions and directions are being and will continue to be implemented.

The petitioner noted that the business has been and is currently engaged in "negotiations and dealings with entities/organizations regarding Real Estate matters." The petitioner submitted copies of four California property and purchase agreements, and noted "the enclosed Contracts have not as yet materialized but are now being again negotiated and discussed. The reasons for the non-finalization of these contracts is currently being researched . . . and it is anticipated that these contracts will soon be revised and thereafter the transaction consummated." The petitioner stated that the company had not yet completed any real estate transactions, noting "it is common knowledge that as a practical matter Real Estate transactions/sales, especially of a Commercial nature in which we are involved and will be involved, take considerable time and effort to complete."

The petitioner submitted an organizational chart depicting a general manager, "manager operation/administrative" and executive assistant/bookkeeper under the beneficiary's supervision, as well as an outsourced accounting firm. The petitioner submitted a copy of its California Form DE-6, Employer's Quarterly Wage and Withholding Report for the second quarter of 2004, which lists the names of the beneficiary and the three employees named on the organizational chart.

In his September 6, 2004 letter, counsel for the petitioner noted that the beneficiary did not arrive in the United States until January 2004 and again refers to the attached purchase agreements as evidence of the progress she has achieved in establishing the business. Counsel stated that the beneficiary would serve in an executive capacity and noted that the number of individuals employed by the company is not determinative, as "eligibility includes the Management of an essential function within the organization and that the individual functions at a senior level." Counsel asserted that the beneficiary's duties "are extremely complex, sophisticated and intricate," and stated that the beneficiary "will attend to an essential and vital function in the business AS WELL [sic] the beneficiary being in overall control and management of the Petitioner's business."

The director issued a request for additional evidence on September 21, 2004, instructing the petitioner to submit, in part: (1) a more detailed description of the beneficiary's duties in the United States, including the percentage of time spent in each of the listed duties; (2) job titles and position descriptions for employees supervised by the beneficiary; (3) a list of all of the U.S. company's employees from the date of establishment to the present, including names, job titles, social security numbers, beginning and ending dates of employment, and wages per week; and (4) an organizational chart clearly identifying the beneficiary's position and all employees under the beneficiary's supervision by name and job title.

Counsel for the petitioner submitted a response dated October 31, 2004. In response to the director's request for a more detailed description of the beneficiary's duties, counsel referred the director to the August 30, 2004 letter submitted in support of the petition, noting that "the duties of the beneficiary are spelled out in painstaking [sic] detail in the letter of employment." Counsel stated that the job description previously provided establishes that the beneficiary "reflects on policy decisions, business decisions, philosophy and strategy. These matters are attended to after perusing all relevant business data as well as reading current business practices in similar industries."

Counsel further indicated that the "percentage of time spent of the duties cannot be determined as these clearly vary depending on the circumstances of the business/economy from time to time. However it can be stated that the beneficiary's duties are all Executive in nature and are not day to day functions."

Counsel provided the following job descriptions for the beneficiary's claimed subordinates:

██████████ Hwa Chong: This is the General manager. He takes instructions/directions/orders from the President. Thereafter the GM instructs and advises the Manager of Operations/Administrative regarding corporate policy, strategy and instructions in managing this [department].

██████████ This person manages the administrative/operational [department] of the business. This person supervises the bookkeeper/executive assistant in the business and ensures that those duties are properly executed. Furthermore this individual ensures that administrative matters are carried out as required.

██████████ This person is the Executive assistant/Bookkeeper in the business. These duties are those of keeping the day to day financial records of the business as well as attending to secretarial duties. . .

Counsel indicated that the general manager and the executive/assistant possess bachelor's degrees in business administration, and noted that the U.S. company utilizes an independent accounting firm to prepare financial documents.

Finally, counsel noted that the petitioner is in the process of finalizing negotiations to purchase an existing business that is engaged in the sale of cell phones and related equipment, and will retain employees currently working for that business.

The director denied the petition on December 7, 2004 concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the petitioner had not described the employer's business activities "in a manner that allows for a clear understanding of the products and services that are provided by the employer to its customers and how the beneficiary's position fits into the organizational hierarchy." The director further found that the petitioner had provided no comprehensive description of the beneficiary's duties. In addition, the director noted that the record shows that the U.S. entity is composed of managers, with no subordinate

employees under the managers who perform the operational duties of the business. The director determined that “the preponderance of the beneficiary’s duties have been and will be directly providing the services of the organization and supervising four employees.”

Overall the director found the record insufficient to establish that the beneficiary would primarily manage the organization, or that the petitioner had reached a level of organizational complexity where the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Finally, the director concluded that the beneficiary would not manage an essential function, or supervise a subordinate staff of professional, managerial or supervisory personnel who would relieve her from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the director erroneously concluded that the beneficiary will be primarily providing the services of the business, and improperly based this determination solely on the type of employees supervised by the beneficiary. Counsel contends that an executive generally must supervise the work of other persons or a function of the organization, and emphasizes that the Act specifically bars a determination on executive capacity to be made exclusively on the basis of the number of employees supervised, noting that if staffing levels are considered, they must be considered in relation to the reasonable needs of the business and its stage of development.

Counsel asserts that the petitioner “has clearly described and evidenced the organizational hierarchy of the company and the beneficiary’s position within [the] hierarchy,” and provided “specific descriptions” for the beneficiary’s subordinates who perform the day-to-day operational tasks of the company, thus allowing the beneficiary to perform primarily executive duties.

Counsel notes that the director placed undue emphasis on the employees supervised by the beneficiary and failed to consider whether the beneficiary will manage an essential function. Counsel cites *National Hand Tool Corp. v. Pasquarrell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and several unpublished decisions to stand for the proposition that the statute was not intended to limit managers or executives to persons who supervise a large number of persons. Counsel also cites an unpublished decision to support his assertion that even a sole employee can qualify under the definitions of managerial and executive capacity. Counsel contends that the beneficiary supervises professional staff and manages an essential function and therefore qualifies for the benefit sought under sections 101(a)(44)(A) and (B) of the Act.

Counsel further contends that much of the case law cited by the director is unrelated to the instant matter or otherwise unresponsive of the director’s decision. Counsel attempts to distinguish the facts of the following cases from the instant matter: *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), and *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, counsel objects to the director’s findings that the petitioner did not provide a sufficient description of the petitioner’s business activities, the beneficiary’s duties, or the beneficiary’s position within the company’s organizational hierarchy, noting that such a conclusion reveals either an abuse of discretion or a lack of understanding of the regulations and the evidence presented. Counsel asserts that the petitioner submitted a lengthy job description, and notes that the previous petition was approved based on the same description.

Counsel asserts that the beneficiary now supervises four employees and asserts that there is no “logic or basis in law” to support a finding that the beneficiary is no longer working in an executive capacity.

Upon review, counsel’s assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

Here, the petitioner has consistently claimed that the beneficiary will be employed in an executive capacity. However, the petitioner has provided a vague and repetitive job description that fails to demonstrate the specific executive-level duties to be performed by the beneficiary on a daily basis. For example, the petitioner stated that the beneficiary will be responsible for “all executive level decisions of the business,” establishing and enforcing “policies, strategies and philosophy,” establishing “guidelines and direction for the promotion/development” of the business, and exercising discretion for “setting all guidelines and parameters within which the business will conduct its operations and all directives, strategy and policies.” Counsel added that the beneficiary’s duties are “extremely complex, sophisticated and intricate” and noted that the beneficiary “directs the management of the organization,” “establishes goals and policies,” and “exercises wide discretionary decision making.” Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Neither the petitioner nor counsel identified any specific tasks to be performed by the beneficiary as part of her responsibility for the overall management of the business, nor were the beneficiary’s policies, strategies, “guidelines,” or “philosophy” explained or defined. 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 has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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 job description submitted, the director specifically requested that the petitioner submit a more detailed description of the beneficiary’s position, listing specific duties and including the percentage of time the beneficiary will devote to each duty. The petitioner acknowledged the director’s request, but declined to submit a meaningful response. Instead, counsel referred the director to the vague description already submitted, and asserted that the position was already described in detail. Rather than providing the requested breakdown of how the beneficiary allocates her time among various duties, counsel stated that this information “cannot be determined” but asserted that “the beneficiary’s duties are all Executive in nature.” 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 regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The evidence requested regarding the beneficiary's actual job duties is absolutely critical to a determination of whether the beneficiary will serve in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(1)(3)(ii). The 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).

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 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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

Here, the petitioner has only addressed the beneficiary's claimed executive level of authority within the organization, but the record is devoid of any evidence that would suggest what duties she actually performs on a daily basis and what proportion of those duties are qualifying duties. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first," principally,' or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also be "principally" or "chiefly" performing managerial or executive duties. Contrary to counsel's contention that there is no regulation requiring a percentage of time devoted to each of the beneficiary's duties, CIS must determine that the beneficiary is primarily engaged in a managerial or executive capacity. To make such a determination it is necessary to require a detailed description of the beneficiary's duties and the time the beneficiary devotes to these duties. The AAO cannot accept counsel's unsupported assertion that the beneficiary's duties are all executive in nature; the regulations require a detailed job description and the director reasonably requested an explanation as to how the beneficiary allocates her time.

Furthermore, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible depiction of the beneficiary's role within the petitioner's organizational hierarchy, in light of the nature of the petitioner's business. As noted by the director, the petitioner has not described the company's business activities in a manner that allows for a clear understanding of the type of business operated by the U.S. company, and thus there is no context in which to view the claimed job duties of the beneficiary and her subordinate employees.

The petitioner claims to operate as a real estate investment and management company, and explained the "protracted, involved and very detailed" nature of real estate transactions and the resulting delay in

concluding its first transaction. The petitioner asserted that the company was “engaged in negotiations and dealings with entities/organizations” and attached copies of four contracts that are being “discussed,” noting that the company was also “investigating and researching” other real estate matters. The AAO notes that two of the purchase agreements submitted are dated June 6, 2003 and August 2, 2003. The U.S. company was incorporated on August 11, 2003, which would indicate that the beneficiary ostensibly signed these documents on behalf of the petitioner prior to its incorporation. A third purchase agreement, dated September 25, 2003, post-dates the incorporation of the company, but the document appears to have been altered at line 1A, where the name of the buyer is identified. Only one of the four agreements, dated January 8, 2004, post-dates the beneficiary’s arrival to the United States in L-1A status. Doubt cast on any aspect of the petitioner’s proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Notwithstanding the petitioner’s assertions that it was operating as a real estate investment company, the petitioner’s lease agreement, dated August 1, 2004, indicates that it leases an “office for import & export” and its City of Los Angeles tax registration certificate indicates that it operates as a “wholesale sales” company. On appeal, counsel asserts that the petitioner’s “growth and stability is dependent not only on the satisfaction of each and every customer, but also on it’s [sic] operational and management procedures and buying and selling trends. It is normal that a start-up operation such as the petitioners has ebbs and flows when it comes to sales.” Counsel’s statements also suggest that the petitioner is engaged in buying and selling goods, rather than engaging in real estate investment activities. Based on the photographs the petitioner provided of the petitioner’s leased premises, it operates from a single small office with only one desk. The petitioner has not provided consistent or credible evidence of the type of business operated by the U.S. company as of the date the petition was filed. 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).

Without a detailed description of the beneficiary’s duties or credible evidence of the type of business operated by the petitioner, if the petitioner is indeed doing business, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. For this reason, the petition cannot be approved.

On appeal, counsel observes that a company’s size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a “new office” petition and require CIS 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.

As discussed above, CIS is unable to determine what type of business the petitioner operates and thus cannot determine what its reasonable needs are, what its stage of development is, or whether the beneficiary's claimed subordinates would relieve her from performing the company's day-to-day operational tasks. The petitioner provided very vague job descriptions for the beneficiary's subordinates and has only defined the actual duties of one employee, a bookkeeper. Again, 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. at 165. Based on the lack of evidence regarding the nature of the business and the duties performed by the beneficiary's subordinates, the AAO has no way of determining whether the beneficiary's subordinates are employed in supervisory, managerial or professional positions. See § 101(a)(44)(A)(ii) of the Act.

On appeal, counsel argues that the director erred by finding that the beneficiary does not manage an "essential function" of the U.S. company, and asserts that she "clearly makes high-level decisions concerning the operation of the business." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). Counsel's general argument that the beneficiary manages all of the company's functions is insufficient in the absence of the required detailed job description and evidence that the beneficiary primarily performs managerial or executive duties. 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 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). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell*. It is noted that the case cited by counsel relates to an immigrant visa petition, and not the extension of a "new office" nonimmigrant visa petition. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the case cited by counsel is distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(14)(ii). Regardless, the director did not deny the petition based on the small size of the company, but rather based on the petitioner's failure to submit sufficient evidence regarding the beneficiary's actual duties and the nature of the company's business activities.

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.

Counsel asserts that the director improperly relied upon several decisions cited in the Notice of Denial, including: *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972); *Matter of Brantigan* 11 I&N Dec. 493 (BIA 1966); and *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). While counsel correctly observes that none of these cases involved an intracompany transferee petition under section 101(a)(15)(L) of the Act, the director's citation to *Matter of Treasure Craft of California* and *Matter of Brantigan* is supportive of the overriding proposition that the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see also*, *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). The petitioner must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Patel*, 19 I&N Dec. 74 (BIA); (1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Similarly, the director's citation to *Matter of Ho* also relates to the petitioner's burden of proof, specifically, the requirement that the petitioner submit competent objective evidence to resolve any discrepancies or inconsistencies in the record. *See, generally* 8 C.F.R. § 103.2(b)(1) (requiring that an applicant or petitioner establish eligibility for a requested immigration benefit). A review of the record and the adverse decision indicates that the director properly applied the statute and regulations, as well as relevant case law, to the petitioner's case. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the statute and regulations.

The AAO acknowledges the petitioner's claims that it intends to purchase a business with existing employees and hire its own additional staff in the future. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. As noted above, 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). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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 is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

Finally, the AAO will address counsel's assertion that the director erred in denying the petitioner's petition for an extension of the beneficiary's status when CIS previously approved a petition based on similar facts. Established precedent reflects that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a

request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(l)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as *prima facie* evidence that eligibility has been established in the present proceeding.

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

Although not addressed by the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status as required by 8 C.F.R. § 214.2(l)(14)(B), or evidence of the financial status of the U.S. company as required by 8 C.F.R. § 214.2(l)(14)(E). The petitioner submitted copies of four purchase agreements, dated June 2003, August 2003, September 2003 and January 2004. As discussed above, two of these documents were signed by the beneficiary on behalf of the petitioning company before the company was even incorporated, and another document appears to be altered. Regardless, there is no evidence that these agreements were ever submitted to a buyer, and the petitioner concedes that the company has not yet completed a real estate transaction. There is no evidence of other business transactions occurring during the company's first year of operations. The petitioner submitted an August 23, 2004 letter from its bank stating that the company had a current balance of \$73,200, but provided no other evidence of the financial status of the U.S. company, such as financial statements, balance sheets or income tax returns. Again, 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. at 165. There is no evidence that the petitioner has been engaged in the provision of goods or services or generated income since the approval of the beneficiary's initial "new office" petition. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.