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U.S. Citizenship  
and Immigration  
Services



D7

DEC 21 2006

File: SRC 05 171 51218 Office: TEXAS SERVICE CENTER Date:

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:



PHOTOCOPY

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, Texas 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, a California corporation, operates a motel and resort. The petitioner claims that it is the affiliate of [REDACTED] and [REDACTED], located in the United Kingdom. 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 the petitioner did not establish that the beneficiary will 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 beneficiary is employed in a managerial capacity in that he manages both a function of the petitioning organization and supervises and controls the work of supervisory employees. Counsel asserts that the director placed undue emphasis on the petitioner's small staff size and failed to consider the reasonable needs of the petitioning company. Counsel emphasizes that given the nature and scope of the petitioner's business, the company has sufficient employees to relieve the beneficiary from performing non-qualifying duties. Counsel submits a brief and additional 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 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 capacity. The petitioner does not claim that the beneficiary will be employed in an executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised,

functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

The nonimmigrant visa petition was filed on May 31, 2005. In a letter dated May 26, 2005, the petitioner described the beneficiary's duties as follows:

[The beneficiary] is the President of the U.S. corporation. He has overall executive responsibilities and oversees the day-to-day operations of his staff. He liaises with trades people, travel agents, and local businesses in order to further develop and attract business to the resort. [The beneficiary] is also charged with hiring administration staff, other personnel, including hiring and firing, and he will be responsible for overseeing budget, finance, and marketing. [The beneficiary] manages a staff of four, which includes the company's on-site General Manager, Front Desk Operative and two Housekeepers for the resort. The staffing level is deliberately kept at this level to match customer needs and ensure business efficiency. As the President [the beneficiary] is ultimately responsible for developing strategic marketing plans to enhance the resort's viability and growth.

The petitioner submitted a copy of its Florida Form UCT-6, Employer's Quarterly Report, for the first quarter of 2005, which shows that the company employed two workers as of March 31, 2005. The two employees received quarterly salaries of \$1,568.00 and \$2,272.00, respectively.

On July 1, 2005, the director issued a request for additional evidence to establish that the beneficiary will be employed by the U.S. company in a managerial or executive capacity under the extended petition. The director noted that although the petitioner claimed to have four employees, the Form UCT-6 for the first quarter of 2005 identified only two employees. The director therefore requested evidence of the petitioner's current staffing level, and position titles and duties of all employees. The director also requested the petitioner's organizational chart, and instructed the petitioner to "explain how the beneficiary will not engage in the day to day operations of the business, and he will be primarily be engaged in managerial or executive duties or managing a function." Finally, the director requested evidence that the beneficiary is managing other managers and professionals.

In a response dated September 27, 2005, counsel for the petitioner provided the following description of the beneficiary's duties:

As President of [the petitioner], [the beneficiary] maintains overall responsibility for the success or failure of the resort. As the top-tier manager of the organization, [the beneficiary] sets the goals and polices for the company, monitors the company's profitability margins and is engaged in strategy planning for the purchase of a second hotel. As the President of [the

petitioner], [the beneficiary] oversees the activities of two Front Desk managers, who in turn supervise the activities of the housekeeping staff (as detailed below). He provides ongoing guidance to his management team, and provides instruction on how to resolve customer complaints.

In addition to managing his direct staff, [the beneficiary] has been responsible for interviewing, hiring, overseeing and coordinating the activities of several contractors (construction contractors and designers), as the resort has recently concluded a major remodeling project to upgrade the property. [The beneficiary] also monitors and coordinates service contractors in the areas of pool service, pest control, landscaping, advertising, cleaning services, and online booking agents, and liaises with state agencies to ensure ongoing licensure and compliance for the resort.

As an experienced manager, [the beneficiary's] primary goal is to analyze the operations of the company and provide strategic direction to enhance profitability.

The petitioner further stated that the beneficiary relies on two front desk managers to handle the day-to-day activities of the motel, and determined that the most effective way to manage the property was to divide the daily responsibilities between the two managers, who in turn supervise the petitioner's housekeeping staff. The petitioner described the duties of the front desk managers as follows:

- Supervise daily activities of housekeeping staff;
- Monitor records of room assignments and availability;
- Respond to guest inquiries regarding hotel services and policies and provide information about local restaurants, shopping, entertainment, and travel;
- Transfer incoming calls to guests' rooms and take messages when they are out;
- Take reservations by telephone and greet guests when they arrive, check guests in, assign [t]heir rooms, and issue room keys;
- Responsible for computing guests' bills and posting charges to guests' accounts for their rooms, phone calls, and food;
- Prepare the bill at checkout, explain charges, and collect payment;
- Prepare daily availability and rate summaries for County Chamber of Commerce; and
- Respond to "Prospect List" received weekly from the Clearwater Beach Chamber of Commerce and the Clearwater Chamber of Commerce.

The petitioner stated that the beneficiary is responsible for reviewing the work of the front desk managers and "maintains final authority on major company decisions (including personnel hiring/firing decisions, service policies, advertising and publicity strategies)." The petitioner indicated that it employs two housekeepers on a contract basis, who are responsible for maintaining the cleanliness of the guest rooms, changing sheets and towels, laundry, and cleaning pool decks, walkways and trash bins. The petitioner provided evidence of payments to its contracted staff, along with its Florida Form UCT-6 for the second quarter of 2005, which confirms the employment of both front desk managers, who earned salaries of \$1,248 and \$2,600 respectively.

The director denied the petition on November 17, 2005, concluding that the petitioner had failed to establish 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 demonstrated that the beneficiary has a sufficient support staff to relieve him from performing non-qualifying duties associated with the day-to-day operations of the business. The director further noted that the evidence submitted failed to establish that the beneficiary would supervise managerial or professional employees.

On appeal, counsel for the petitioner asserts that the beneficiary is employed in a primarily managerial capacity and objects to the director's determination that the beneficiary is required to participate in the non-managerial day-to-day activities of the petitioner's resort. Counsel asserts that the beneficiary directs the management staff, sets the company's goals and policies, oversees and coordinates the activities of several contractors, monitors the company's financial health, and "plans strategically for the purchasing [of] additional properties."

With respect to the petitioner's staffing levels, counsel emphasizes that the beneficiary made a strategic decision to downsize the resort's staff, noting that the two front desk managers, one of whom lives on-site, are able to resolve problems or emergencies 24 hours per day and run the day-to-day operations of the resort. Counsel asserts that the beneficiary's subordinates perform the duties of "hotel managers" and "front office managers" as described in the U.S. Department of Labor's *Occupational Outlook Handbook*.

Counsel emphasizes that Citizenship and Immigration Services (CIS), in considering the petitioner's staffing levels, is required to consider the petitioner's use of independent contractors and must consider the reasonable needs of the organization in light of its overall purpose and stage of development. Counsel references hospitality industry publications in support of her assertion that the petitioner's staffing levels are well within industry standards. Counsel further cites unpublished AAO decisions to stand for the proposition that an employee who supervises a small staff, or even no staff, can be employed in a managerial or executive capacity.

Counsel asserts that the beneficiary supervises both a function of the organization and a component within the organization, in that he is responsible for managing the company's real property acquisition activities, as well as the overall management of the petitioner's resort. Counsel emphasizes that these responsibilities represent the "essence of the U.S. entity." In addition, counsel asserts that the director failed to consider that the beneficiary's immediate subordinates are employed in a supervisory capacity, thus further supporting a finding that he himself is a manager pursuant to section 101(a)(44)(A)(ii) of the Act.

Counsel also states that the beneficiary exercises discretion over personnel actions, and functions at a senior level within the petitioner's organizational hierarchy "by budgeting, financing, and marketing, engaging in strategic planning for the purchase of additional properties, and analyzing the operations to provide direction in enhancing profitability."

Upon review, counsel's assertions are not persuasive. 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.*

While the petitioner has clarified that it seeks to employ the beneficiary in a managerial capacity, the evidence submitted is insufficient to establish that the beneficiary's actual duties are primarily managerial in nature. The petitioner and counsel have provided vague and non-specific job descriptions that fail to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner initially stated that the beneficiary will "oversee the day-to-day operations," "be responsible for overseeing budget, finance and marketing," and develop "strategic marketing plans." The petitioner did not, however, articulate the specific managerial tasks associated with overseeing the company's day-to-day operations, or indicate whether the beneficiary performs all of the beneficiary's finance and marketing tasks, or directs subordinate staff to do so. 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 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, the petitioner indicated that the beneficiary is responsible for liaising with "trades people, travel agents and local businesses in order to further develop and attract business to the resort." These duties suggest that the beneficiary himself is responsible for the company's marketing and promotional activities, which do not fall traditionally fall under the statutory definition of managerial capacity.

As the petitioner's initial evidence was insufficient to establish the beneficiary's employment in a primarily managerial capacity, the director reasonably requested additional evidence in order to clarify how the beneficiary will not engage in the day-to-day operation of the business, but rather will perform primarily qualifying managerial duties. The petitioner's response to the director's request did not assist in identifying the beneficiary's actual duties, such that they could be classified as managerial in nature. The petitioner added that the beneficiary is responsible for setting "goals and policies," monitoring profitability margins, "strategy planning for the purchase of a second motel," coordinating the activities of service providers such as pool cleaning and pest control providers, analyzing the operations of the company, and providing "strategic direction." Again, these descriptions suggest that the beneficiary is responsible for the overall operations of the business, but fail to address what tasks he actually performs on a day-to-day basis. 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 has not disclosed its "goals and policies" or its plans for purchasing a second motel, nor has it identified the specific managerial duties entailed by "providing strategic direction" or "analyzing the operations." While the final decision to purchase an additional motel would be considered a managerial or executive duty, the planning and research leading to such a decision would not necessarily require the beneficiary's services in a managerial capacity.

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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because some of the beneficiary's stated responsibilities, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See, e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel contends on appeal that the beneficiary qualifies for an extension of his L-1A status in a managerial capacity based on his management of supervisory personnel, and based on his management of an "essential function." The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professionals. Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner claims that the beneficiary will oversee two supervisory personnel, both of whom hold the position of "front desk manager" for the petitioner's resort. Specifically the petitioner claims that these employees are responsible for supervising the work of the company's two contracted housekeeping personnel. However, the AAO notes that the petitioner originally identified the beneficiary's subordinates as "general manager" and "front desk operative," and subsequently designated both employees as "front desk managers." 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).

Further, a review of the job descriptions for the front desk managers shows that they are primarily responsible for room reservations, guest inquiries and services, answering telephones, assisting customers with check-in and check-out and preparing daily reports. Based on the evidence presented, the record does not establish that the front desk managers are primarily serving the petitioner in a supervisory capacity over the hotel's housekeeping staff. Rather, their duties are more akin to those of a front desk clerk. Moreover, even if the petitioner's front desk staff are employed in a supervisory capacity, the record does not establish the proportion of time the beneficiary devotes to supervisory duties and the AAO cannot conclude that this is his primary responsibility. The petitioner indicates that the beneficiary is also responsible for budgeting and finance activities, marketing and promotion tasks, liaising with suppliers, scheduling the work of outside service providers, and performing planning associated with future acquisitions, duties which do not appear to involve supervision of the hotel's front desk staff. The petitioner has not established that the beneficiary qualifies as a manager pursuant to section 101(a)(44)(A)(ii) of the Act on the basis of his supervisory duties.

Counsel correctly 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). However, it is appropriate for CIS 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). Furthermore, 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.

In this case, an analysis of the reasonable needs of the corporation in conjunction with its overall purpose and stage of development undermines the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other such pertinent factors as the nature of the petitioner's business, which, together, can be used as indicators which help determine whether a beneficiary can remain focused on managerial or executive duties or whether that person is needed, in large part to assist in the company's day-to-day operations.

The petitioner in the instant matter operates a small resort with fifteen rental units and also offers water sport rentals. At the time of filing the petitioner employed the beneficiary as president, two front desk managers, and two contracted housekeepers. A review of the petitioner's quarterly wage reports suggests that one, or possibly both, of the front desk managers are employed on a part-time basis. During the quarter in which the petition was filed, one front desk manager earned wages of only \$1,248, or \$96.00 per week, while the other employee earned \$2,600, or an average of \$200.00 per week. The record shows that the petitioner's housekeepers are paid an hourly wage of \$11.00. Since the petitioner claims that the front desk employees supervise the housekeeping staff, it is reasonable to assume that they earn an hourly wage of at least \$11.00. Therefore, based on the wages paid to the two front desk managers, neither of them was employed on a full-time basis as of the date the petition was filed, notwithstanding the petitioner's claim that the petitioner's employees were available to respond to guests needs 24 hours daily.

Moreover, as acknowledged by the petitioner, the company did employ as many as six employees during the first year of operations, with its quarterly payroll reaching approximately \$12,000 in the third quarter of 2004. Although the petitioner indicated that the beneficiary made the decision to "reassign" duties of the former employees to the two current front office staff, the petitioner has not persuasively explained how the petitioner reduced its monthly payroll by more than two-thirds, without assigning some non-managerial tasks to the beneficiary. The AAO acknowledges counsel's assertion that the decision to downsize the petitioner's staffing levels was an appropriate business decision designed to increase the company's profits. However, the

petitioner still has the burden to establish that someone other than the beneficiary is available to perform the day-to-day operational and administrative tasks of the petitioner's business.

The petitioner reasonably requires staff to perform a number of routine operational duties associated with operating a resort, including handling guest reservations and inquiries, staffing the front desk during regular business hours and after-hours, to check guests in and out of rooms, to maintain the cleanliness of rooms and facilities, to order hotel and office supplies, to make arrangements with outside service providers, to perform bookkeeping duties, to market and promote the motel to potential customers, and to perform administrative and clerical duties associated with operating any business. Upon review, it does not appear that these non-managerial duties could be performed entirely by the petitioner's front desk staff, at least one of whom is employed on a part-time basis, and two contracted housekeepers. Rather, the evidence submitted shows that the beneficiary has subordinate staff to perform housekeeping tasks, and a portion of the resort's day-to-day front desk operations. Accordingly, it is reasonable to conclude, and has not been shown otherwise, that many of the non-managerial tasks associated with operating a resort on a day-to-day basis would necessarily be performed by the beneficiary.

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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel asserts that the beneficiary manages the essential function of "real property acquisition" for the petitioning company. 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 position description that clearly describes the duties to be performed in managing the essential function, i.e. 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *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)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Other than ambiguously referring to the beneficiary's responsibility for acquiring an additional hotel property, neither the petitioner nor counsel have clarified the beneficiary's day-to-day tasks associated with this responsibility, nor provided an explanation as to how much of his time is allocated to the claimed

"essential function." 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).

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including 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. The fact that the beneficiary owns and manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Counsel's assertion that the beneficiary works primarily through subordinate employees and does not perform non-managerial duties necessary to provide the services of the company is not supported in the record.

Counsel 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.

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 are related to operational or policy management, not to the supervision of non-professional employees or the performance of the duties of another type of non-managerial or non-executive position. While the beneficiary in this matter evidently exercises discretion over the petitioner's business as its president and shareholder, the petitioner has failed to show that his actual duties on a day-to-day basis will be primarily managerial in nature. Accordingly, 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.