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File: WAC 04 088 51655 Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2006

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief

Administrative Appeals Office

**DISCUSSION:** The Director, 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 corporate development 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 is a corporation organized in the State of Arizona that claims to be engaged in the export and distribution of various products. It operates a swimming pool servicing and maintenance business. The petitioner claims that it is the subsidiary of C.O.F. Distributors, CC, located in South Africa. The beneficiary has been employed by the petitioner in the United States in L-1A status since April 2001, and the petitioner now seeks to extend the beneficiary's stay.

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 the director misapplied the regulations to the facts of the instant petition, overlooked essential characteristics of the position offered, and ignored the reasonable needs of the organization in light of the company's overall purpose and stage of development. 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 first issue in the present matter is whether 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 February 9, 2004. In a February 5, 2004 letter, the petitioner provided the following description of the beneficiary's position:

The Corporate Development Manager is responsible for ALL aspects of the company's operations. [The beneficiary] will continue to be responsible for managing and executing the company's sales/marketing, administrative and financial functions. [The beneficiary] will also continue to be responsible for hiring, training and supervising all employees of the company.

Specifically, [the beneficiary's] duties will continue to include: researching and analyzing local/regional/international market data and using that analysis to formulate/reformulate the company's strategic and marketing plan as necessary; seeking out and hiring qualified professionals to assist in the operation of the company; negotiating contracts with strategic import/export partners and providers; recruiting, hiring, training and supervising all employees (including subordinate managers); hiring and coordinating services of subcontractors to fulfill client needs as necessary; and coordinating new product development with overseas manufacturers/distributors based on local/regional demand.

Additionally, as his title reflects, [the beneficiary] is responsible for locating, and thereafter, developing new/additional business opportunities for the parent company in the United States. Accordingly, [the beneficiary's] duties are executive/managerial in nature in that he is BOTH supervising subordinate employees and managing several of the company's vital functions.

The petitioner also submitted a January 12, 2004 letter signed by the beneficiary, in which he described his "Executive and Managerial position" as follows:

1. Plans, directs, develops and coordinates all aspects of the companies [sic] operations and objectives.
2. Assesses changing needs of business locally, nationally and internationally to develop further business. Negotiates business relationships with strategic export/import partners and service providers. Establishes and maintains relations with product manufacturers locally and in South Africa.
3. Provides daily oversight to assigned staff  
Coordinates and hires related sub-contractors as necessary to fulfill client needs and market demands on a weekly basis.
4. [The beneficiary] is also responsible for market analysis and new Product development. He coordinates the product needs with the Pool Industry in South Africa and the U.S.A., through the network of daily contact with the retail service business of our Company and the purchasing of inventory pursuant to finding opportunities for innovative product.

The January 12, 2004 letter also included a list of six subordinate employees and short descriptions of their duties. The listed employees included a route manager, two customer service employees, a consultant, a

secretary/personal assistant, and an employee responsible for bookkeeping. The petitioner also submitted a document labeled "1099 Detail" showing payments to its employees during the 2003 year. Of the six employees on the petitioner's employee list, only two, the route manager and one of the customer service employees, were receiving payments from the U.S. company as of the end of 2003.

On May 11, 2004, the director issued a request for additional evidence, instructing the petitioner to submit, in part: (1) the total number of employees at the location where the beneficiary will be employed; (2) an organizational chart listing all employees under the beneficiary's supervision by name and job title, and including a brief description of their job duties, educational level, annual salaries/wages, immigration status, and source of remuneration; (3) a list of all U.S. employees from the date of establishment to the present including names, job titles and beginning and end date of employment; (4) a more detailed description of the beneficiary's duties in the U.S., including the percentage of time spent in each of the listed duties; (5) copies of the U.S. company's state quarterly wage report for the last three quarters; (6) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for the last three quarters; and (7) copies of the U.S. company's payroll summary, IRS Forms W-2 and W-3 evidencing wages paid to employees.

The petitioner submitted a response received on August 3, 2004. In response to the director's request for a more detailed description of the beneficiary's job duties, the petitioner provided the following:

Authority held by the Beneficiary:

- 100% Management decision in the day-to-day business
- Full financial control and decision making
- Asset purchasing and control
- All estimation and bidding
- All procurement of work, sub-contractors and future employees
- The necessity to train others
- All research and market analysis
- Report analysis of input by staff and customers
- New Product opportunities

Duties	Estimate Time Spent
Manage day-to-day business	2
Personnel instructions and supervision	15
Review of sales and contracts	4
Review of estimated bidding	5
Procurement of new business	32
Meeting with prospective Buyers	6
Marketing Analysis: National and International	8
Marketing Projections	2
Management of Sub-contractors	4
Consult with Bankers	2
Consult with Auditors	2
Training of staff and Sub-contractors	10

Invoicing	2
Payment receipts and payments	2
Proposals for daily work contracts to clients	2
Hiring and firing of staff	2

The petitioner indicated that it employed four employees including a manager, two customer service representatives/technicians, and an administrative/bookkeeping employee. Although the administrative/bookkeeping employee was listed among the current employees, the petitioner listed her dates of employment as January 2003 through January 1, 2004. The petitioner also provided a list of six former employees, four of whom were included on the petitioner's initial employees list.

The petitioner stated that its manager is responsible for purchasing and coordination of contracts, management of routes, analysis of equipment, decision-making regarding customers, supervision of new staff members and demonstration of new products. The petitioner noted that its customer representatives/technicians service customers, install new products, assess and report on all customer start-ups, represent the company when procuring new business, and report to both the beneficiary and the manager daily.

The petitioner stated that all of its employees are paid on a contract basis and therefore it could not provide the requested state or federal quarterly reports or copies of IRS Forms W-2 or W-3. The petitioner instead submitted a comprehensive "1099 Detail" showing payments to all employees from June 2001 through May 2004, and copies of its IRS Forms 1099-MISC issued to contract employees in 2003. The petitioner's 1099 detail confirms that only [REDACTED] the manager, and [REDACTED] a customer representative/technician, were employed when the petition was filed in February 2004. [REDACTED] left the company in April 2004, and the petitioner subsequently hired two additional customer representatives/technicians in May 2004.

Finally, the petitioner submitted an organizational chart showing the beneficiary over an accountant and the bookkeeper and two departments, "Servicing Pools of Arizona" (SPA) and "SCP Pool Corporation." The chart depicts [REDACTED] as the manager of SPA overseeing two technicians and an open technician position. "SCP Pool Corporation" is identified as "Planned Expansion – Wholesale Distributor of Swimming Pool Products." The petitioner noted in a May 25, 2004 letter that the company is seeking new opportunities to import/export products between the U.S. and South Africa and has been in negotiation with SCP Pool Distributors, LLC, a wholesale distributor of swimming pool products, since 2001.

The director denied the petition on September 10, 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 demonstrated that the beneficiary would primarily supervise a subordinate staff of professional, managerial or supervisory personnel who could relieve him from performing non-qualifying duties. The director further determined that the petitioner had not established that the beneficiary would primarily manage the organization or an essential function or component of the organization, or that he would operate at a senior level within an organizational hierarchy. The director concluded that the preponderance of the beneficiary's duties would be directly providing the services of the organization and supervising non-professional employees.

On appeal, counsel for the petitioner asserts that the director's decision "improperly limits the L-1A visa to large, hierarchical organizations by means of a restrictive reading of the regulatory definitions of "Executive" and "Manager." Counsel further asserts that the director failed to consider and "ignores completely the essential characteristics of the Corporate Development Manager position that were clearly stated in the petitioner's initial submission."

Counsel emphasizes that the petitioner clearly stated that the beneficiary would manage the petitioner's "sales/marketing, administrative and financial functions" and notes that inherent to the definitions of managerial and executive capacity is "the premise that a person in managerial and/or executive capacity may oversee not solely individuals or groups of individuals, but also the functions being performed by those individuals to ensure the operability of the entity." Counsel also attempts to further clarify the beneficiary's job duties, and provides a new breakdown of how he allocates his time among various responsibilities. As counsel's brief is part of the record, the new job description will not be repeated herein.

Counsel emphasizes that the beneficiary's duties far exceed those of a front-line supervisor and are characteristic of a "functional manager/executive." Counsel asserts that the beneficiary acts as an executive by exercising authority over generalized policy and that his primary duty is to manage the functionality of the company and ensure its success, "as well as the incidental duty of directly supervising a lower-level manager who himself manages the other three employees and four contract pool maintenance workers."

Counsel further asserts that the director placed undue emphasis on the size of the petitioning company, noting that the company has "clearly been established beyond the point of initial expansion with a general manager, two customer representatives, an administrative accountant, and four contract pool maintenance workers." Counsel states that non-executive essential duties are delegated through the lower level manager and notes that the beneficiary "has by now moved out of the hands-on-all tasks role of a start-up manager." Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988) and unpublished AAO decisions in support of her assertion that CIS imposes no requirements as to the size of the petitioning organization or the number of employees supervised.

Counsel questions the director's reference to *Matter of Church Scientology International*, 19 I&N Dec.593 (Comm. 1988) arguing that the decision undermines "guidelines" established by the 1990 amendment to the Immigration and Nationality Act. Counsel asserts that, contrary to the director's conclusion, the beneficiary's duties do not include performance of the tasks necessary to provide the petitioner's pool maintenance services. Counsel states that the director incorrectly concluded that the beneficiary would not supervise lower-level managers, noting that the beneficiary will supervise a manager who performs "many of the day-to-day duties of a non-executive nature including supervision of a staff member."

Finally, counsel references the U.S. Department of Labor's *Occupational Outlook Handbook* ("Handbook") entry for "General Managers and Top Executives," noting that the Handbook acknowledges that in small corporations, general managers will often perform a broader range of duties, including purchasing, hiring, training and day-to-day supervisory duties. Counsel asserts that many of the beneficiary's executive responsibilities require "rare incidental instances of the executive personally partaking in the duties that the

Service has deemed ‘day-to-day.’” Counsel submits a summary of an unpublished AAO decision in support of the appeal.

Upon review, counsel’s assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily 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(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.* In the instant case, counsel asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity.

The petitioner and counsel have provided several different versions of the beneficiary’s position description, none of which are persuasive in demonstrating that the beneficiary’s day-to-day duties would be primarily managerial or executive in nature. The petitioner initially indicated that the beneficiary would be responsible for “managing and executing the company’s sales/marketing, administrative and financial functions,” but the record does not establish that the petitioner employed any subordinates who performed routine sales, marketing, administrative or finance-related tasks, and the petitioner indicated that the beneficiary himself would perform market research and analysis and negotiate contracts with providers. Accordingly, these broad responsibilities appear to include non-qualifying marketing, sales, administrative and financial duties directly performed by the beneficiary. Much of the initial job description was related to the company’s proposed import/export business and appeared to be prospective in nature. The remainder of the description referred to the beneficiary’s supervision of employees and responsibility for “developing new/additional business opportunities,” but did not describe the “opportunities,” under development by the beneficiary, or the specific duties he performed to manage “several of the company’s vital functions.” Reciting the beneficiary’s vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. The petitioner’s initial job description 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. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

In response to the director’s request for evidence, the petitioner indicated that the beneficiary would dedicate the largest percentage of his time, 32 percent, to “procurement of new business,” but failed to identify the specific managerial or executive-level tasks this responsibility would entail. Without additional explanation, the AAO cannot conclude that the beneficiary’s responsibility for procuring new business would involve primarily qualifying duties, rather than sales and marketing tasks. Neither of the beneficiary’s subordinates are responsible for performing any duties associated with generating new business, so it is reasonable to assume, and has not been shown to be otherwise, that the beneficiary himself is responsible for marketing and selling the petitioner’s pool maintenance services. The petitioner also indicates that the beneficiary is

responsible for reviewing sales, contracts and “estimated bidding,” as well as meeting with prospective buyers. Again, the petitioner did not identify any lower-level employees who would prepare contracts and “bidding” documents, or perform the company’s day-to-day sales work for the beneficiary to “review,” nor did the petitioner explain how meeting with prospective buyers qualifies as an executive or managerial duty. These duties, which account for an additional 15 percent of the beneficiary’s time, have not been shown to be managerial or executive in nature. The petitioner also describes the beneficiary as being responsible for additional non-qualifying duties including issuing invoices, issuing payments and payment receipts, performing market research, and preparing proposals for clients, duties which account for an additional 16 percent of the beneficiary’s time.

Based on the petitioner’s response to the director’s request for evidence, the majority of the beneficiary’s time is devoted to non-qualifying sales, marketing, administrative and financial tasks. 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).

While counsel claims on appeal that the petitioner employs sufficient lower-level employees to provide the petitioner’s pool maintenance services, the petitioner’s focus on this one particular task is misplaced. Job duties performed in connection with a business’ sales, marketing, finances and general administration may be deemed non-qualifying duties if they involve the actual performance of the function. As previously discussed, the evidence provided suggests that the beneficiary is personally performing these non-qualifying tasks rather than managing or supervising the performance of these routine duties by other subordinate employees.

On appeal, counsel provides a new iteration of the beneficiary’s job duties that essentially paraphrases the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The new description provided on appeal appears to have the beneficiary performing broader responsibilities related to the company’s goals, objectives and overall profitability, and fewer non-qualifying administrative and operational tasks. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Counsel also asserts on appeal that the petitioner has “eight employees and contract service providers” when the evidence submitted prior to the director’s decision clearly shows that only two subordinates were employed by the petitioner at the time of filing. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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 related 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.

On appeal, counsel places great emphasis on the beneficiary's level of authority as the highest ranking employee and "owner" of the company. However, despite the changes made by the Immigration Act of 1990 referenced by counsel, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under 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 or other non-qualifying duties, that individual cannot also be "principally" or "chiefly" perform managerial or executive duties. Counsel's assertion that the beneficiary delegates the company's non-executive and non-managerial tasks through his management-level employee and does not perform non-qualifying tasks is not supported by the record. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

The petitioner indicates that the beneficiary devotes a total of 29 percent of his time to supervising, instructing and training his subordinate staff. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner claims that the beneficiary supervises one subordinate manager, but does not claim to employ professional personnel. Although counsel claims on appeal that the beneficiary delegates all non-qualifying duties through the manager, the petitioner previously stated that the customer representative/technician reported directly to the beneficiary, who is also responsible for his training. Accordingly, it is difficult to determine the actual level of supervisory authority of the claimed managerial employee.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's two subordinates, regardless of their job titles, must necessarily perform the actual day-to-day tasks of providing pool maintenance services. The petitioner has not provided evidence of an organizational structure

sufficient to elevate the beneficiary's supervisory responsibilities to those of a manager or executive. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial.

Counsel claims on appeal that the beneficiary is a "functional manager/executive" and variously claims that he manages the sales/marketing, administrative and financial function, the public relations function, and the "functionality" of the company. The record does not support counsel's claim that the beneficiary qualifies as a "function manager." Counsel further refers to several unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving as a function manager for L-1 classification even though the petitioning organizations had few employees. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. 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 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 provide 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. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager depends on upon whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, the petitioner has not met this burden.

Counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 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). As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner is a three-year-old company operating a swimming pool maintenance company. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as ordering and receiving delivery of supplies, answering questions about

services from customers, marketing and selling the company's services, performing day-to-day clerical and administrative duties, managing a checking account and paying bills, and providing the actual pool maintenance services. The petitioner also claims to be in the process of commencing business as an importer and distributor of swimming pool products. As of the date the petition was filed, the petitioner employed the beneficiary as its corporate development manager, one "manager" and one customer representative/technician. While the manager and technician may have been capable of providing the pool maintenance services without the beneficiary's involvement, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing most or all of the company's administrative, clerical, sales, marketing and financial tasks. Contrary to counsel's assertion on appeal, the record does not support a finding that the beneficiary performs non-qualifying duties on only "rare incidental instances." Again, the petitioner has failed to establish that these non-managerial and non-executive tasks do **not constitute the majority of the beneficiary's time.** See 8 C.F.R. § 214.2(l)(3)(ii). The actual duties themselves 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).

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. In the present matter, the petitioner has not established the basic eligibility requirement in this matter, that the beneficiary is primarily performing managerial or executive duties.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), 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 *Mars Jewelers, Inc. v. INS*. Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a **matter of law.** *Id.* at 719. **Furthermore, a review of the director's decision reveals that the petition was not denied solely on the basis of the size of the petitioning company, but rather on the basis that the beneficiary would not be performing primarily managerial or executive duties.**

Finally, counsel's reference to position descriptions found in the U.S. Department of Labor's *Occupational Outlook Handbook* is not persuasive. Generic job descriptions found in Department of Labor publications have no bearing on an assessment of this beneficiary's duties within the statutory and regulatory requirements

for this visa classification, and the petitioner cannot satisfy its burden of proof by paraphrasing or making comparisons to such descriptions. The petitioner is required to provide a detailed description of the actual duties to be performed by the beneficiary and establish that they qualify him to be classified as a nonimmigrant intracompany transferee in a managerial or executive capacity, as those terms are defined at sections 101(a)(44)(A) and (B) of the Act.

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

Beyond the decision of the director, the record contains insufficient evidence to establish that the petitioner maintains a qualifying relationship with its claimed South African parent company. The petitioner claims that it is a wholly-owned subsidiary of the foreign entity, but indicated on its 2002 and 2003 IRS Forms 1120, U.S. Corporation Income Tax Return, that it is not owned by a foreign person or by another entity. The AAO notes that counsel for the petitioner also referred to the beneficiary as the “owner” of the U.S. company, a statement which contradicts the petitioner’s claim of ownership by a foreign company. This petition is the second request for an extension of the beneficiary’s L-1A status, therefore the petitioner was not required by regulation to submit evidence related to its claimed qualifying relationship with the foreign entity. *See* 8 C.F.R. § 214.2(l)(14)(i). However, 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). In light of these unresolved discrepancies, the AAO cannot conclude that the U.S. and foreign entities maintain a qualifying relationship. 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).

Finally, the AAO acknowledges that CIS previously approved two L-1A nonimmigrant petitions filed on the beneficiary’s behalf. However, each nonimmigrant petition has a separate record of proceeding with a separate burden of proof; each individual petition must stand on its own merits. *See* 8 C.F.R. § 103.8(d). The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner’s and beneficiary’s qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the prior approval would constitute material and gross error on the part of the director. Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approvals by denying the present extension petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology*

*International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.