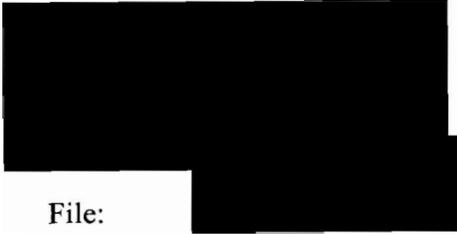


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Services

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File:

SRC 04 011 50879

Office: TEXAS SERVICE CENTER

Date:

SEP 29 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:



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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 Texas corporation, is engaged in the operation of a gas station and convenience store. The petitioner claims that it is the affiliate of Pal Electronics Systems, located in Thane, India. 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 status for three years.

The director denied the petition concluding that the petitioner did not establish: (1) that the U.S. company was doing business for the previous year; or (2) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed the instant 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 U.S. company was doing business at the time the petition was filed and has continued to do business since August 2003. Counsel further asserts that the beneficiary performs solely executive and managerial duties and does not participate in the day-to-day operations of the petitioner's business. Counsel contends that the director placed undue emphasis on the size of the petitioning company without considering the reasonable needs of the business. 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 first issue in this proceeding is whether the petitioner established that it has been doing business for the year preceding the filing of the instant petition as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The term "doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office. 8 C.F.R. § 214.2(l)(1)(ii)(H).

The nonimmigrant petition was filed on October 15, 2003. The beneficiary's "new office" petition was previously granted for a one-year period commencing on October 16, 2002. In support of the initial petition, the petitioner submitted: (1) a bill of sale for a business known as "Handi Stop #65," indicating that the petitioner purchased the business on August 1, 2003; (2) its Texas Sales and Use Tax Permit to operate a convenience store, commencing on July 14, 2003; (3) copies of state-issued permits for the sale of food products, tobacco products, alcoholic beverages, and lottery tickets, dated between July and September 2003; (4) a certificate of operation under an assumed name dated July 8, 2003; (5) a summary of monthly sales for 2003, identifying August 2003 as the first month of activity for the business; (6) copies of bank statements for the period of September 2002 through September 2003; and (6) an income statement showing store revenues of \$180,780 for the two months ending September 30, 2003.

On November 22, 2003, the director issued a request for additional evidence, in part instructing the petitioner to submit evidence of the business conducted by the petitioner during the past year, such as sales contracts, invoices, bills of lading, shipping receipts, and orders.

In a response dated January 27, 2004, counsel for the petitioner stated that the U.S. company began conducting business in August 2003. The petitioner submitted copies of invoices for inventory purchased, copies of monthly sales and use tax returns, and other documentary evidence to establish that the company has been doing business since August 2003.

The director denied the petition on June 8, 2004, concluding that the petitioner had not been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Specifically, the director observed: “The evidence submitted shows a large number of invoices the beneficiary received from vendors for goods purchased by the petitioner. The petitioner does not provide evidence to show that it has a continuous, regular, systematic provision of services or goods.”

The petitioner filed the instant appeal on July 12, 2004. On appeal, counsel for the petitioner asserts that the petitioner commenced its business operations in August 2003 and “from that commencement date to today has continued operating its business without any interruption.” Counsel emphasizes that the petitioner was clearly doing business as of the date the petition was filed, and had been conducting business regularly, systematically and continuously since August 2003. Counsel submits copies of bank statements, purchase invoices, sales and use tax returns, utility bills, business licenses and permits and the petitioner’s 2003 corporate tax return and financial statements as evidence that the company has been doing business since August 2003.

Upon review, the petitioner has not established that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The AAO acknowledges that the petitioner has been doing business since August 2003. However, when seeking to extend a petition that involved a “new office,” the petitioner is not required to merely demonstrate that it is doing business at the time of the request for an extension of the beneficiary’s initial “new office” petition. The regulations specifically require the petitioner to establish that it has been doing business throughout the previous year.

When a petition indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is ready to commence doing business immediately upon approval. At the time of filing the initial petition to open a “new office,” a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the “new office.” 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the “new office” petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business “for the previous year” through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term “doing business”). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business or search for business opportunities. *Cf.* Sections 101(a)(15)(B) and 101(a)(15)(E) of the Act (defining the B-1 business visitor and the E-2 treaty investor nonimmigrant visa classifications). The regulations allow for a one-year period for a “new office” petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, CIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a “new office” visa petition requires the petitioner to demonstrate that it is staffed and has been “doing business” in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its initial new office petition. At the time the initial “new office” petition was approved, the beneficiary was present in the United States as B-2 nonimmigrant tourist. It is unclear what the petitioner and beneficiary were doing in the United States between the approval of the previous petition in October 2002 and August 2003, when the petitioner began operating the gas station and convenience store. If the beneficiary was simply exploring business opportunities or looking for an investment for nine months, this would constitute the “mere presence of an agent or office” and would not constitute the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner has not provided any explanation for this lengthy delay in commencing its operations.

The petitioner has not submitted evidence on appeal to overcome the director’s decision on this issue. For this reason, the appeal will be dismissed.

The second 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.

In an addendum attached to the Form I-129 Petition, the petitioner described the beneficiary's duties as follows:

The Beneficiary will continue to be employed as the President of the Petitioner, and will be responsible for performing the following duties; supervise and oversee subordinate employees; overseeing preparation of sales and marketing reports; reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaigns developed by subordinate managers.

In the performance of her duties, the Beneficiary will receive minimum supervision from the Board of Directors, and the Beneficiary will exercise wide discretion and latitude in the performance of his [sic] duties.

In support of the petition, the petitioner provided a copy of its Texas Form C-3, Employer's Quarterly Report, for the third quarter of 2003, confirming the employment of the beneficiary and four other workers as of September 30, 2003.

On November 22, 2003, the director requested additional evidence, including, in part: (1) a definitive statement describing the beneficiary's employment including a list of all duties and the percentage of time spent on each duty; (2) the number of subordinate managers/supervisors who report to the beneficiary, including their job titles, duties and educational background, or, if applicable, the essential function managed by the beneficiary; (3) an explanation as to who provides the product sales/services of the business; and (4) an organizational chart for the U.S. entity.

In a response letter dated January 26, 2004, the petitioner provided the following position descriptions for the beneficiary and her claimed subordinates:

[The beneficiary], President

Duties will include: Ten percent (10%) of her time to supervise and oversee subordinate employees; Fifteen percent (15%) overseeing preparation of sales and marketing reports; Fifteen percent (15%) reviewing and analyzing sales data; Fifteen percent (15%) establishing and implementing policies to manage and achieve marketing goals; Fifteen percent (15%) review financial reports, budgets and expense reports prepared by subordinate employees; Fifteen percent (15%) managing the company; and Fifteen percent (15%) overseeing marketing campaigns developed by subordinate managers. The beneficiary is responsible for supervising one (1) store manager. The Beneficiary is responsible for seeking additional retail locations for the Petitioner, thus the Beneficiary directs the major component or function of the Petitioner's efforts to expand its retail operations.

* * *

Amir K. Maknojia, Store Manager

Duties Include: locating vendors; resolving issues relating to defective or unacceptable goods with vendors; purchase inventory; supervise subordinate employees; preparing employee work schedule; preparing and maintaining inventory report; prepare sales report; preparing budget and expense reports; maintain records of underground petroleum storage tanks in accordance with state and federal environmental laws; reconcile all accounts and prepare daily sales report. Mr. Maknojia has a college education and has over five years experience in Management.

Zubeda K. Dholsaniya, Assistant Manager/Cashier

Duties Include: assist in preparing employee work schedule; maintain/order inventory; preparing maintaining inventory report; prepare sales report; and assist in preparing budget and expense reports; reconcile all accounts and assist in preparing daily sales report; and operate cash register and credit card machine.

Michelle Luna Aleem, Cashier

Duties Include: operate cash register/credit card machine; maintain business premises; and reconcile daily cash with sales receipts.

Zarina Manesiya, Cashier

Duties Include: operate cash register/credit card machine; maintain business premises; and reconcile daily cash with sales receipts.

The petitioner re-submitted its Texas Employer's Quarterly Report for the third quarter of 2003, which confirms the employment of the named employees as of September 2003.

On June 8, 2004, the director denied the petition concluding that the petitioner 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 beneficiary would have to engage in the day-to-day functions of the business given the current structure of the company and the payroll data submitted. The director further found that the beneficiary would not be functioning at a senior level within an organizational hierarchy, supervising managerial or professional employees, or managing an essential function of the organization.

On appeal, counsel for the petitioner disputes the director's decision and asserts that the beneficiary will perform solely managerial or executive duties. Counsel contends that the director placed undue emphasis on the small size and nature of the business in concluding that the petitioner cannot support a managerial or executive position, asserting, "a typical corporation that operates retail business does not normally hire more than four to five workers, and someone has to be the manager of all the retail businesses. Yet the District Director's position is that a retail store cannot hire a manager." On appeal, counsel repeats the job description previously provided by the petitioner and further explains:

By overseeing preparation of sales and marketing reports, and reviewing an[d] analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; the Beneficiary will primarily be responsible for managing the Marketing "department, function or component" of the Petitioner as he [sic] will devote more than Forty Five Percent (45%) of time to these activities. Furthermore, by reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees; managing the company, and overseeing marketing campaign developed by subordinate managers, as well as reviewing additional retail locations, the Beneficiary will primarily supervise and control other managerial or professional employees, including the Store Manager, who in turn oversees a subordinate Employees [sic]. The Beneficiary is responsible for seeking additional business locations for the Petitioner, thus the Beneficiary directs the major component or function of the Petitioner's efforts to expand its operations. The Beneficiary does not have time to perform day-to-day operations.

Finally, counsel cites an unpublished AAO decision and several U.S. District Court decisions in support of the petitioner's assertion that a small company, including a small retail business, can support a bona fide managerial or executive position.

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

In the instant matter, the petitioner does not clarify whether it claims the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel refers to the statutory definitions of both managerial capacity and executive capacity, thus, it appears that counsel intends to represent that the beneficiary will be 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 demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

The petitioner has provided a brief description of the beneficiary's job duties and assigned a percentage to the amount of time the beneficiary spends performing each described task. On appeal, counsel notes that the beneficiary devotes 45 percent of her time to managing the petitioner's marketing "department, function or component," including overseeing marketing campaigns, overseeing the preparation of marketing reports, and implementing policies to achieve marketing goals. The petitioner operates a gas station and convenience store, and, according to its 2003 income tax returns and financial statements, has never spent any money on advertising. The petitioner does not indicate that any of the beneficiary's subordinates perform any duties related to the petitioner's marketing function. The petitioner has not sufficiently explained the beneficiary's marketing goals and policies or described the petitioner's "marketing campaign" such that the AAO can determine that the beneficiary plausibly performs any managerial duties related to this function. Collectively, the evidence suggests that the beneficiary would not plausibly devote nearly half of her time to managing marketing functions as the president of a convenience store with five employees. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of 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).

The petitioner indicates that the beneficiary devotes 30 percent of her time to reviewing and analyzing sales data, financial reports, budgets and expense reports. Without additional explanation, the AAO cannot conclude that reviewing reports rises to the level of managerial responsibility as contemplated by the regulations. The petitioner further indicates that the beneficiary manages the "expansion function" by "reviewing additional retail locations." However, the petitioner does not indicate how much time the beneficiary dedicates to this responsibility, provide any documentary evidence of the petitioner's expansion efforts, or describe any specific tasks the beneficiary has undertaken with respect to this function.

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 her 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). Overall, the petitioner's job description is insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also states that the beneficiary receives only minimum supervision from the petitioner's Board of Directors and will "exercise wide discretion and latitude in the performance of his duties." These statements, in addition to borrowing liberally from the definition of executive capacity, are general and do not convey an understanding of the beneficiary's daily duties. 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). See also section 101(a)(44)(B)(i) and (ii). Again, the actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

On appeal, counsel for the petitioner asserts that the director erred by emphasizing the number of workers employed by the petitioner, noting that the statute and regulations do not impose such a requirement with respect to the size of the petitioning organization. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require 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.

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. The petitioner operates a gas station and convenience store and employs the beneficiary as president, a store manager, an assistant manager/cashier, and two cashiers. Although the petitioner did not provide its hours of operation, the AAO will assume *arguendo* that the gas station/convenience store is open daily from 7:00 a.m. to 10:00 p.m. or 105 hours per week. At most, the petitioner employed one manager, one "assistant manager" and two cashiers to perform all of the day-to-day functions of ordering merchandise and supplies, arranging and stocking merchandise displays, cleaning the store and restrooms, processing customer purchases of groceries and gasoline, receiving deliveries, preparing foods, reconciling daily cash register receipts and many other routine duties. The petitioner also requires someone to manage its banking activities, pay bills, and perform other administrative functions associated with operating a business. In addition to these routine duties, the petitioner claims that its manager and assistant manager prepare, sales, financial, budget, inventory and expense reports. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, two managers, and two subordinate staff members.

Given the absence of employees who would perform the non-managerial or non-executive operations of the company, it is reasonable to conclude that the beneficiary would need to spend a significant portion of her time directly providing the services of the company, directly supervising low-level employees during the hours in which the store manager is not working, and/or preparing many of the reports purportedly assigned to the petitioner's "managers." 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally

vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner claims that the beneficiary will have supervisory authority over subordinate employees, including a store manager who in turn supervises an “assistant store manager/cashier.” Although the beneficiary is not required to supervise personnel, if it is claimed that she is a manager because her 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 does not assert that any of its employees are professionals. Although the petitioner identifies two layers of “management,” given the petitioner’s limited staffing levels and reasonable needs of the petitioner’s business, it has not been established that any of the beneficiary’s subordinates would be engaged in supervisory or managerial duties rather than operational tasks.

The petitioner may not create artificial tiers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary’s subordinates correspond to their placement in an organization’s structural hierarchy. CIS reviews the totality of the record, including the 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, when examining the managerial or executive capacity of a beneficiary. In this matter, upon review of the totality of the record, the petitioner has not established that the beneficiary performs primarily executive or managerial duties.

The AAO acknowledges the petitioner’s claim that it is seeking to expand its business to other retail locations. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. As noted above, 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. In order to qualify for an extension of L-1A nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary’s duties and the staff of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and *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 *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a “new office” nonimmigrant visa. As the new office extension regulations call for a review of the petitioner’s business

activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii).

Counsel also cites *Gasboy Texas, Inc. v. Upchurch*, 2004 WL 396257 (N.D. Tex.), in which the United States District Court found that an AAO decision was not due deference because the administrative record was “shoddy” and haphazardly assembled and because the AAO decision did not address a letter submitted by the petitioner. Without discussing the applicable statute and regulations, the court summarily concluded that the “president and general manager” of a gas station/convenience store qualified as a manager and executive under “8 C.F.R. § 214.2(l)(ii) [sic].” However, the *Gasboy* decision does not stand for the proposition that all gas station managers qualify as a manager or executive under the Act; rather, the court's decision was based on an analysis of a specific deficiency in the administrative record. Other than noting that the petitioner in the cited case operated a business similar to the business operated by the petitioner in the instant matter, counsel did not establish that the facts of the two cases are analogous. 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. Counsel's reference to the *Gasboy* decision is not persuasive.

Counsel further refers in to an unpublished decision in which the AAO determined that a beneficiary was serving in an executive capacity for L-1 classification even though he was the sole employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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. Furthermore, 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.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily executive or managerial capacity. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization or that she will be primarily supervising a subordinate staff that would relieve her from performing the non-qualifying duties of operating a gas station and convenience store. The provided description of the beneficiary's duties is insufficient to demonstrate that the beneficiary is primarily acting in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The petition will be denied and the appeal dismissed 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.