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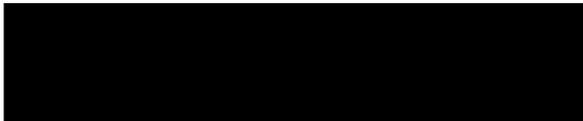
File: WAC 06 020 50002 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2007

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 business development/marketing manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it is engaged in the import and distribution of clothing. It claims to be a subsidiary of King Rhino Clothing S.A. de C.V., located in Mexico. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his status for three additional years.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record establishes that the beneficiary will primarily manage professional employees, as well as an essential function of the petitioning organization. Counsel contends that the director erred by failing to consider whether the beneficiary qualifies for the benefit sought as a "function manager." Counsel submits a brief and documentary evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed 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 October 24, 2005. On the Form I-129, the petitioner stated that the U.S. company has three employees, and attached the following description of the beneficiary's duties as business development/marketing manager:

Manage staff, prepared work schedule, determine staffing requirements, interview, hire and fire. Review financial statements, direct and coordinate financial and budget activities to fund operations, and maximize investments. [The beneficiary] will continue to set goals and policies to expand the business and increase sales.

In an attached letter, dated September 19, 2005, the petitioner further described the beneficiary's duties as follows:

[The beneficiary] has been responsible for developing the business in the United States. He has been in charge of a major function of the business during its inception and responsible for establishing a brand name in the United States. [The beneficiary] has hired qualified employees to assist in them [sic] marketing efforts of the business. He has the authority to hire and fire employees as seen fit[.]

[The beneficiary] researches and analyzes market conditions and thereby decide [sic] the best marketing strategy and channel of distribution. Furthermore, by analyzing current marketing trends and by gathering information on its competitors, the beneficiary is able to determine pricing, sales methods, customer preferences and customers buying habits.

The petitioner submitted a copy of its most recent California Form DE-6, Quarterly Wage and Withholding Report, which confirmed the employment of the beneficiary and two other employees as of the second quarter of 2005.

The director issued a request for additional evidence on January 20, 2006, instructing the petitioner to submit additional evidence that the beneficiary will be employed in a managerial or executive capacity, including: (1) an organizational chart clearly depicting the beneficiary's position and all employees under his supervision by name, job title, job duties, and educational level; and (2) a more detailed description of the beneficiary's duties, including the percentage of time spent in each of the listed duties.

In a response dated March 30, 2006, the petitioner included the following statement regarding the beneficiary's job duties:

As a Marketing Director, [the beneficiary] is in charge of managing the U.S. Subsidiary's staff, which consists of [REDACTED] the Company's Market Development Officer, and [REDACTED] a Sale Associate. [The beneficiary] is responsible for preparing the work schedules and determining the staffing requirements making him responsible for hiring and firing. He spends 34% of his time overseeing the employees and making sure they are each doing their main functions. . . .

[The beneficiary] also spends approximately 25% of the time on the phone, negotiating, and tracking merchandise. He makes arrangements regarding the shipping, requests for expedites and speaks to customers. There is also approximately 20% of time spent marketing products with potential new buyers. The 21% of his left time, the beneficiary is in charge of reviewing financial documents, directing and coordinating the Company's financial and budget activities to fund operations. He also implements the departments policies, goals, procedures and objectives to increase the sales.

100% of [the petitioner's] products are clothes that are imported directly from the Parent company in Mexico. It is important that the manager speaks both fluently in English and Spanish to make the transactions and order the correct merchandise. . . . His knowledge and fluency of the languages, do not only save the company money by avoiding mal-transactions but it also helps gain customers by providing efficient orders.

Above all, [the beneficiary] holds monthly meetings with the Market Development Officer to review and discuss the process and objectives of the company. He is working on procedures to increase the sales and make [the petitioner] as successful or much more than its Parents [sic] company.

In an attached organizational chart, the petitioner provided the following job descriptions for the beneficiary's subordinates:

Market Development Officer (PHD in Economy)

- Develop pricing strategies, balance firm objectives and customer satisfaction
- Identify, develop and evaluate marketing strategy, based on knowledge of establishment objectives
- Compile lists describing product or service offerings
- Use sales forecasting and strategic planning to ensure the sale and profitability of products

Sales Associate (High School Graduate)

- Maintains knowledge of current sales and promotions, policies regarding payment and exchanges, and security practices.
- Ticket, arrange and display merchandise to promote sales
- Compute sales prices, total purchases and receive and process cash or credit payment
- Recommend, select and help locate or obtain merchandise based on customer needs and desires.

The director denied the petition on May 8, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that the beneficiary's proposed duties are primarily comprised of marketing tasks that do not fall under the statutory definitions of managerial capacity, and noted that several of the beneficiary's duties were stated in vague and general terms that failed to identify the specific managerial task to be performed. The director concluded that the record did not demonstrate that the beneficiary would primarily supervise a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties; that the beneficiary would be functioning at a senior level in an organizational hierarchy; or that the beneficiary would primarily manage an essential function of the organization.

On appeal, counsel for the petitioner asserts that the Immigration Act of 1990 (IMMACT 90) "made it very clear that [CIS] may not discriminate between functional managers and managers who oversee personnel." Counsel reiterates the position description submitted in response to the director's request for evidence and asserts that "[o]bviously, the job description provided evidences that [the beneficiary] will be acting as a 'functional' manager, responsible for the marketing of the company." Counsel asserts that both of the beneficiary's subordinates are professionals who hold degrees related to their positions and states that the employees "will alleviate Beneficiary in performing non-qualifying or general duties." Counsel further notes that the petitioner will hire additional employees in the near future, while the beneficiary will continue to be responsible for "the key duties and functions within the marketing component."

In addition, counsel states:

As a functional manager, [the beneficiary] will develop pricing strategies, balancing firm objectives and customer satisfaction, identify, develop, and evaluate marketing strategy,

based on knowledge of establishment objectives, market characteristics, and cost and markup factors. Moreover, he will evaluate the financial aspects of product development, such as budgets and expenditures, research and development appropriations, and return-on-investment and profit-loss projections. Coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers. [The beneficiary] will direct the hiring, training, and performance evaluations of marketing and sales staff and oversee their daily activities. Negotiate contracts with vendors and distributors to manage product distribution, establishing distribution networks and developing distribution strategies.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), and several unpublished decisions to stand for the proposition that the statute was not intended to limit managers or executives to persons who supervise a large number of persons.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary's duties for the petitioner will be primarily managerial or executive. 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.*

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 performance of the duties of another type of non-managerial or non-executive position, or other involvement in the operational activities of the company.

As noted by the director, the petitioner's description of the beneficiary's duties did not demonstrate that the beneficiary will primarily perform the types of high-level responsibilities that are specified in the statutory definitions of managerial or executive capacity. For example, the petitioner indicated that the beneficiary spends 25 percent of his time "on the phone, negotiating, and tracking merchandise," making shipping arrangements and speaking to customers. The petitioner further emphasized the importance of the beneficiary's bi-lingual skills to ensure accurate and efficient order transactions. Based on the petitioner's representations, the beneficiary is directly responsible for accepting sales orders and making shipping arrangements for the company, rather than delegating these operational tasks to his subordinate personnel. The petitioner further indicated that the beneficiary devotes an additional 20 percent of his time to "marketing products with potential new buyers." Again, the petitioner did not indicate that the beneficiary supervises or delegates these non-qualifying duties. Accordingly, these two responsibilities, which account for 45% of the beneficiary's time, have not been demonstrated to be managerial or executive in nature.

The petitioner stated that the beneficiary devotes an additional 21% of his time to "reviewing financial documents, directing and coordinating the Company's financial and budget activities to fund operations." However, the petitioner has not identified any subordinate employees who would perform the routine day-to-day bookkeeping, banking and financial functions of the company, or prepare financial documents for the beneficiary's review. Therefore, it cannot be concluded that the beneficiary's responsibilities with respect to the petitioner's financial activities would be primarily managerial.

Overall, the position description submitted in response to the director's request for evidence suggests that more than half of the beneficiary's time would be allocated to non-qualifying marketing, logistics and financial-related tasks, rather than to managerial- or executive-level duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services or other non-qualifying duties 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).

On appeal, counsel reiterates the job description submitted in response to the director's request for evidence, noting that these duties account for 100 percent of the beneficiary's time, yet counsel goes on to attribute additional duties to the beneficiary, including two responsibilities that were previously claimed to be performed by the petitioner's "market development officer." 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). Furthermore, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence, such as new job duties, offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Under the circumstances, the AAO need not and will not consider the job description submitted on appeal.

On appeal, counsel asserts that the beneficiary is a "function manager," who supervises professional employees. 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 other 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 professional." 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 both of the beneficiary's subordinates, a market development officer and a sales associate, are employed in a professional capacity. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. Although the petitioner has provided brief job descriptions for the beneficiary's subordinates, the AAO cannot determine based on the limited information provided that a bachelor's degree is required to perform the duties of a sales associate or market development officer. The AAO particularly questions the accuracy of the job description provided for the sales associate, which suggests that he performs duties in a retail sales setting, although the petitioner does not in fact operate a retail business. 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).

Furthermore, the petitioner initially indicated that the market development officer possesses a doctorate degree, while the sales associate is a high school graduate. On appeal, counsel asserts that both employees possess bachelor's degrees in a specialization related to their job duties. Again, 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. *Id.* at 591-92. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In the instant case, the petitioner has not established that a bachelor's degree is actually necessary, for example, to perform the claimed duties of the sales associate or market development officer.

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 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(i)(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.

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 turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, based on the petitioner's representations, it is evident that the beneficiary devotes the majority of his time to performing non-managerial duties related to the petitioner's marketing, shipping and finance functions, rather than performing primarily managerial duties.

With regard to the petitioner's employees, counsel suggests that the director denied the petition, in part, because the beneficiary supervises only two employees. 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. 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.

There is no indication in this matter that the reasonable needs of the organization were not properly considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Further, the director did not deny the petition based solely on the number of employees supervised by the beneficiary. The director reviewed the job descriptions submitted by the petitioner, which included a number of non-managerial duties, and also observed that the petitioner did not employ other employees to perform many of the day-to-day non-managerial tasks inherent to operating the petitioner's business. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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.

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). 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. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

Counsel further refers to several unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial capacity, specifically as a function manager, even though he or she supervised few or no employees. Counsel has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished matters. 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 appeal, counsel indicates that the petitioner intends to hire additional employees in the near future. 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).

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 fact that the beneficiary 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 sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Here, the record fails to establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. 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.

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Page 12

ORDER: The appeal is dismissed.