

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D7

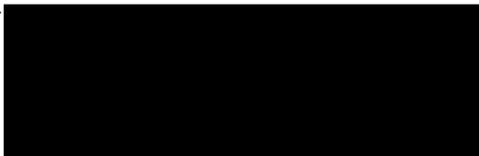


File: EAC 07 012 52295 Office: VERMONT SERVICE CENTER Date: DEC 21 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 Florida corporation, intends to operate a travel agency specializing in Peruvian adventure tourism. It claims to be a subsidiary of Union Tours, S.A., located in Peru. The petitioner seeks to open a new office in the United States and has requested that the beneficiary be granted a one-year period in L-1A classification to serve as its president.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity within one year. The director also found that "the beneficiary's duties abroad do not appear to qualify the beneficiary for a position of L-1A caliber."

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 that asserts that the petitioner has "exhaustively" shown that the beneficiary's duties will be managerial. Counsel contends that the director placed undue emphasis on the size of the U.S. company, rather than focusing on the duties to be performed by the beneficiary. Counsel also asserts that the beneficiary will supervise three managers who will relieve him from providing or supervising the provision of services by the U.S. company. Counsel submits a brief in support of the appeal.¹

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.

¹ Counsel indicated on the Form I-290B, Notice of Appeal, that "newly acquired evidence (that was not available on the date of the initial filing) will show that this is an L-1A caliber position." Counsel indicated that such evidence would be submitted within 30 days. The appeal was filed on January 22, 2007. Counsel eventually submitted a brief on September 25, 2007, but no additional evidence has been provided. The AAO will accept the late-filed brief and now considers the record of proceeding complete.

- (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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue addressed by the director is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

The nonimmigrant petition was filed on October 18, 2006. In a letter dated October 17, 2006, the petitioner described the beneficiary's proposed duties as president as follows:

[The beneficiary] will be responsible for all structuring and star-up [sic] activities of the U.S. Subsidiary, which we expect him to be engaged in for the coming months. Although he will initially have a wide range of duties, he will fulfill the role of President, and as such, will be responsible for the establishment, management and business development activities of the U.S. Subsidiary, including sales and marketing strategies, and product and service positioning in accordance with the Parent Company's established policies and procedures. He will establish the overall policies and direction of the U.S. Subsidiary, including planning business objectives, developing organizational policies, and implementing strategies for the attainment of corporate objectives. [The beneficiary] will be responsible for managing and directing the operations of the U.S. Subsidiary to ensure maximum performance and profitability pursuant to the Petitioner's goals and objectives.

[The beneficiary] will also perform the following specialized functions:

- Develop, implement and supervise all marketing, sales, advertising and promotional campaigns.
- Supervise the research of market conditions worldwide to determine potential markets for the company's tourism packages.
- Manage the gathering of information from competitors, prices, sales, and methods of marketing.
- Employ research and survey results to create marketing campaigns based on regional preferences and buying habits.
- Direct and coordinate research & development activities for tourism products and services.
- Develop pricing strategies and budgets with the goal of maximizing the U.S. Subsidiary's profits and share of the market, while ensuring the company's customers are satisfied.
- Hire, train & supervise marketing, sales & customer service staff.
- Oversee the activities of business development personnel, sales and marketing personnel, to ensure that they are undertaking a coordinated and consistent approach to the penetration, maintenance and expansion of our identified markets.
- Develop new sales channels worldwide; and supervise the selection, training, and activities of independent representatives and distributors.
- Research and develop new business opportunities in the U.S. Hispanic market.
- Hire and fire employees, as necessary.

As President, [the beneficiary] will exercise:

- A high level of authority and a broad range of job responsibilities;
- Leadership on development of key operational performance processes and performance indicators;
- The planning function, and formulate policy and direct important functions for the organization to achieve its goals;

- Full responsibility for large financial transactions;
- The broadest discretion in development and directing the activities of the company.

The petitioner indicated on Form I-129 that the petitioner will operate a travel agency, and noted in its supporting letter that the company "will work to develop the U.S. market for tourism to Peru," particularly focused on adventure travel and tourism. The petitioner submitted a business plan outlining the company, its objectives, and its projected balance sheets and profit and loss statements for three years. The business plan did not include a hiring plan although the AAO notes that the company projected paying annual salaries in the amount of \$75,000 during its first year of operations, and \$84,500 by its third year.

The director issued a request for additional evidence on October 27, 2006, in which the petitioner was instructed to submit: (1) an organizational chart clearly outlining the beneficiary's proposed position; (2) complete job descriptions for the positions subordinate to the beneficiary's proposed position; (3) a comprehensive description of the beneficiary's proposed duties, indicating how such duties are managerial or executive in nature; (4) evidence to show how the U.S. company will grow to be of sufficient size to support a managerial or executive position; and (5) a copy of the U.S. company's business plan, giving specific dates for each proposed action, for three years starting with the date the company commenced operations in the U.S., and documenting staffing, projections and goals.

In a response dated December 6, 2006, the petitioner submitted a "start-up organizational chart" for the U.S. entity indicating that the beneficiary would manage a general manager, who in turn would supervise a sales manager and an office manager. The chart shows that the sales manager would supervise travel agents. The petitioner submitted position description for each of the proposed subordinate employees, which are part of the record and will not be repeated here. Briefly, the petitioner indicated that that the general manager would direct and coordinate the activities of the travel agency business, manage staff, prepare work schedules, establish departmental policies and goals, hire and train staff, monitor travel agents and assist the president. The AAO notes that all of the duties assigned to the sales manager are identical to duties included in the beneficiary's job description, including developing, implementing and supervising all sales, advertising and promotion campaigns, supervising market research, developing pricing strategies and budgets, and hiring, training and supervising travel agents and customer service staff. The petitioner indicated that the office manager will direct and coordinate the daily administrative activities of the company, including finance and accounting, directing support services, preparing reports and schedules, analyzing internal processes, administer and control budgets, purchasing supplies, and hiring clerical and administrative personnel.

The petitioner also submitted a statement describing the beneficiary's duties, in which the petitioner stated that the beneficiary will supervise subordinate managers, but will primarily perform the duties of a function manager. The petitioner explained that the success of the company depends upon the beneficiary's knowledge of the company's tourism and adventure tourism products, its niche markets, the policies and procedures of the parent company, and the company's "highly specialized" marketing and sales programs. The petitioner further explained as follows:

[The beneficiary] will be employed at the most senior level in the Company, both with respect to organizational hierarchy, and with respect to the function managed. He will employ his functional expertise in Adventure tourism product identification, selection and procurement at desired price points. He will then implement these tourism products and services and integrate them into the overall business plan for the U.S. He will then develop

sales and marketing programs for the U.S. market. He will build these programs based on his identification and analysis of niche markets for this highly specialized type of tourism, and he will identify and develop strategies and programs for the penetration of these new markets. . . He possesses unique knowledge of the large expanse of the Peruvian Tourism destinations. . .

[The beneficiary] will not only develop and manage creative commercial strategies, he will also optimize business performance in areas such as cash flow, supplier relationships and performance, and customer satisfaction. He will approve recommendations for new plans, routes and destinations, and will oversee implementation of all projects. He will manage external relationships important to the success of the business, working with executive level management of suppliers, competitors, and third parties. He will work regularly on a peer level with to [sic] develop business, purchase travel packages and products, manage technology, comply with legal and tax requirements, and identify, evaluate and implement plans and projects in order to optimize overall short and long-term business performance. He will exercise complete authority over suppliers, functional budgets, prioritization of activities, sales offerings to customers, and allocation of funds to various functions.

[The beneficiary] will be an essential functional manager in the United States. The actual duties related to the beneficiary's functional expertise, i.e., the paperwork, sales, logistics, customer service, account management, and accounting will be carried out and/or overseen by the Company's managers, such as the General Manager and the Sales Manager, who will implement the technical aspects of [the beneficiary's] vision for the company through the Travel Agents, in order to make his vision a reality.

The petitioner stated that any "non-qualifying duties" would be eliminated within a one-year period. The petitioner also provided a chart depicting the functions managed by the beneficiary including accounting/budget analysis, operations, marketing/logistics, functional development, business development/Internet strategies, policies and procedures, sales and strategy and "functional leadership for sales managers and travel agents."

Finally, the petitioner submitted a revised business plan, which includes on page 15 a personnel plan for the first five years of operations. During fiscal year 2007, the petitioner anticipates operating with a total staff of three employees, including the beneficiary and two travel agents, and total salary costs of \$75,000. According to the personnel plan, one sales manager and one additional travel agent would be hired during the second year of operations, and the company would maintain a staff of five employees through 2011. Notably, the proposed positions of general manager and office manager are not mentioned in the petitioner's business plan.

The director denied the petition on December 20, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within a one-year period.² The director noted the petitioner's intent to employ three people during the first year of operations and determined that the company would not grow to a sufficient size to support the beneficiary in a primarily

² The AAO notes that the director's decision referenced the regulations governing the extension of a petition involving a new office pursuant to 8 C.F.R. § 214.2(l)(14)(ii). However, a review of the decision in its entirety reflects that the director applied the appropriate regulatory requirements for an initial new office petition pursuant to 8 C.F.R. § 214.2(l)(3)(v).

managerial or executive capacity. The director acknowledged the position descriptions submitted for the beneficiary, but found that he will "act more or less as a first line supervisor of one office with direct responsibilities related to providing a service overseeing non-professional travel agent positions." The director also found the business plan insufficient to support a finding that the proposed entity would "elevate the proposed position to one of managerial or executive capacity."

On appeal, counsel for the petitioner states that the petitioner has "exhaustively shown" that the beneficiary's duties will be managerial and executive in nature, and contends that the petitioner has described in great detail the functions to be performed. Counsel alleges that the director erroneously based the denial on the size of the business, rather than on the duties to be performed, noting 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 cites *National Hand Tool v. Pasquarell*, 889 F.2d 1472 n.2 (5th Cir. 1989), *Mars Jewelers v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988), and numerous unpublished AAO decisions in support of these claims. Counsel reiterates that the current regulations include functional managers, and place less emphasis on the size of the company.

Counsel contends that the actual duties necessary to provide the services of the petitioning company will be performed by a general manager, a sales manager and travel agents, while the office manager will oversee the actual sale, administration and delivery of tour packages to customers. Counsel asserts that the petitioner never mentioned that the beneficiary would be involved in producing or supervising the production of tour packages for customers. Rather, counsel asserts that the beneficiary will be primarily "developing and expanding the business across U.S. markets." Counsel emphasizes that the beneficiary will be in charge of a complex international operation requiring "complex logistical, pricing and in-country knowledge of an ancient, vast and diverse nation." Counsel concludes that it is "a misapplication of the law to deny the petition of a small company whose beneficiary is a manager who does not engage in first-line supervision and whose work is complex."

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year.

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.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. See generally, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner's descriptions of the beneficiary's proposed position, while lengthy, are insufficient to establish that the beneficiary would perform primarily managerial or executive duties on a

day-to-day basis. For example, the petitioner's statements that the beneficiary will "establish the overall policies and direction" of the company, plan business objectives, develop organizational policies, and implement strategies merely paraphrase the statutory definition of executive capacity and convey little understanding of the beneficiary's actual 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, several of the beneficiary's duties are more akin to those of a market research analyst or marketing representative rather than those typically assigned to a manager or executive, such as developing marketing, sales, advertising and promotional campaigns, and employing research and surveying results to create marketing campaigns. Although the petitioner indicates that the beneficiary will "supervise" the research of market conditions, "manage" the gathering of information from competitors, and "direct and coordinate research and development activities," the petitioner's business plan does not identify any lower-level employees who would actually perform routine market research functions. The AAO also questions why all of the duties assigned to the sales manager are identical to duties included in the beneficiary's initial position description. Since the petitioner's business plan suggests that the sales manager would be hired some time during the second year of operations, the AAO finds it reasonable to conclude that the beneficiary would retain sole responsibility for non-qualifying marketing and market research duties at the end of the first year of operations and these duties have not been shown to be primarily managerial or executive in nature.

In addition, the evidence submitted indicates that the beneficiary would be solely responsible for "product identification, selection and procurement," "supplier relationships," and purchase of travel packages and products to be offered by the U.S. company, and suggests that he would also design travel packages. These are tasks required to provide the petitioner's service and have also not been demonstrated to be managerial or executive in nature.

The definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove 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 AAO does not doubt that the beneficiary will have managerial or executive authority over the petitioner's start-up operations and would eventually supervise the day-to-day operations of the business once it is operational. However, based on the position description alone, the AAO is unable to determine whether the claimed managerial duties would constitute the majority of the beneficiary's duties, or whether the beneficiary would primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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).

Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. The petitioner has submitted two business plans, both of which indicate that the petitioner anticipates total salary costs of \$75,000 during the first year of operations. The business plan submitted in response to the director's request for evidence indicates that this amount will be divided among the beneficiary as president and two travel agents, with an additional travel agent and a sales manager to be hired in 2008. At the same time, the petitioner indicated that it intends to hire a general manager, an office manager, a sales manager and travel agents during the first year of operations. 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).

Given the petitioner's consistent information regarding its anticipated salary payments for the first year of operations, the AAO finds the staffing structure contemplated in the business plan to be more persuasive. Further, the business plan, which includes a personnel plan for the years 2007 through 2011, does not indicate the petitioner's intention of hiring a general manager or an office manager during the five-year period. 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 record demonstrates that the petitioner will employ only the beneficiary and two travel agents at the end of the first year of operations. Although the director reached this same conclusion based on the evidence submitted, counsel insists on appeal that the beneficiary will manage and delegate non-qualifying operational and supervisory duties to the office manager, sales manager and general manager. 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).

The petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for U.S. Citizenship and Immigration Services (USCIS) 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). Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

The record demonstrates that at the end of one year, the U.S. company will employ the beneficiary as president and two travel agents. The travel agents' duties are limited to communicating with customers, computing and quoting travel costs, selling travel packages, booking transportation and hotel reservations, and collecting payments from customers. 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 a president who

performs primarily managerial or executive duties and two travel agents. All other non-managerial tasks associated with operating the business would necessarily fall under the beneficiary's responsibility, including purchasing, market research, marketing and promotion, supplier and vendor relationships, routine banking and financial tasks, administrative and clerical functions. The record does not suggest that these non-qualifying tasks would be merely incidental to any managerial tasks the beneficiary would perform. Again, 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).

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).

Although counsel claims that the beneficiary will manage three managers, the evidence submitted demonstrates that the beneficiary's only subordinates at the end of one year will include two travel agents. The petitioner has neither claimed nor established that the travel agents would be employed in managerial, supervisory or professional positions. Thus, the beneficiary cannot be considered a personnel manager based on his supervision of two non-professional personnel.

Alternatively, the petitioner claims that the beneficiary would be employed primarily as a functional manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary would manage an essential function.

The petitioner stated that the U.S. company requires the beneficiary's "functional expertise" in the Peruvian tourism industry and his "vision," and notes that all "actual duties related to the beneficiary's functional expertise" would be carried out by or overseen by the company's three managers. While the AAO does not doubt the beneficiary's familiarity and experience with the Peruvian tourism market and his authority to determine the company's strategies and directions, the record does not establish that someone other than the beneficiary would perform the majority of the "actual duties related to the beneficiary's functional expertise." As discussed above, the petitioner has not demonstrated that it will employ the three subordinate managers

within a one-year period, nor is the AAO persuaded that two travel agents would relieve the beneficiary from performing primarily non-managerial duties. Whether the beneficiary is a function manager turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial in nature. See section 101(a)(44)(A) of the Act.

Counsel asserts on appeal that the beneficiary would also be employed in an executive capacity within one year. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The petitioner has not established that the beneficiary will be relieved from primarily focusing on the day-to-day operations of the business within one year, or that he will "direct the management" of the company.

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. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not to a "new office" nonimmigrant visa petition. As the new office regulations call for a review of the petitioner's business plan and proposed staffing levels, the cases cited by counsel are distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(3)(v)(C)(I). 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. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, the AAO has consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Counsel further refers to unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee or supervised 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.

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

The second issue to be addressed is whether the petitioner established that the beneficiary has been employed by the foreign entity for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The director noted in his decision that "the beneficiary's duties abroad do not appear to qualify the beneficiary for a position of L-1A caliber since the duties are not clearly of a managerial or executive nature and . . . appear to be consistent with that of a first-line supervisor." The director concluded that the record did not establish that the beneficiary "has been" or will be employed in the capacity of an executive or manager.

On appeal, counsel does not address the director's finding that the beneficiary was not employed in a qualifying managerial or executive capacity with the foreign entity. Upon review, the AAO concurs with the director's ultimate conclusion that the petitioner has not satisfied the requirement set forth at 8 C.F.R. § 214.2(l)(3)(v)(B). The AAO notes, however, that the record does not support the director's finding that the beneficiary was merely a first-line supervisor, as the foreign entity appears to employ an assistant sales manager, subordinate to the beneficiary's position of sales manager, and this employee appears to be responsible for the first-line supervision of the foreign entity's travel agents.

However, although not addressed by the director, the record clearly demonstrates that the beneficiary was not employed by the foreign entity for one continuous year in the three-year period preceding the filing of the petition, and therefore the beneficiary is ineligible for this visa classification. The petitioner indicates that the beneficiary commenced employment with the foreign entity on January 1, 2005. The beneficiary was admitted to the United States in B-2 status as a nonimmigrant visitor on October 21, 2005 and remained in the United States up until the time the instant petition was filed on October 18, 2006. The petitioner must establish that the beneficiary was employed by the foreign entity for one continuous year prior to his admission to the United States, as time spent in the United States cannot be counted towards the fulfillment of the beneficiary's period of qualifying employment abroad. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). The beneficiary has less than eleven months of qualifying employment with the foreign entity and is therefore ineligible for classification as an intracompany transferee. For this additional reason, the appeal will be dismissed.

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

The petition will be denied 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.