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File: EAC 07 084 51686 Office: VERMONT SERVICE CENTER Date: DEC 20 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 Service 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, is described as an investment and holding company involved in investment, remodeling and establishment of an international retail store. 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 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 director abused his discretion in denying the petition, and failed to take into account the substantial investment in the U.S. company, its structure, and its projections. Counsel further contends that the director improperly discriminated against the petitioner based upon the salary offered to the beneficiary and the size of the U.S. company. Counsel submits a brief 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)(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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition.

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.

The nonimmigrant petition was filed on February 4, 2007. In a letter dated January 10, 2007, the petitioner stated that the U.S. company opened a retail convenience store on December 1, 2006, and was presently operating for twelve hours per day, six days per week with a staff of two employees. The petitioner stated that the beneficiary will "direct those employees, supervise their activities, arrange for suppliers and service and, as business improves, hire additional people."

On February 9, 2007, the director issued a request for additional evidence, advising the petitioner that the evidence submitted did not establish how the new company will require the services of a bona fide manager or executive. The director advised that the petitioner must submit evidence to demonstrate that the beneficiary would be relieved from performing the non-managerial, day-to-day operations involved in producing a product or providing a service, within one year. Specifically, the director requested: (1) an organizational chart for the U.S. entity clearly specifying the beneficiary's proposed subordinates; and (2) a complete position description for each of the beneficiary's proposed subordinates, including a breakdown of the number of hours devoted to each of the subordinate's job duties on a weekly basis.

In a response dated May 3, 2007, counsel for the petitioner indicated that the company's staff had grown to four employees. Counsel described the beneficiary's proposed duties as follows:

As President, the Beneficiary will mainly plan, develop, and establish policies and objectives of the business organization in accordance with board directives. He will confer regularly with company officials to plan business objectives, develop organizational policies, and establish responsibilities and procedures for attaining objectives. He will primarily review

activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions in order to maximize returns on investments, and to increase productivity, while planning and developing public relations and marketing policies designed to improve company's image and relations with customers, employees, stockholders and public.

Of course, it is necessary that the work of the employees have organization, direction and supervision, particularly at the start-up of the business. . . . Even as all employees learn their duties and responsibilities and specific job tasks, they cannot be left to their own direction and need to be supervised to have the store properly operate and best serve its customers. Also, there are functions, such as purchasing, quality control, pricing, accounting (albeit the company engages a professional accountant), advertising, payroll and so on that can't be left to the employee group as a whole, but that must be in the hands of a manager.

The job duties of the Beneficiary will primarily be executive and managerial in nature, however, should he be involved in some non-managerial activities at the business start-up; that could continue but at a significantly reduced level, since even a manager, if on premises, is expected to respond to and assist customers from time to time. However, as the business grows and perhaps expands, the manager will be more in an oversight position, allowing regular employees to perform the day to day work required.

Counsel indicated that the beneficiary would manage one subordinate sales manager, who holds a bachelor's degree in accounting and "manages the sales activities of the U.S. entity." Counsel described the sales manager's duties as the following:

She establishes sales territories, quotas, and goals, and advises dealers, distributors, and clients concerning sales and advertising techniques, and directs product simplification and standardization to eliminate unprofitable items from sales line. In the future, she may represent the company at trade association meetings to promote its products, and provides periodic sales reports, while at the same time, recommending expenditures.

The petitioner also provided a list of its employees, which included the sales manager and three salespersons. The sales manager's duties are stated as: managing sales (24 hours per week); customer service (8 hours per week); and pricing goods (4 hours per week). The petitioner stated that the three salespersons each work 30 hours per week and are all responsible for: assisting customers (a total of 60 hours per week); preparing food (a total of 21 hours per week); and organizing goods (a total of 9 hours per week). The petitioner also stated that it utilizes the services of a contracted accountant, who devotes four hours per week to accounting and financial consultation.

The director denied the petition on May 11, 2007, concluding that the petitioner failed to establish that the petitioner would employ the beneficiary in a primarily managerial or executive capacity within a one-year period. The director acknowledged the brief position descriptions provided for the subordinate staff, but found insufficient evidence that the positions subordinate to the beneficiary would require the services of bona fide managers or professionals. The director observed that the beneficiary's proposed annual salary of \$24,000 is "incongruous with that of an employee who is actually managing a bona fide accountant or sales manager." The director also found that the petitioner had failed to establish that the beneficiary would manage or direct a

function within the organization. The director concluded that the beneficiary would not perform the claimed managerial or executive duties on a full-time basis, but would likely be engaged in the non-managerial, day-to-day operations of the petitioner's business.

On appeal, counsel for the petitioner contends that the director's findings are conclusory and speculative in nature. Counsel further argues that the director's consideration of the beneficiary's salary in determining his proposed employment capacity was improper. Counsel asserts that "the Beneficiary implicitly qualifies as an executive of the company as a starting point," because he is the president and part-owner of the U.S. company.

Counsel asserts that the director failed to consider the substantial monetary investments and effort that went into opening the petitioner's store, as well as the complexities involved in the start-up of the operations. Counsel contends that the beneficiary's role in setting up the business, making purchasing decisions, overseeing daily operations, traveling internationally, making adjustments to product lines, evaluating suppliers, making banking arrangements, advertising, licensing and employee relations involves primarily executive-level duties. Counsel states that the beneficiary "is not simply operating the business, as the Service's conclusions would suggest."

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) in support of the proposition that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises. Counsel asserts that USCIS must look at the totality of the circumstances and "look for elements beyond general job tasks, such as proprietary knowledge and special skills." Counsel goes on to cite a number of AAO decisions relating to the L-1B "specialized knowledge" intracompany transferee visa classification in support of her argument.¹ Counsel contends that "although arguably the position of commercial retail store and restaurant President in itself is not inherently complex, we assert that the job duties to be evaluated also include the duties as President of the holding company, President of the remodeling company, and President of the U.S. operations in their entirety." Counsel asserts that the director should have considered the beneficiary's proprietary knowledge, his long-term relationship with the foreign entity, and his skills and training as an architect. Counsel concludes that "the petitioner demonstrated that the beneficiary's services as an executive or managerial transferee are essential for the successful operation of this particular business, and therefore, he should be deemed eligible for the classification sought."

Counsel further asserts that the beneficiary may qualify for L-1A classification as a "functional manager" even if he does not supervise any employees. Counsel cites an unpublished decision in support of this claim. Counsel goes on to state that "the Beneficiary's job title may be classified as inherently one that by its nature would denote executive capacity," and contrasts his title to those of the beneficiaries in *Matter of Raulin* and *Matter of LeBlanc*. Counsel asserts that the director "did not fully consider all of the responsibilities that the Beneficiary will have to make the business and the investment succeed," and again emphasizes that "the number of employees should not have been determinative of the Beneficiary's executive capacity at this stage of development."

¹ Counsel cites *Matter of Raulin*, 18 I&N Dec. 618 (Reg. Comm. 1970); *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm. 1971), *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); and *Matter of Colley*, 18 I&N Dec. 117, 119 (Comm. 1981).

Counsel states that the petitioner presently employs two individuals, including a manager, and notes that the beneficiary will direct these employees and "continue to travel throughout the U.S. and internationally as the U.S. head of operations and as the entrepreneur of the business, in order to investigate further investment activities."

Upon review of the petition and the evidence, and for the reasons discussed herein, 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.

However, as a preliminary point, the AAO concurs with counsel that the director's decision is not adequately supported by a discussion of the petitioner's evidence, and why such evidence was deemed insufficient to establish eligibility for the benefit sought. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). The AAO also agrees that the director's determination that the beneficiary's offered salary is "incongruous" with an executive or managerial position is not supported by the statute and regulations. Therefore, the director's comments in this regard are inappropriate and will be withdrawn.

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, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary coming to the United States to open or be employed in a new office. Such evidence includes 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 by 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 the new 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).

The petitioner has provided only general descriptions of the beneficiary's proposed duties that fail to establish what specific managerial or executive tasks he would be performing within one year of approval of the petition. For example, the petitioner's initial statement that the beneficiary will supervise the activities of the store's employees, "arrange for suppliers and service," and "hire additional people," fell significantly short of establishing that the beneficiary would perform primarily managerial or executive duties. The petitioner did not provide a business plan, hiring plan, or otherwise indicate who the beneficiary would supervise and what duties they would perform. 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)).

While counsel provided a lengthier position description in response to the director's request for evidence, it was also deficient as it included overly general statements and paraphrased the statutory definition of

executive capacity. See section 101(a)(44)(B) of the Act. For example, the petitioner indicated that the beneficiary would "plan, develop and establish policies and objectives," "plan business objectives, develop organizational policies, and establish responsibilities and procedures for attaining objectives," "review activity reports and financial statements," and plan "public relations and marketing policies." 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.).

Counsel further indicated that the beneficiary's duties would include supervising store employees, and handling functions such as purchasing, quality control, pricing, accounting, advertising, and payroll. Although counsel stated that these duties must be "in the hands of a manager," these are first-line supervisory, operational and administrative tasks that have not been shown to be managerial or executive in nature. The petitioner has not indicated that any of the beneficiary's proposed subordinates would relieve him from purchasing inventory and supplies, routine financial and administrative tasks associated with operating a business, or marketing and advertising the petitioner's store. Absent evidence that the beneficiary would delegate these functions within the first year of operations, the beneficiary's position cannot be considered managerial or executive in nature.

Overall, the duties described suggest that the beneficiary will exercise the appropriate level of authority over the new office; however, the definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary will *primarily* perform these specified responsibilities and will 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).

Contrary to counsel's assertions that the beneficiary's "inherently" or "implicitly" qualifies as an executive based on his job title and partial ownership of the business, the fact that the beneficiary will manage a business 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). The petitioner has the burden of establishing that a majority of the beneficiary's duties would be managerial or executive in nature. This determination cannot be based on the beneficiary's job title, partial ownership in the company, his educational or professional background, or a position description that is only partly comprised of specific daily tasks. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel asserts for the first time that the beneficiary's duties will include traveling around the United States and internationally "in order to investigate further investment activities," but provides no explanation of any specific tasks to be performed in this regard, and no explanation as to why this responsibility was not mentioned previously. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel also asserts that the beneficiary's responsibilities include duties as president of the retail store, president of the "holding company," president of the "remodeling company," and president of the U.S. operations in their entirety. It appears that counsel is attempting to establish that the beneficiary will not be involved in the day-to-day operations of the U.S. bakery and café, but will instead be focused on expansion of the business and other facets of the U.S. operations. However, the petitioner has not previously indicated that its business will expand beyond the operation of a single store by the end of the first year of operations. There were no previous references in the record to a "remodeling company" or to any duties performed by the beneficiary in relation to the "holding company." A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs 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).

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).

Although one of the beneficiary's proposed subordinates has been given the title of "manager" and two of his proposed subordinates are claimed to have bachelor's degrees, the petitioner has not established that the beneficiary would in fact supervise a staff of supervisory, managerial or professional employees. First, the job description provided for the petitioner's "sales manager" is inconsistent with the type of business operated by the petitioner. The petitioner indicated that this employee "establishes sales territories, quotas and goals," "advises dealers, distributors and clients concerning sales and advertising techniques," "directs product simplification and standardization," and "will represent the company at trade association meetings." These duties would be credible if the petitioner were operating as a wholesaler of goods, but the petitioner has not established that a small retail bakery and sandwich shop would require a sales manager to establish sales territories, interact with dealers and distributors, or participate in trade association meetings. The job description for this position also does not include any clearly supervisory duties. Furthermore, 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. The petitioner has not established that the duties of a salesperson, which include "assisting customers," "food preparation," and "organizing goods" actually require a professional employee possessing a bachelor's degree. Other than the sales manager and salespersons, the petitioner has not identified any staff to be hired during the first year of operations. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act, and the beneficiary's responsibilities for "supervising their activities" cannot be considered managerial in nature.

As noted above, 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. Upon review, the petitioner has failed to provide a clear description of its intended organizational structure and its hiring plan for its first year of operations.

The petitioner claimed to employ two unidentified employees at the time of filing in February 2007, and four employees, including one manager, as of May 2007. In an appellate brief dated November 1, 2007, counsel indicates that the petitioner presently employs two employees, including one manager. As the petitioner has not provided a business plan or identified the number and type of employees to be hired during the first year of operations, the AAO cannot determine that the beneficiary would be relieved from performing non-managerial and non-executive duties associated with operating a retail bakery and café within the one-year timeframe established by regulation. Based on the limited evidence provided, it appears that the petitioner's business has been operating with two to four employees since opening in December 2006.

Furthermore, although the petitioner is already operational and claimed to have four employees at the time it replied to the request for evidence, the petitioner offered no evidence to document such employees or to corroborate its claims regarding the number of hours they work. 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.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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). The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. See *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003).

The petitioner operates a retail bakery and café, which, based on various claims in the record, is open between 55 and 84 hours per week. The only claimed employees are involved in sales and food preparation activities, which would leave all other operational, administrative and financial functions, as well as at least some first-line supervisory duties, to be fulfilled by the beneficiary. Therefore, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary would need to spend a significant portion of his time directly performing non-qualifying duties associated with the company's day-to-day operations, such as purchasing, marketing, administrative tasks, routine financial operations and first-line supervision of sales people. 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).

Counsel correctly states that the statutory definition of "managerial capacity" allows for "function managers." 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. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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 will manage an essential function, nor even identified what function the beneficiary would be managing. The fact that the beneficiary will manage the company does not automatically mean that the beneficiary is a function manager as contemplated by the statutory definition. Regardless, whether the beneficiary is a function manager turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. See sections 101(a)(44)(A) of the Act. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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. For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the record suggests that the beneficiary would be primarily employed as a first-line supervisor and/or be primarily engaged in performing non-qualifying administrative or operational tasks. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an 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. 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 an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee 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 decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, counsel's reliance on precedent decisions relating to L-1B visa petitions is misplaced. While the AAO does not doubt the beneficiary's knowledge of the foreign entity's operations and his importance to the petitioner's group, and his qualifications for the offered position, the petitioner must still establish that the beneficiary's actual duties are primarily managerial or executive in nature. If the petitioner believes that the beneficiary is qualified for classification as a nonimmigrant transferee with specialized knowledge, then it may file an I-129 petition requesting L-1B classification, rather than requesting that the criteria for an L-1B employee be utilized to adjudicate the instant request for L-1A classification.

Overall, the vague job description provided for the beneficiary, and the ambiguity of the petitioner's business plan and hiring plan for the first year of operations, prohibit a determination that the petitioner would support a managerial or executive position within one year. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the evidence of record does not establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one continuous year within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner indicates that the beneficiary was employed as "co-manager" of the petitioner's two foreign affiliates since 1994, overseeing a total of 15 employees. This brief description is insufficient to establish that the beneficiary's role was primarily managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Absent a detailed description of the beneficiary's actual duties while employed by the foreign entity, and more information regarding his role within the organizational hierarchy, the AAO cannot determine that he was employed in a primarily managerial or executive capacity.

Further, it is not clear that the beneficiary has been employed with the foreign entity for at least one continuous year within the three years preceding the filing of the petition on February 4, 2007. The petitioner indicated on Form I-129 that the beneficiary has been continuously employed by its foreign affiliates since 1994, and does not acknowledge any interruptions in employment. However, the evidence of record shows that the beneficiary was admitted to the United States in F-1 nonimmigrant status on August 27, 2002 to attend Florida International University. He was subsequently admitted to the United States in F-1 status on August 25, 2003 and January 3, 2004. USCIS records show that, while in the United States as a nonimmigrant student, the beneficiary filed a Form I-765, Application for Employment Authorization Document, pursuant to 8 C.F.R. § 274a.12(c)(3) on November 2, 2004, which was approved for a one-year period commencing on December 20, 2004. It is unclear why the petitioner did not acknowledge this interruption in the beneficiary's employment with the foreign entity. 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).

The beneficiary was admitted to the United States in B-2 status on April 20, 2006 and remained in the United States at the time the instant petition was filed on February 4, 2007. The petitioner must establish that the beneficiary was employed by the foreign entity for at least one continuous year between February 2004 and February 2007.

Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A), periods spent in the United States in a lawful status for a branch of the same employer or a parent, affiliate or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad, but such periods shall not be counted toward fulfillment of that requirement. However, the beneficiary's time spent in the United States as an F-1 student would be considered interruptive of his continuous employment abroad. Absent evidence that the beneficiary returned to Turkey to work for the foreign entity for a full year subsequent to applying for an Employment Authorization Document in November 2004 and prior to returning to the United States as a visitor in February 2006, the AAO cannot conclude that the beneficiary possesses one year of employment abroad within the requisite time period. For this additional reason, the petition cannot be approved.

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

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.