

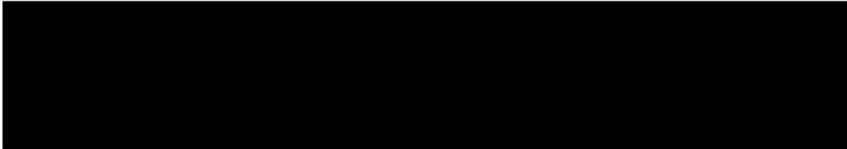
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

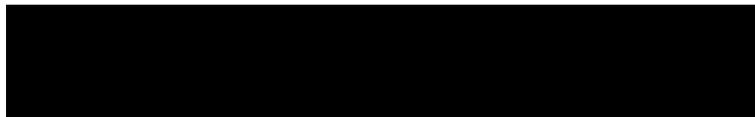
PUBLIC COPY



D7

FILE: SRC 05 230 52740 Office: TEXAS SERVICE CENTER Date: FEB 01 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

www.uscis.gov

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

The petitioner, a Texas corporation, claims that it operates a convenience store and gas station. The petitioner states that it is an affiliate of Bata Agency, located in India. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 was initially granted a one-year period of stay to open a new office. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president for a three-year period.

The director denied the petition on January 10, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business. In addition, the director noted discrepancies between the number of employees listed on the Form I-129 and the employees listed on the U.S. company's employer quarterly wage reports.

On appeal, counsel for the petitioner acknowledges the director's statements concerning the discrepancies between the petitioner's statement on the Form I-129 regarding the U.S. entity's current employees, and the information provided in the U.S. company's quarterly wage reports that indicates fewer individuals employed by the U.S. company. Counsel asserts that the "reality of any business is that staffing levels fluctuate." In addition, counsel states that the U.S. company was "in an early stage of development." Counsel further asserts that the Service made a legal error in "overly focusing on the number of subordinate employees." Counsel contends that the Service cannot look at the company's size alone but must also take into account the reasonable needs of the organization. Counsel also states that the Service must consider the beneficiary's duties "in light of the overall stage of development" of the U.S. company. Finally, counsel for the petitioner asserts that the beneficiary is a function manager, and is employed by the petitioner in a primarily executive and managerial capacity. Counsel submits a brief in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 August 18, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of president for the petitioner, which claimed to have three employees. In a support letter dated August 16, 2005, the beneficiary's proposed duties in the U.S. are described as the following:

- Manage and oversee all aspects of the business;
- Hire, train and fire employees;
- Manage all business expansion, including what lines of business to enter and where the retail stores would be located and which service areas to conduct business;
- Make decisions concerning purchases of major items;
- Do the business' financial planning;
- Decide what kind of marketing strategy to take with the public or with air conditioning carriers.

In addition, the petitioner stated in the letter of support that the U.S. company currently employs two individuals in addition to the beneficiary. The petitioner stated the same on the Form I-129.

On August 29, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested that the petitioner submit: (1) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for all employees for the last four quarters; (2) an organizational chart for the U.S. company; (3) a list of all employee positions, qualifications and duties; and (4) a list of the beneficiary's duties and percentage of time spent on each duty.

In a response to the director's request, dated October 25, 2005, the petitioner submitted the following description of the duties the beneficiary will perform in the position of president for the U.S. company:

- Oversee the operation of the store and retail shop by supervising and receiving reports from the Convenience Store Manager and Sales Manager, who in turn will supervise the workers there (20% of the time);
- Plan, develop and establish policies and objectives of both organizations, the convenience store/gas station and retail shop (15% of the time);
- Manage all business expansion, including purchasing additional stores and gas stations (7% of the time);
- Handle relations with major gas distributors, vendors and customers (18% of the time);
- Develop and direct the investment of [the U.S. company] and [the foreign company] – (10% of the time);
- Hire, train and fire employees (4% of the time);
- Direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity (13% of the time);
- Do the business' financial planning – Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions (8% of the time);
- Decide what kind of items to sell and what kind of marketing strategy to take with the public – Plan and develop labor, and public relations policies designed to improve company's image and relations with customers and employees (5% of the time).

In addition, the petitioner stated that the positions employed by the U.S. company are one general manager and two sales associates/cashiers. The position of the general manager is described as the following:

Full-time position, manage retail store engaged in check cashing and selling gas, oil, packaged food (candies, bread, etc.), sodas, beer, lottery tickets, cigarettes, and other items; plan and prepare work schedules and assign employees to specific duties, directs workers preparing inventory displays; formulate pricing policies on merchandise according to requirements for profitability of store operations; supervise cashier, oversee appearance and

cleanliness of store, fill up coolers, order and record inventory, do daily accounting; receive, process, and disburse money for third party check cashing.

In addition, the petitioner described the duties performed by the two sales associates/cashier as the following:

Full-time positions, [the U.S. company's] Sales Associates are the most important one in our company. As a Sales Associate, they are more than a cashier clerk, they are the face of our "convenience" to our customers, receive cash from customers for payment of good such as, gasoline, candy, cigarettes, gum, and phone cards; read and record totals shown on cash register tape and verify against cash on hand; handle customer service and maintain a clean, customer-friendly environment in the store; stock merchandise products.

In addition, the petitioner submitted an organizational chart for the United States company. The chart indicates the beneficiary as the president, who supervises the store manager, who in turn supervises two cashiers. The petitioner also submitted the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the quarters ended in June 2005 and September 2005. The tax returns indicate that the U.S. company employed two individuals during these two quarters. The two individuals are the store manager and one sales associate/cashier.

The director denied the petition on January 10, 2006 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

The petitioner filed an appeal on February 9, 2006. On appeal, counsel for the petitioner acknowledges the director's statements concerning the discrepancies between the petitioner's statement on the Form I-129 regarding the U.S. entity's current employees, and the information provided in the U.S. company's quarterly wage reports that indicates fewer individuals employed by the U.S. company. Counsel asserts that the "reality of any business is that staffing levels fluctuate." In addition, counsel states that the U.S. company was "in an early stage of development." Counsel further asserts that the Service made a legal error in "overly focusing on the number of subordinate employees." Counsel contends that the Service cannot look at company's size alone but must also take into account the reasonable needs of the organization. Counsel also states that the Service must consider the beneficiary's duties "in light of the overall stage of development" of the U.S. company. Finally, counsel for the petitioner asserts that the beneficiary is a function manager, and is employed by the petitioner in a primarily executive and managerial capacity.

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

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 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).

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. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. at 604.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as the beneficiary will "manage and oversee all aspects of the business"; "plan, develop and establish policies and objectives of both organizations, the convenience store/gas station and retail shop"; "develop and direct the investment of [the U.S. company] and [the foreign company]"; and "direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will "manage all business expansion, including what lines of business to enter and where the retail stores would be located and which service areas to conduct business"; "decide what kind of marketing strategy to take with the public or with air conditioning carriers;" "handle relation with major gas distributors, vendors and customers"; "do the business' financial planning – Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions"; and "decide what kind of items to sell and what kind of marketing strategy to take with the public – Plan and develop labor, and public relations policies designed to improve company's image and relations with customers and employees." Since the petitioner has not explained that the U.S. company has hired any employees in accounting, marketing or financial development, it appears that the beneficiary will be providing the services of accounting, finance, and market research and operations rather than directing such activities through subordinate employees. Again, 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).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how his time will be divided among managerial and non-managerial duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicates that the beneficiary will spend 20 percent of his time to "oversee the operation of the store and retail shop by supervising and receiving reports from the Convenience Store Manager and Sales Manager, who in turn supervise the workers there." According to the record, the U.S. company employed one store manager and one sales associate/cashier. The record does not indicate that the U.S. company employed a sales manager, however, the beneficiary's job description states that the beneficiary will supervise the sales manager. 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 lack of a sales manager for the beneficiary to supervise raises questions as to whether the beneficiary is managing these activities or actually performing the petitioner's sales and marketing duties.

The petitioner further states that the beneficiary will spend 18 percent of his time to "handle relations with major gas distributors, vendors and customers." Without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine administrative tasks. If the beneficiary is in fact researching the distributors and vendors, and negotiating the contracts, or simply ordering inventory from suppliers, these duties have not been shown to be managerial or executive in nature. 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)).

In addition, the petitioner states that the beneficiary will spend in total 17 percent of his time to "manage all business expansion, including purchasing additional stores and gas stations," and "develop and direct the investment of [the U.S. company] and [the foreign company]." These duties require market research, administrative and finance functions in order to obtain the required capital and funding, and possibly may include negotiating contracts, duties which have not been shown to be managerial or executive in nature. Further, the petitioner has not further described the U.S. company's expansion or investment plans, or provided evidence associated with these activities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

The petitioner also states that the beneficiary will spend 21% of his time to "direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity;" and "do the business' financial planning – Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions." As the U.S. company has not employed a finance manager, bookkeeper or other employee to manage the financial operations for the company, it can be reasonably assumed that the beneficiary is performing the majority of these functions with the assistance of the general

manager. The lack of subordinate employees for the beneficiary to direct in the financial tasks for the U.S. company, raises questions as to whether the beneficiary is managing these activities or actually performing duties related to the company's routine day-to-day banking and financial activities. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. at 604.

Finally, the petitioner indicates that the beneficiary will spend 5% of his time to "decide what kind of items to sell and what kind of marketing strategy to take with the public – Plan and develop labor, and public relations policies designed to improve company's image and relations with customers and employees." The record does not resolve whether the beneficiary will perform the day-to-day tasks to develop and implement the marketing programs and policies, and customer relation policies, or whether he will direct others to do so. The petitioner indicated a vague description of the duties performed by the general manager who is supervised by the beneficiary, however, the duties of the general manager do not appear to include managing the marketing operations for the U.S. company. The lack of employees for the beneficiary to "direct and coordinate" raises questions as to whether the beneficiary is managing these activities or actually performing the petitioner's marketing duties.

As noted above, according to the petitioner's statement on Form I-129, the U.S. company has three employees. However, the petitioner's Form 941, Employer's Quarterly Federal Tax Report for the quarters ended in September 2005 and March 2005, indicates that the U.S. company employed two employees, the general manager and the sales associate. On appeal, counsel for the petitioner asserts that the "reality of any business is that staffing levels fluctuate." In addition, counsel contends that the Service must take into account that the U.S. company was "in an early stage of development," and therefore the staffing level may be fewer in the set-up stages of the company. The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, for the reasons discussed herein, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel correctly observes that a company's size alone, may not be the determining factor in denying a visa to a multinational manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, 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. Again, there is no provision in CIS regulations that allows for an extension of this one-year period.

Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would

perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Although the petitioner did not provide its hours of operations, the AAO will assume that its gas station/convenience store, given the nature of the business, is open daily for at least ten hours, or a total of 70 or more hours per week. At the time of filing, the petitioner employed the beneficiary as president, one general manager and one sales associate/cashier. The petitioner claims that the general manager supervises the cashier, but has not accounted for who is responsible for operating the store during the many operating hours when neither of the beneficiary's subordinates are available. The petitioner has not explained how two employees are able to perform most or all of the day-to-day functions of ordering merchandise and supplies, arranging and stocking merchandise displays, cleaning the store and restrooms, processing customer purchases of groceries and gasoline, receiving deliveries, reconciling daily cash register receipts and many other routine duties associated with operating the business. Given the absence of employees who would perform the non-managerial or non-executive operations of the company, it is reasonable to conclude that the beneficiary would need to spend a significant portion of his time directly providing the services of the company or directly supervising employees performing cashier duties.

Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as the president and one general manager and one sales associate/cashier. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The record establish that the beneficiary will supervise a general manager and a sales associate.

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 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. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the store management and cashier functions of the subordinates supervised by the beneficiary. Rather, based on the type of business operated by the petitioner and its staffing levels, the general "manager" would necessarily be involved in the routine tasks associated with operating a retail convenience store, which can not be considered professional in nature.

Furthermore, on appeal, counsel asserts that the position offered to the beneficiary is employed in an executive capacity. 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-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.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the beneficiary supervises one general manager and one sales associate/cashier, the U.S. company has not established a complex organizational structure which would elevate the beneficiary beyond a first-line supervisor. In the instant matter, the petitioner has not established evidence that the beneficiary is in an executive capacity with the U.S. entity. Thus, the petitioner has not established that the position is in an executive capacity.

As discussed above, the beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

Finally, the AAO acknowledges counsel's contention that the service further erred in not identifying the position as an essential function within the petitioner's organization. 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 manages an essential function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations duties, 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. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Other than stating that the proposed position is an essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. 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).

As discussed above, the totality of the record supports a conclusion that the beneficiary would be required to perform primarily non-qualifying duties associated with the petitioner's day-to-day functions, as the petitioner has not identified sufficient staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. It is the petitioner's obligation to establish however, through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although, as correctly noted by counsel, these employees need not be professionals. Here, the petitioner has not met this burden.

Furthermore, counsel for the petitioner discusses prior cases approved by the AAO where the AAO held that a small staff does not justify a denial where the beneficiary holds wide decision-making discretion. 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. 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.

Additionally, counsel observes that Congress omitted the language that discussed individuals who produce a product or provide a service from the Immigration Act of 1990 and asserts that this is a clear indicator that such individuals are not precluded from qualifying as multinational managers or executives. However, the AAO will not draw this conclusion based solely on an omission.

Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel's unsupported assertions are not persuasive on this point.

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 (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).

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.