

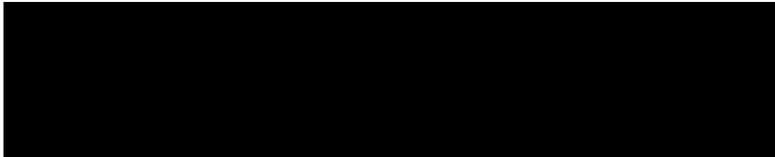
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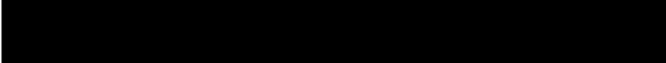


U.S. Citizenship
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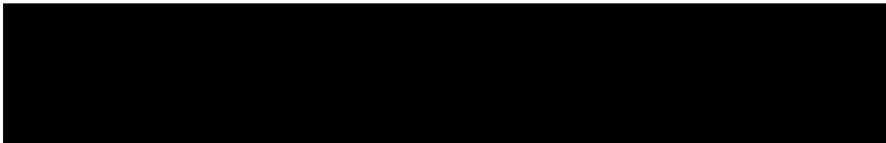


FILE: SRC 03 043 51255 Office: TEXAS SERVICE CENTER Date: **MAY 24 2007**

IN RE: Petitioner: 
Beneficiary: 

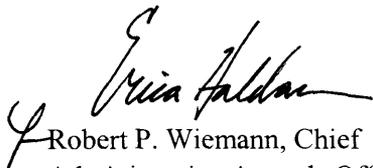
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 is engaged in the export and import of merchandise. The petitioner states that it is a subsidiary of GEE ESS International, 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 beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of director/vice-president for a three-year period.

The director denied the petition on May 27, 2004, 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 U.S. entity employed any additional employees and thus the beneficiary does not supervise a staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Thus, the director determined that the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

The petitioner subsequently filed an appeal on June 25, 2004. 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 contends that CIS should not be determining managerial or executive capacity merely on the basis of the number of employees that the beneficiary supervises or the job titles of the employees. Counsel contends that CIS cannot look at the company's size alone but must also take into account the reasonable needs of the organization and must consider the beneficiary's duties "in light of the overall purpose and stage of development" of the U.S. company. Counsel further asserts that the beneficiary is in a senior-level and executive position for the U.S. entity. Counsel states that the U.S. entity is in an early stage of development as the entity "does not require large staffing levels." In addition, counsel cites several decisions to support the claim that a beneficiary as a sole employee or managing a small number of supervisors may qualify as a position of managerial or executive capacity. 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(1)(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 (1)(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 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 November 27, 2002. The Form I-129 indicates that the beneficiary will be employed in the position of director for the petitioner, which claimed to have two employees. On the Form I-129, the beneficiary's proposed duties in the U.S. are described as the following:

Direct and coordinate activities of the organization and formulate and administer company policies: In consultation with the management and the Indian Company develop long range goals and objectives of the company. Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary. Direct and coordinate activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated to further attainment of goals and objectives. Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. Discuss with management and employees to review achievements and discuss required changes in goals or objectives of the company.

The petitioner also submitted several documents for the U.S. entity, including financial statements, tax returns, insurance policies, employee quarterly wage reports, and receipts and invoices, for 2002.

On April 27, 2003, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested additional information. The petitioner responded to the response on July 21, 2003. On December 22, 2003, the director sent out a second request for evidence with additional questions to be addressed by the petitioner based on its response to the initial request. The director requested the following documentation in the combined requests for evidence: (1) a description of the position held by the beneficiary, including all duties performed and percentage of time spent on each duty; (2) an organizational chart of the U.S. entity, including the position titles and duties of all of the employees; (3) a copy of the Form 1120, U.S. Corporation Income Tax Return, for 2002; (4) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for all employees for 2002 to 2003; (5) a position description of each individual employed by the U.S. entity, including all duties performed and percentage of time spent of each duty; (6) copies of Forms W-2 for all employees for 2002; (7) an explanation as to whether the beneficiary is performing the functions of the U.S. company since the submitted Quarterly Wage Reports indicate zero employees; and, (8) an explanation as to the products that are imported and exported by the petitioner and where such products are stored and sold.

In response to the director's request, the petitioner submitted the following job description of the duties to be performed by the beneficiary in the U.S. entity:

In consultation with the management and the parent company in India, develop long-range goals and objectives of the US subsidiary company. Develop strategic planning goals for this company – **15 percent of the time**

Direct and coordinate marketing, business development and import/export activities of the organization. Plan and manage all the business investments made by the foreign parent corporation in the United States. Oversee new investment activities, including reviewing proposals and exploring other businesses – **15 percent of the time**

Organize the company and its corporate affairs. Confer and cooperates with management personnel in formulating administrative and operational policies and procedures – **15 percent of time**

Responsible for corporate planning, administration, marketing, sales, import/export and purchase activities of the company and for all business activities in the US, costs, operation and future projections of the company and assessment of the progress of the company towards stated goals and objectives – **15 percent of the time**

Discuss with management and employees to review achievements and discuss required changes in projects or objectives of the company – **10 percent of the time**

Direct and coordinate activities of employees in the operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives – **10 percent of the time**

Direct and coordinate activities of employees in the operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives – **10 percent of the time**

Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives – **10 percent of the time**

Oversee the financial and accounting activities of the organization, including budgeting, tax and regulatory matters – **5 percent of the time**

Responsible to report and advise the parent company for future diversification of assets dependent on the prevalent market trends – **5 percent of the time**

The petitioner also provided job descriptions for the individuals currently employed by the U.S. entity which include the president, the store manager, the finance manager, and two floor helpers. The petitioner submitted an organizational chart of the U.S. company that indicates that the U.S. entity employs a president who supervises the beneficiary as the vice-president, who in turn supervises the store manager and the

finance manager, who supervise two floor helpers. In a letter submitted in response to the director's request for evidence, dated March 11, 2004, counsel for the petitioner asserts that the beneficiary "has two professional employees reporting to him" who are the finance manager and the store manager who "look after the day-to-day operations of the organization." Counsel further asserts that the beneficiary supervises an "outside Accountant, who prepares and files the taxes for the organization."

The petitioner also submitted Forms W-2 for 2003 for the beneficiary and four additional employees. The additional employees received annual salaries that ranged from \$3000 to \$7000, thus it is not clear that these employees worked a full-time schedule. Regardless, the Forms W-2 are for 2003 which is the year after the instant petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner also submitted the U.S. company's 2002 Form 1120, U.S. Corporation Income Tax Return, which indicated that the U.S. entity paid \$27,000 in compensation to officers, and did not pay any salaries or wages for 2002.

In addition, the petitioner submitted the company's Texas Employer's Quarterly Report for all four quarters of 2003 and the last three quarters of 2002. In the last quarter of 2002, the quarter in which the instant petition was filed, the U.S. entity employed one individual, the beneficiary. In addition, the petitioner submitted Form 941, Employer's Quarterly Federal Tax Return, for the last two quarters of 2003 and 2002. The Form 941 for the last quarter of 2002, the quarter in which the instant petition was filed, indicates that \$10,500 in wages was paid that quarter, which is the same wages paid to the beneficiary in the state tax returns.

The director denied the petition on May 27, 2004, 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 does not appear that the beneficiary supervises a staff who will relieve him from performing non-qualifying duties. Thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

On appeal, counsel for the petitioner contends that the CIS should not be determining managerial or executive capacity merely on the basis of the number of employees that the beneficiary supervises or the job titles of the employees. Counsel contends that CIS cannot look at the company's size alone but must also take into account the reasonable needs of the organization and must consider the beneficiary's duties "in light of the overall purpose and stage of development" of the U.S. company. Counsel further asserts that the beneficiary is in a senior-level and executive position for the U.S. entity. Counsel states that the U.S. entity is in an early stage of development, as the entity "does not require large staffing levels." In addition, counsel cites several decisions to support the claim that a beneficiary as a sole employee or managing a small number of supervisors may qualify as a position of managerial or executive capacity. 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 specific 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).

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 "develop long-range goals and objectives of the US subsidiary company"; "develop strategic planning goals for this company"; "organize the company and its corporate affairs"; and "responsible to report and advise the parent company for future diversification of assets dependent on the prevalent market trends." 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 "direct and coordinate marketing, business development and import/export activities of the organization"; "plan and manage all the business investments made by the foreign parent corporation in the United States"; "oversee new investment activities, including reviewing proposals and exploring other businesses"; "responsible for corporate planning, administration, marketing, sales, import/export and purchase activities of the company and for all business activities in the US, costs, operation and future projections of the company and assessment of the progress of the company towards stated goals and objectives"; "direct and coordinate activities of employees in the operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives" and "oversee the financial and accounting activities of the organization, including budgeting, tax and regulatory matters."

Since the petitioner has not provided evidence that the U.S. company hired any additional employees at the time the instant petition was filed, it appears that the beneficiary will be performing non-qualifying duties related to purchasing, finance, marketing, sales, import/export functions, and business operations, rather than directing such activities through subordinate employees. 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. at 604.

As noted above, according to the petitioner's statement on Form I-129, the U.S. company has two employees. In addition, in response to the director's request for evidence, the petitioner indicated that the U.S. entity has six employees. However, the petitioner's state tax return, Texas Employer's Quarterly Report, for the quarter ended December 2002, indicated one employee. Thus, for the quarter in which the instant petition was filed the U.S. company employed one individual. Although the company submitted the petitioner's federal and state tax returns for 2003 which indicated that the U.S. entity employed additional individuals in 2003, that was after the instant petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In addition, the petitioner submitted the U.S. company's 2002 Form 1120, U.S. Corporation Income Tax Return, which indicated that the U.S. entity paid \$27,000 in compensation to officers, who is shown as the beneficiary, and the U.S. entity did not pay any salaries and/or wages for 2002. Thus, it does not appear that the U.S. company employed any individuals in addition to the beneficiary at the time the petition was filed.

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.

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.* 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. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from

primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

At the time of filing, the petitioner was a one-year old company that imported and exported merchandise and managed a dollar store. According to the Form 941, Employer's Quarterly Federal Tax Return, for the last quarter of 2002, the quarter in which the instant petition was filed, the U.S. entity employed one individual who is assumed to be the beneficiary. As the only employee of the U.S. entity, it appears that the beneficiary will be performing all of the various operational tasks inherent in operating a retail store on a daily basis, such as acquiring products, negotiating contracts with suppliers, preparing budgets, budgeting, bookkeeping, paying bills, maintaining inventory, handling customer transactions and customer service. 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. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary alone. 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On appeal, counsel asserts that the position offered to the beneficiary is executive in 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.* As the beneficiary is the only employee, the U.S. company has not established a complex organizational structure which would elevate the beneficiary to a position of primarily 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 any 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 beneficiary's position as one which manages 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 any staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. Again, 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 consistently 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 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. The cases cited by counsel are not AAO precedent decisions.

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 to the extension of an L-1 nonimmigrant visa pursuant to 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.