

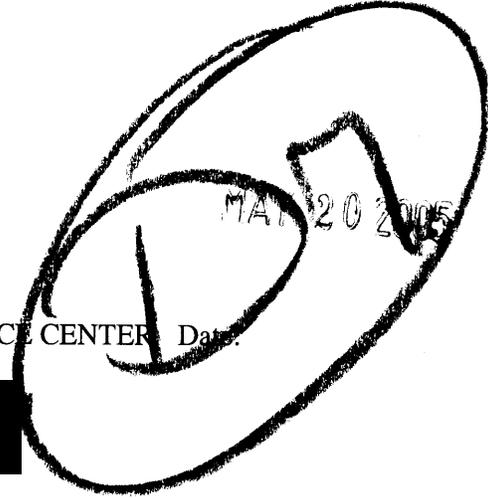
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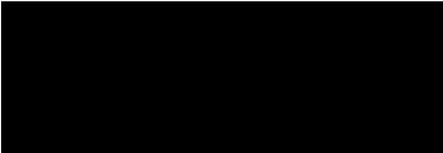


File: SRC 03 095 51038 Office: TEXAS SERVICE CENTER Date:

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)

IN 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, Director
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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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 is a Texas corporation engaged in the operation of a gas station and convenience grocery store. The petitioner claims that it is the affiliate of Hardik Hotels Private Limited, located in Mumbai, India. 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 status.

The director denied the petition concluding that (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) the petitioner did not establish that the U.S. entity was doing business for the previous twelve months.

The petitioner subsequently filed the instant 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 beneficiary performs solely executive and managerial duties and contends that the director placed undue emphasis on the type of business and number of employees. Counsel further asserts that the director misinterpreted certain evidence provided and overlooked key evidence which established that the petitioner had been doing business during the first year of operations. Counsel submits a brief and additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an addendum attached to the Form I-129 Petition, submitted on February 13, 2003, the petitioner described the beneficiary's duties as follows:

The Beneficiary will continue to be employed as the President of the Petitioner, and will continue to be responsible for performing the following duties; hiring and firing managers; supervising subordinate employees; overseeing preparation of sales and inventory reports; reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers.

In the performance of his duties, the Beneficiary will receive minimum supervision from the Board of Directors. Beneficiary will exercise wide discretion and latitude in the performance of his duties.

On June 2, 2003, the director requested additional evidence, including, in part: (1) a definitive statement describing the beneficiary's employment including a listing of all duties and the percentage of time spent on each duty; (2) the number of subordinate managers/supervisors who report to the beneficiary, including their job titles, duties and educational background; and (3) an explanation as to who provides the product sales/services of the business.

In a response letter dated July 17, 2003, the petitioner provided the following position descriptions for the beneficiary and his claimed subordinates:

President

Duties include: ten percent (10%) of his time hiring and firing managers; twenty percent (20%) supervising subordinate employees; fifteen percent (15%) overseeing preparation of marketing, sales and inventory reports; twenty percent (20%) reviewing an [sic] analyzing

sales data, financial reports, budget and expense reports prepared by subordinate employees; fifteen percent (15%) establishing and implementing policies to achieve marketing goals; twenty percent (20%) managing the company, and overseeing marketing campaign developed by subordinate managers. As President of the Petitioner, the Beneficiary is responsible for not only overseeing the management of the retail location, but also reviewing additional retail locations. The Beneficiary's position will be solely executive or managerial and does not include doing day-to-day work, of the business. The Beneficiary functions at a senior level and holds the highest authority level within the organization.

J.G. Torres, Operations Manager

Duties Include: Preparing marketing campaign; locating vendors; supervising subordinate employees who prepare inventory and expense reports; resolving issues relating to defective or unacceptable goods with vendors; supervising purchase activities; maintain/order inventory; supervise subordinate employees.

C.G. Gamboa, Manager

Duties Include: Preparing employee work schedule; maintain/order inventory; preparing maintaining sales and inventory report; preparing budget and expense reports; reconcile all accounts and prepare sales report; maintain records of underground petroleum storage tanks in accordance with state and federal environmental laws; and supervise subordinate employees.

E. Torres, Assistant Manager/Cashier

Duties Include: maintain/order inventory; preparing and maintaining inventory report; assist in preparing daily sales report; and assist in preparing budget and expense reports; operate cash register/credit card machine; reconcile daily cash with sales receipts; and supervising subordinate employees.

P.M. Pena, Cashier

Duties Include: assist customers; operate cash register/credit card machine; and reconcile daily cash with sales receipts.

T.T. Chareles, Cashier

Duties include: assist customers; operate cash register/credit card machine; and reconcile daily cash with sales receipts.

The petitioner also submitted its Form 941, Employer's Quarterly Income Tax Return and Texas Employer's Quarterly Wage Report for the first quarter of 2003. Although all of the above employees are listed in the Quarterly Wage Report, the petitioner indicates that it employed five employees in January 2003 and only four employees in February and March of 2003.

On March 29, 2004, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner did not demonstrate that the beneficiary would be managing other professionals or

managers. The director further observed that the beneficiary would have to engage in the day-to-day business activities given the current structure of the company and pay data of the employees listed.

On appeal, counsel for the petitioner disputes the director's decision and asserts that the beneficiary will perform solely managerial or executive duties. Counsel contends that the director placed undue emphasis on the small size and nature of the business in concluding that the petitioner cannot support a managerial or executive position, asserting, "a typical corporation that operates retail business does not normally hire more than five to six workers, and someone has to be the manager of all the retail businesses. Yet the District Director's position is that a retail store cannot hire a manager." On appeal, counsel repeats the job description previously provided by the petitioner and further explains:

By overseeing preparation of sales and marketing reports, and reviewing an[d] analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; the Beneficiary will primarily be responsible for managing the Marketing "department, function or component" of the Petitioner as he will devote more than Forty Five Percent (45%) of time to these activities. Furthermore, by reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees; managing the company, and overseeing marketing campaign developed by subordinate managers, as well as reviewing additional retail locations, the Beneficiary will primarily supervise and control other managerial or professional employees, including the Operations Manager, who in turn oversees a subordinate manager. The Beneficiary is responsible for seeking additional business locations for the Petitioner, thus the Beneficiary directs the major component or function of the Petitioner's efforts to expand its operations. The Beneficiary does not have time to perform day-to-day operations.

Finally, counsel cites an unpublished AAO decision and several U.S. District Court decisions in support of the petitioner's assertion that a small company, including a small retail business, can support a bona fide managerial or executive position.

Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. 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.*

In the instant matter, the petitioner does not clarify whether it claims the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel refers to the statutory definitions of both managerial capacity and executive capacity, thus, it appears that counsel intends to represent that the beneficiary will be primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section

101(a)(44)(A) of the Act. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

The petitioner has provided a brief description of the beneficiary's job duties and assigned a percentage to the amount of time the beneficiary spends performing each described task. On appeal, counsel notes that the beneficiary devotes 45 percent of his time to managing the petitioner's marketing "department, function or component," including overseeing marketing campaigns and implementing policies to achieve marketing goals. The petitioner operates a gas station and convenience store, and, according to its 2002 and 2003 income tax returns, has never spent any money on advertising. The petitioner has not sufficiently explained the beneficiary's marketing goals and policies or described the petitioner's "marketing campaign" such that the AAO can determine that the beneficiary plausibly performs any managerial duties related to this function. The petitioner indicates that the beneficiary devotes 35% of his time to overseeing preparation of and reviewing or analyzing marketing, sales, financial, budget, inventory and expense reports. The petitioner has not identified the specific duties involved in "overseeing preparation" of said reports, or explained how he utilizes the information contained in the reports. Without additional explanation, the AAO cannot conclude that reviewing reports rises to the level of managerial responsibility as contemplated by the regulations. The petitioner further indicates that the beneficiary manages the "expansion function" by "reviewing additional retail locations." However, the petitioner does not indicate how much time the beneficiary dedicates to this responsibility, provide any documentary evidence of the petitioner's expansion efforts, or describe any specific tasks the beneficiary has undertaken with respect to this function.

Overall, the petitioner's job description is insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity. 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)). 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).

The petitioner also states that the beneficiary receives only minimum supervision from the petitioner's Board of Directors and will "exercise wide discretion and latitude in the performance of his duties." These statements, in addition to borrowing liberally from the definition of executive capacity, are general and do not convey an understanding of the beneficiary's daily duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). See also section 101(a)(44)(B)(i) and (ii). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

On appeal, counsel for the petitioner asserts that director erred by emphasizing the number of workers employed by the petitioner, noting that the statute and regulations do not impose such a requirement with respect to the size of the petitioning organization. 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, Citizenship and Immigration Services (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.

At the time of filing, the petitioner did not provide a description of its staffing levels as required by 8 C.F.R. § 214.2(l)(14)(ii)(D). In response to the request for evidence, the petitioner stated that it employed the beneficiary, an operations manager, a manager, an assistant manager/cashier, and two cashiers. Although the petitioner described duties for six employees, the petitioner's Texas Employer's Quarterly Report for the first quarter of 2003 indicates that the petitioner reported four employees in February 2003, the month in which the petition was filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Given this inconsistency, the AAO is unable to determine which employees were working for the petitioner as of the date of filing. Based on the Quarterly Wage Report, it is evident that the two individuals identified as cashiers and the cashier/assistant manager were employed on a part-time basis if they were in fact employed by the petitioner as of February 2003.

Although the petitioner did not provide its hours of operation, the AAO will assume that its gas station/convenience store is open daily from 7:00 AM to 10:00 PM, or 105 hours per week. The AAO will further assume that the petitioner requires two people to be present in the store, at least during daytime hours when suppliers deliver gasoline and grocery items. At most, the petitioner employed two managers and three part-time cashiers to perform 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. In addition to these routine duties, the petitioner claims that its two managers develop marketing campaigns and prepare marketing, sales, financial, budget, inventory and expense reports. 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 president, and three to five subordinates, particularly since the cashiers appear to work only part-time. 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, directly supervising low-level employees, and/or preparing many of the reports purportedly assigned to the petitioner's "managers." 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. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). 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. at 604.

The petitioner claims that the beneficiary will have supervisory authority over subordinate employees, including an operations manager who in turn supervises a manager. 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 petitioner does not assert that any of its employees are professionals. Although the petitioner identifies two layers of “management,” the duties of the operations manager, manager and assistant manager/cashier overlap significantly, and some of the duties attributed to the operations manager, namely supervision of employees who prepare inventory and expense reports, overlap with the beneficiary’s duties. Furthermore, many of the more sophisticated tasks attributed to the beneficiary’s subordinates, including development of marketing campaigns, preparation of marketing, budget, financial and expense reports, do not seem plausible given the nature of the petitioner’s business. Finally, as discussed above, the petitioner has provided inconsistent evidence with respect to its number of employees at the time of filing, making it difficult to determine whom the beneficiary supervises. Given the petitioner’s limited staffing levels and reasonable needs of the petitioner’s business, it has not been established that any of the beneficiary’s subordinates would be primarily engaged in supervisory or managerial duties.

The petitioner may not create artificial tiers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary’s subordinates correspond to their placement in an organization’s structural hierarchy. CIS reviews the totality of the record, including the descriptions of a beneficiary’s duties and his or her subordinate employees, the nature of the petitioner’s business, the employment and remuneration of employees and any other facts contributing to a complete understanding of a beneficiary’s actual role in a business, when examining the managerial or executive capacity of a beneficiary. In this matter, upon review of the totality of the record, the petitioner has not established that the beneficiary performs primarily executive or managerial duties.

The AAO acknowledges the petitioner’s claim that it is seeking to expand its business to other retail locations. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts [REDACTED] (Reg. Comm. 1978). When a new business is 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 activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. As noted above, the regulation 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. In order to qualify for an extension of L-1A nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary’s duties and the staff of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity.

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). The AAO does not dispute that the beneficiary spends some portion of his time performing duties which meet the definition of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. However, the petitioner has not established that he *primarily* performs these duties. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO is not required to conclude that the beneficiary qualifies as an executive under section 101(a)(44)(B) of the Act simply because he possesses an executive job title and exercises discretionary decision-making authority over the petitioner's operations.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and [REDACTED] *Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(I)(14)(ii).

Counsel also cites *Gasboy Texas, Inc. v. Upchurch*, 2004 WL 396257 (N.D. Tex.), in which the United States District Court found that an AAO decision was not due deference because the administrative record was "shoddy" and haphazardly assembled and because the AAO decision did not address a letter submitted by the petitioner. Without discussing the applicable statute and regulations, the court summarily concluded that the "president and general manager" of a gas station/convenience store qualified as a manager and executive under "8 C.F.R. § 214.2(I)(ii) [sic]." However, the *Gasboy* decision does not stand for the proposition that all gas station managers qualify as a manager or executive under the Act; rather, the court's decision was based on an analysis of a specific deficiency in the administrative record. Other than noting that the petitioner in the cited case operated a business similar to the business operated by the petitioner in the instant matter, counsel did not establish that the facts of the two cases are analogous. Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Counsel's reference to the *Gasboy* decision is not persuasive.

Counsel further refers in to an unpublished decision in which the AAO determined that the beneficiary was serving in an 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. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily executive or managerial capacity. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization or that he will be primarily supervising a subordinate staff that would relieve him from performing the non-qualifying duties of operating a gas station and convenience store. The provided description of the beneficiary's duties is insufficient to demonstrate that the beneficiary is primarily acting in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that it has been doing business during the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The evidence submitted with the initial petition indicated that the beneficiary purchased the assets of its gas station/convenience store and signed a lease for the property within a few weeks following the approval of the new office petition. The petitioner submitted its 2002 U.S. Corporation Income Tax Return, invoices for purchase of goods for the store during the last quarter of 2002 and first quarter of 2003, and evidence of wages paid to employees since the first quarter of 2002. The petitioner also submitted a "management agreement" signed on February 28, 2002 with [REDACTED] which pertains to the petitioner's sale of alcoholic beverages. The agreement states "the 'permittee' [REDACTED] shall at all times retain exclusive control of every phase of the purchase, storage, distribution, possession, transportation and sale of all wine, beer and malt liquor inventory."

The director denied the petition, concluding that the petitioner had failed to establish that it had been doing business for the previous year. Specifically, the director stated "the petitioner has entered into a management agreement with [REDACTED] which places control of the petitioner's goods and shows petitioner does not control or own the goods it has agreed to sell for [REDACTED]. The director further noted that the evidence submitted merely shows that the petitioner purchased inventory.

On appeal, counsel asserts that the director did not fully understand the terms of the petitioner's management agreement and contends that the petitioner submitted sufficient documentation to establish that company had been doing business for the previous year. With respect to the management agreement, counsel states:

Article 6(a) of this agreement states that this agreement shall terminate in sixty (60) days from February 28, 2002 or upon receipt of a TABC license by the Petitioner. Since the Petitioner received its TABC license on May 6, 2002, the management agreement was terminated on May 6, 2002 by the provision contained in Article 6(a) of the said agreement. Furthermore, the scope of this agreement is limited to alcoholic beverages. Thus the District Director is wrong in has [sic] assertion that the Petitioner does not control or own its own goods.

Upon review, the petitioner has submitted sufficient evidence to establish that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO is satisfied by counsel's explanation regarding the terms of the submitted management agreement, and disagrees with the director's conclusion that

the petitioner has been merely purchasing inventory, but not providing goods or services during its first year of operations. The director's decision with respect to this issue will be withdrawn.

Beyond the decision of the director, the petition indicates that the beneficiary owns a majority share of both the petitioner and the foreign entity. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.