

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

D7

PUBLIC COPY



File: SRC 05 118 50711 Office: TEXAS SERVICE CENTER Date: DEC 08 2006

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

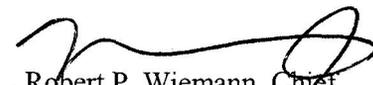
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 visa petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability company organized under the laws of the State of Texas and claims to be engaged in the marketing and distribution of bathroom fixtures. The petitioner states that it is an affiliate of IC Fabac, S.A. de C.V., located in Mexico. The petitioner seeks to employ the beneficiary as the operating manager of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary was employed by the foreign entity in a primarily managerial capacity for one continuous year during the three years preceding the filing of the petition; or (2) that the intended U.S. operation had secured sufficient physical premises to house the new office.

The petitioner filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary, in his current role with the foreign entity, utilizes the services of independent contractors and manages an essential function of the organization. Counsel further asserts that the U.S. company “can operate without an actual, physical office,” and argues that the director’s strict adherence to the requirement that the petitioner secure an office “does not take into consideration the type of operation” in which the petitioner intends to engage. Counsel submits a brief and 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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

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

The first issue in this matter is whether the petitioner has secured sufficient physical premises to house the new office in the United States, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The nonimmigrant petition was filed on March 17, 2005 without evidence that the U.S. company had secured sufficient physical premises from which to operate its proposed marketing and wholesale business. Accordingly, in a request for evidence dated March 26, 2005, the director instructed the petitioner to submit "evidence of a valid business lease or purchase for the U.S. entity and evidence it is zoned for commercial use."

In a response dated April 14, 2005, counsel for the petitioner stated that the petitioner "has secured an office and will execute a lease upon approval of the I-129 petition." The petitioner submitted a copy of correspondence between the beneficiary and the general manager of Regus confirming that the beneficiary had inquired about "Virtual Offices" available at the North Mopac Centre in Austin, Texas in January 2005. The attached information regarding the Regus Virtual Offices indicates that the available options would include a "mail only"

service, a “virtual office,” which includes mail, fax handling, and personalized call and message handling, and an option allowing the use of an office for up to 50 hours per month.

The petitioner also submitted a business plan dated April 14, 2005, which indicates the petitioner’s intent to eventually open a distribution center and showroom in the United States. The business plan states that if the petition is approved, the beneficiary would open a temporary office with “HQ Global Workplaces,” and then start looking for a warehouse operation service provider.

The director denied the petition on April 29, 2005, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. The director noted that, contrary to counsel’s statement that the petitioner “has secured an office,” the evidence submitted shows that the petitioner has merely been provided with information regarding virtual office packages. The director further noted that at most, the petitioner intended to secure office space for 50 hours per month, and had not demonstrated that a virtual office would be sufficient to enable the U.S. entity to conduct the intended business. Finally, the director noted that no agreement had yet been signed with the company offering the virtual office, and emphasized that the physical premises must be secured as of the date of filing.

On appeal, counsel for the petitioner states:

In spite of the fact that the Petitioner is a “new” office, it can operate without an actual, physical office. What is actually required is for [the beneficiary] to call on prospects and customers at their respective locations. All that [the beneficiary] needs is a telephone and can operate from a home or even from anywhere. The fact that he provided evidence of a possible office lease indicates that one is available if, and when he might need one. Strict adherence to “securing” an office does not take into consideration the type of operation of the Petitioner....

Upon review, counsel’s assertions are not persuasive. Notwithstanding counsel’s earlier indication to the contrary, counsel now concedes that the petitioner has not secured physical premises to house its intended wholesale business in the United States.

On appeal, counsel argues that the petitioner will not require an office in order to conduct business and suggests that strict adherence regulatory requirement that physical premises be “secured” is not warranted if the type of business operated by the petitioner is taken into consideration. Counsel submits no evidence in the form of Congressional reports, case law, or other documentation to support his argument that USCIS is required to consider the type of business conducted by the U.S. business or the petitioner’s need for physical premises in determining whether the petitioner has satisfied its evidentiary burden pursuant to 8 C.F.R. § 214.2(l)(v)(A). The plain language of the regulation clearly requires that “sufficient physical premises to house the new office have been secured.” Further, 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). Accordingly, counsel’s indication that the petitioner may secure office space, if such space is required, at some unknown time in the future will not satisfy the petitioner’s burden of proof.

In addition, counsel's claims on appeal are contradicted by the petitioner's business plan, which indicates that the U.S. company requires a showroom and warehouse in order to operate its intended business. 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).

Finally, the AAO notes that even if the petitioner had signed a "virtual office" agreement, the petitioner would not have established that it had secured adequate physical premises to house an import and wholesale company. The proposed "virtual office" options would not satisfy the petitioner's burden to show that it has obtained sufficient physical premises from which to operate its intended business and would appear to grant the petitioner, at most, the right to use an office for several hours per week.

The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

The second issue in this matter is whether the beneficiary has been employed for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3)(v)(B).

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 a letter dated March 16, 2005, the petitioner provided the following description of the beneficiary's duties as the managing director of the foreign entity:

[The beneficiary] has been the executive running the Mexican affiliate. . . . As such he has been the individual that sets company goals, policies and procedures. He has the authority to hire and fire employees and is accountable solely to the shareholders of the corporation, namely himself and his wife. All functions which are required are outsourced as needed.

* * *

He is responsible for the planning, organizing, directing and controlling the business. He sets goals and policies for the Mexican business.

The petitioner stated that the beneficiary had served in this capacity since 2003. The petitioner submitted a partially translated copy of what appears to be the articles of incorporation (*acta constitutiva*) for the foreign entity, dated April 2, 2002, which identify the beneficiary as the majority shareholder and "sole administrator" of the company. The majority of the supporting documentation was submitted in the original Spanish language without English translations.

In her request for evidence, dated March 26, 2005, the director instructed the petitioner to submit evidence that the beneficiary was employed by the foreign entity for at least one year during the three years prior to the filing of the petition. The director also requested that the petitioner submit evidence that the beneficiary was employed by the foreign entity in a managerial or executive capacity, including: (1) a list of his day-to-day job duties; (2) an organizational chart indicating the job titles and a job description for each employee managed by the beneficiary; (3) payroll evidence to document the foreign entity's employees; and (4) evidence related to the foreign entity's claimed outsourced contractors, to include their job titles, job duties and evidence of payments made to the contractors, including copies of contracts or agreements between the foreign company and the contractors.

In a response dated April 14, 2005, the petitioner resubmitted its partially translated "acta constitutiva" as evidence of the beneficiary's employment with the foreign entity. Counsel emphasized that as the foreign entity's sole administrator, the beneficiary is the foreign entity's sole legal representative and as such is charged with responsibility for the entire business, including administering the business, exercising authority

over its assets, representing the corporation before government entities, executing and signing credit instruments, and appointing and removing the director or general manager and naming other directors and managers. Counsel noted that the beneficiary has held the position of “sole administrator” since the formation of the company on April 2, 2002. Counsel stated that for tax purposes the beneficiary has arranged to be paid by a separate company, Integradora de Asesoría y Servicios, S.A. de C.V., which invoices the foreign entity for his services. The petitioner submitted five un-translated invoices issued to the foreign entity by Integradora de Asesoría y Servicios S.A. de C.V., for the months of August through December 2004.

With respect to the beneficiary’s job duties while employed by the foreign entity, counsel for the petitioner submitted the following description:

[The beneficiary] has been the legal representative of the foreign entity from the very inception of the corporation. The powers granted to the legal representative can be considered executive or managerial in nature. Additionally, [the beneficiary] is actually the individual that contracts with third parties to operate the foreign entity.

As the company executive, he sets goals, policies and procedures. He has the authority to hire and fire employees and is accountable solely to the shareholders of the corporation. . . All functions which are required are outsourced as needed. [The beneficiary] decides the direction of the business, determines which markets to develop, negotiates with suppliers and prospective clients. He hires third-party contractors for different services, including accounting (MM Consultores), Human Resources (Integradora de Asesoría y Servicios), Office Services (HQ Global Workplaces), Logistics and Freight (Menlo and UPS) and Marketing (Adverti). [The beneficiary] handles relationship and responsibilities with governmental agencies, is responsible for new product development and ultimately is responsible for the entire operation.

Counsel for the petitioner listed the contractors utilized by the foreign entity, and indicated that they provide the following services: bookkeeping, tax reporting, and financial services; human resources (employees and payroll); call center and offices; logistics and freight; and marketing (brochures and publicity). The petitioner submitted the following documents as evidence of the foreign entity’s use of contractors: (1) five un-translated invoices from the bookkeeping/financial consulting firm; (2) a mostly un-translated contract between the foreign entity and Integradora de Asesoría y Servicios S.A. de C.V., dated July 1, 2004; (3) copies of monthly invoices from HQ Global Workplaces dated December 2003 through April 2005 for telephone service, fax service and “phone identity program”; (4) several invoices from Menlo Worldwide Forwarding, Inc., for freight forwarding services billed to the foreign entity between September 2004 and January 2005; (5) three un-translated invoices from Adverti, dated February, May and June 2004.

The director denied the petition on April 29, 2005, concluding that the petitioner had not established that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director observed that the beneficiary himself is responsible for negotiating with suppliers and prospective clients, as well as for new product development. The director acknowledged the foreign entity’s contractors, but determined that they would perform support functions, while the beneficiary would personally be required

to provide the services of the company and thus is not employed in a primarily managerial or executive capacity. The director further found that insufficient evidence had been submitted to establish that the beneficiary had been employed by the foreign entity for at least one of the previous three years. The director noted that the invoices submitted from Integradora de Asesoría y Servicios, S.A. de C.V. were not translated, and did not indicate wages paid to the beneficiary or to any other individual.

On appeal, counsel for the petitioner asserts that the beneficiary has been employed by the foreign entity as its majority shareholder and sole administrator since the formation of the company. Counsel emphasizes that while the beneficiary did not receive “wages” from the foreign entity, he was indirectly paid for his services and should be considered an employee of the foreign entity. Counsel cites *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) in support of his claim that employment does not necessarily depend upon the amount or the existence of a salary.

Counsel further cites an unpublished AAO decision in which the sole employee of a company was found to be employed in a managerial or executive capacity, noting that managers may supervise independent contractors as well as employees. Counsel cites the statutory definitions of managerial and executive capacity and further asserts:

[The beneficiary] manages the entire foreign entity; he could be considered to manage an essential company function, such as Administration/Coordination of all operations; he obviously functions at a senior level in the organization; and exercises discretion over day to day operations. I respectfully submit that under the above definition [the beneficiary] is PRIMARILY engaged in a managerial or an executive capacity. . . .

Counsel states that the beneficiary “fits almost exactly the description of an Executive.” Counsel asserts that the director failed to take into account the reasonable needs of the organization in light of its overall purpose and stage of development, “since the foreign entity. . . basically operates with one employee ([the beneficiary]) utilizing independent contractors as needed.” Counsel contends that the foreign entity may eventually have a need for more subordinate employees to perform non-executive tasks, but currently depends heavily on independent contractors.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. However, the AAO is persuaded that the beneficiary, as the foreign entity’s majority shareholder, managing director, and “sole administrator,” has been an employee of the foreign entity for at least one year out of the three years preceding the filing of the petition. As the petitioner has submitted evidence that the foreign entity has been doing business and has no other employees, it is reasonable to conclude that the beneficiary’s employment with the foreign organization has been on a full-time and continuous basis. Accordingly, the director’s determination that the beneficiary was not an employee of the foreign entity for the requisite time period will be withdrawn.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner’s description of the job

duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner's initial description of the beneficiary's duties merely paraphrased the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). For example, the petitioner stated that the beneficiary "sets company goals, policies and procedures," "has the authority to hire and fire employees," "plans, organizes, directs and controls the business" and "is accountable solely to the shareholders of the corporation." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). USCIS will not accept a vague job description and speculate as to what managerial or executive duties the beneficiary performs to "direct and control" the business.

Accordingly, the director specifically requested a detailed description of the beneficiary's day-to-day job duties. In response, the petitioner submitted essentially the same vague job description, adding that the beneficiary "decides the direction of the business, determines which markets to develop, and negotiates with suppliers and prospective clients," and holds responsibility for "new product development." The petitioner did not provide the detailed description of the beneficiary's day-to-day duties as requested by the director. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). A detailed description of the beneficiary's day-to-day duties would have assisted greatly in establishing whether the beneficiary performs primarily managerial or executive duties, or whether he is primarily engaged in non-qualifying operational or administrative functions. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

However, new duties included in the petitioner's response to the director's request for evidence suggest that the beneficiary himself is responsible for procuring products from suppliers and selling those products to clients, as well as performing product and/or market research related to new product development. Although counsel and the petitioner place great emphasis on the third party contractors utilized by the foreign entity for different services, none of the contractors is claimed to perform any duties related to procurement, sales or development of the petitioner's products. Therefore, it is reasonable to assume, and has not been shown otherwise, that the beneficiary himself is solely responsible for all non-managerial duties associated with these functions. Furthermore, as the foreign entity is primarily engaged in the wholesale business, it can be concluded that the sales duties performed by the beneficiary are not merely incidental to any managerial or executive tasks he performs. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the

enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The 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 show 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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position. In the instant matter, while the beneficiary evidently exercises discretion over the foreign entity, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

As noted above, such a conclusion is further supported by the lack of evidence of subordinate employees to relieve the beneficiary from performing the non-managerial and non-executive tasks associated with his responsibilities. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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).

At the time of filing, the foreign entity was a three-year-old company engaged in the wholesale distribution of bathroom fixtures. The petitioner claims that the foreign entity operates a distribution center in Monterrey, Mexico. The company employs the beneficiary as managing director and utilizes the services of a bookkeeping/financial consulting firm, logistics/freight-forwarding companies, a payroll/human resources company, and a marketing company which creates brochures and other publicity materials for the foreign entity. The petitioner has opted not to provide detailed position descriptions for the contracted employees, although these were requested by the director. As noted above, the petitioner, a sales company, does not claim to directly or indirectly employ any sales staff. Nor does the record establish that any of the beneficiary's subordinates would perform other duties associated with operating this type of business, including administrative matters such as issuing invoices and following up on payments, coordinating orders with suppliers, warehouse and inventory-related tasks involved in operating the claimed "distribution center," paying suppliers, responding to customer inquiries, and other routine operational and administrative tasks. As the beneficiary is the only full-time employee of the foreign entity, it is evident that he is required to primarily perform tasks required to provide a service or produce a product.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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.

On appeal, counsel claims for the first time that the beneficiary manages an essential function “such as Administration/Coordination of all operations.” 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 provide a detailed job description that clearly specifies 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 “primarily” 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. The petitioner has neither provided a detailed description of the beneficiary's duties, nor identified the “essential function” with specificity. To extend the term “function manager” to encompass a function as broad as “coordination of all operations” would render the term virtually meaningless.

Counsel 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.

Furthermore, while it is true that the sole employee of a company can qualify as a manager or executive, the petitioner still has the burden of establishing that someone other than the beneficiary, either direct employees or independent contractors, performs the majority of the non-managerial and non-executive tasks associated with operating the business on a daily basis. Furthermore, the AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The petitioner cannot be exempted from this statutory requirement merely because it claims that the foreign entity is still in a preliminary stage of development.

Finally, the AAO notes that the fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*,

724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Here, the petitioner has not established that the beneficiary performs primarily managerial or executive duties in his current role with the foreign entity.

Based on the foregoing discussion, it cannot be found that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Another issue not addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval of the "new office" petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). 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. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner has provided only a vague and nonspecific description of the beneficiary's proposed duties that fails to identify what tasks he will perform on a day-to-day basis. The position description provided is essentially identical to that provided for the beneficiary's current role and is deficient for the reasons discussed above. 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).

Furthermore, the majority of the beneficiary's duties, as provided in response to the director's request for evidence are non-qualifying duties that do not clearly fall under traditional managerial or executive duties as defined in the statute. *See* sections 101(a)(44)(A) and (B) of the Act; 8 U.S.C. §§ 1101(a)(44)(A) and (B). For instance, the petitioner indicated that the beneficiary's specific duties would include following up with current and prospective customers, supplier payment coordination, customer accounts receivables, invoicing, warehouse and inventory handling, order shipping coordination and customer service. Although requested by the director, the petitioner did not submit a detailed business plan, a proposed organizational chart, or other evidence regarding the intended staffing levels after the first year of operations. 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)). Accordingly, the petitioner has not established that the beneficiary would be relieved from performing primarily non-qualifying duties within a one-year period. 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 Intn’l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Overall, the evidence submitted does not demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. For this additional reason, the appeal will be dismissed.

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

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

ORDER: The appeal is dismissed.