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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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DATE: **OCT 03 2011**

Office: VERMONT SERVICE CENTER

FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, states that it is engaged in "export-import; cleaning." It claims to be an affiliate of Carvalho & Domingues, Ltda, located in Brazil. The beneficiary was previously granted L-1A classification for a period of one year in order to open a new office in the United States. The petitioner seeks to extend the beneficiary's employment in the position of president and chief executive officer for three additional years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director further found that the petitioner presented no evidence that it had secured sufficient physical premises to house its operations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner contends that the director failed to review the petition under the standards applicable to the statutory definition of executive capacity, and placed undue emphasis on the size of the petitioning company.

I. The Law

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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. Discussion

A. Employment in a Managerial or Executive Capacity

The primary issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. On appeal, counsel contends that "this Petition is NOT based on a managerial capacity." Accordingly, the AAO will limit its review to whether the petitioner established that the beneficiary will be employed in an executive capacity under the extended petition.

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

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 26, 2008. The petitioner indicated on Form I-129 that it has seven employees and gross income of \$64,086 for the first six months of 2008.

In a letter dated July 23, 2008, counsel for the petitioner stated that the beneficiary, as Chief Executive Officer and President of the company "has overall direction and authority for control of the company as well as the hiring and firing of employees, establishing corporate policies, establishing corporate purchase and acquisition criteria," as well as responsibility for "setting financial goals and budgets, all marketing decisions and expansion plans."

The petitioner, in its letter dated July 18, 2009, described the company as a start-up involved in two types of business, specifically "Export-Import and Cleaning." The petitioner noted that the "cleaning component is the dominant part of the business." The petitioner noted that it relies on a combination of employees and independent contractors for staffing.

The petitioner submitted an organizational chart in support of the petition. The chart identifies the beneficiary as President/CEO with two direct subordinates, a director of marketing [REDACTED] and a director of importation and exportation [REDACTED]. Subordinate to the director of marketing, the chart depicts an assistant manager [REDACTED] an "assistant manager for independent contractors" [REDACTED] office cleaners and construction cleaners.

In addition, the petitioner submitted a payroll summary for the period January 1 through June 24, 2008. The payroll summary identifies wages paid to the beneficiary, [REDACTED], and to six persons not named on the organizational chart. The petitioner's payroll records did not show any wages paid to the two claimed "assistant managers."

As evidence of its use of independent contractors, the petitioner provided a bookkeeper services agreement with MBA Accounting Services, signed in January 2008. Under the terms of the agreement, the bookkeeper provides a monthly record of income, expenses, profit and loss statements, bank reconciliation, weekly payroll, and quarterly state and federal employment filings.

The petitioner also submitted a copy of its City of Jacksonville Business Tax Receipts which indicate that the company operates as an "Employment Agency" and as a "Public Service or Repair" business from its location at [REDACTED]. The AAO notes that the petitioner lists this address as the beneficiary's residential address on the Form I-129. In addition, one of the petitioner's employees, Andrea Silva, indicated this location as her home address on her IRS Form W-4.

However, the petitioner indicated on the Form I-129 that the beneficiary will work at [REDACTED] in Jacksonville, Florida. The petitioner submitted a commercial lease for this address signed on July 15, 2007. According to the terms of the lease, the premises are to be used as storage/office space, at an annual rent of \$6,000. The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2007 and its profit and loss statement for the first six months of June 2008 show that the company has paid no rent expenses in either year, so it is unclear whether the petitioner occupies or has ever occupied these premises.

The petitioner also submitted a letter dated August 28, 2007 from [REDACTED] who indicates that the beneficiary resides at her residence located at [REDACTED] Court East. [REDACTED] states that the beneficiary is using one of her rooms as an office "to receive correspondence for her new business." The petitioner submitted photographs of a small room with a computer displaying the petitioner's logo.

The director issued a request for additional evidence ("RFE") on March 3, 2009. The director instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties; (2) an organizational chart for the U.S. entity; (3) complete position descriptions for the United States entity's employees; (4) the number of subordinate supervisors under the beneficiary's management; (5) the amount of time the beneficiary will allot to managerial or executive duties in relation to non-executive functions; and (6) copies of the petitioner's annual corporate tax returns and quarterly tax statements since commencement of operations.

In a response dated May 22, 2009, counsel for the petitioner sought to clarify the nature of the company's business, noting that "the Florida company currently provides service personnel for other companies in the Jacksonville area, and does not export to any extent at this time." Counsel noted the petitioner's intent to engage in exporting in the future. In a letter dated April 4, 2009, the petitioner specified that it "provides staffing services for Espeto Brazilian Steak House and Tento Churrascaria," noting that it hires employees and places them in restaurants to perform "different duties." The petitioner indicates that it will export American products to Brazil upon approval of the petition to extend the beneficiary's status.

With respect to the beneficiary's job duties and those performed by her subordinates, the petitioner provided the following information:

The President directs and coordinates financial budgets activities. She analyzes operations supervised by the Director of Marketing, [REDACTED] and the Export Director, [REDACTED]. The two directors make recommendations to the President as to determining areas of potential cost reduction, program improvement, or policy change.

The director of Marketing is focused on the restaurant/cleaning part of the enterprise, which at the present time is the dominant source of income for the business. The Assistant Manager, [REDACTED] works directly with the restaurant workers, and reports to the Director of Marketing.

The President reviews the reports of the Director of Marketing and receives input as needed from the other managers. The President is not to be involved in supervising any cleaning/restaurant duties.

The President implements policies and objectives of [the petitioner] in order to ensure continuing operations, and to increase productivity.

The President reviews budgets for approval, and makes final decisions in conjunction with the recommendations made by the Brazilian affiliate, which in this case is owned 90% by the President.

Another duty of the chief executive is to negotiate or approve contracts and agreements with suppliers, distributors and other organizational entities.

The President appoints department managers and assigns responsibilities. In addition, she directs human resources activities, and establishment and organization of the company.

The goal is to increase exports from the U.S. to the Brazilian affiliate in [REDACTED]. [REDACTED] works on this aspect of the business. She contacts companies with potential products to be exported. She also contacts transportation companies and obtain[s] the best quotes. . . .

[REDACTED] as Director of Marketing is marketing the company using phone solicitations.

[REDACTED] manages and resolves any issues with regard to the cleaning/restaurant operations of [the petitioner]. She is in charge of purchasing supplies, and making the schedules for the cleaning and restaurant services.

Lastly, the petitioner stated that the beneficiary devotes 100 percent of her time to executive/managerial duties and exercises complete discretionary authority based on her ownership of the company.

The petitioner submitted a revised organizational chart which identifies the beneficiary's subordinates as Director Marketing, Export Director, and [REDACTED], whose title is identified as "Director of Operations." The chart indicates that [REDACTED] supervises [REDACTED] and [REDACTED].

The petitioner submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2008, which shows that the company reported gross receipts of approximately \$130,000 and paid \$109,709 in wages. The petitioner reported no rent or advertising expenses, and describes its business activity as "food services." The petitioner also submitted copies of nine IRS Forms W-2, Wage and Tax Statement, issued in 2008. The petitioner provided copies of invoices issued to Espeto Brazilian Steak House for "services rendered."

The director denied the petition on June 5, 2009 concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that it appears that the petitioner has changed the intent and purpose of the business since the original filing, and determined that the petitioner had failed to demonstrate that the business is functioning at the level and scope to support an individual acting in a primarily executive capacity as of the date of filing. The director acknowledged that the petitioner provided evidence that it employed seven workers, but found that, based on the petitioner's descriptions of their job titles and job duties, the record does not establish that the beneficiary's subordinates are managers, supervisors or professionals who would relieve her from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that it is immaterial that the petitioner changed its line of business since the original petition was filed. Counsel emphasizes that the petitioner need only establish that it has been doing business in the United States for the previous year, a fact that was undisputed. Counsel further

contends that the director erred by denying the petition, in part, based on a finding that the beneficiary is not engaged in the supervision of subordinate professionals. As noted above, counsel clarifies that the petition was not filed based on a claim that the beneficiary would be employed in a managerial capacity, but rather was filed with the intent of establishing that the beneficiary will be employed in an executive capacity.

Counsel also contests the director's finding that "the record does not establish that the business has grown to sufficient scope" to support an executive position. Counsel asserts that the director had no legal basis for reaching this conclusion, as section 101(a)(44)(C) of the Act requires that USCIS must take into account the reasonable needs of the organization and its stage of development if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises.

Finally, counsel asserts that the beneficiary's position "will completely direct overall management of the company and will manage the organization, supervise and control the work of all employees," and including "the authority to hire and fire all employees," "exercise discretion over the day-to-day operations," "make all major decisions," "coordinate activities with all clients," and "have full power and control over the U.S. enterprise."

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in an 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 in either an executive or a managerial capacity. *Id.* The definitions of executive and managerial capacity each 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).

At the time of filing, the petitioner failed to provide the required statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary would perform under the extended petition. See 8 C.F.R. § 214.2(l)(14)(ii)(C). Counsel indicated that the beneficiary "has overall direction and authority for control of the company," including the authority to establish company policies and goals. While counsel's brief statement suggests that the beneficiary exercises the appropriate level of authority over the petitioning company, it offered no insight with respect to her actual day-to-day duties. 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).

Accordingly, the director requested that the petitioner provide a comprehensive description of the beneficiary's duties. The petitioner's response, however, offered little additional insight into the nature of the

beneficiary's role. The petitioner indicated that the beneficiary "directs and coordinates financial budget activities," reviews reports from subordinate managers, implements policies and objectives, makes budgetary decisions, negotiates or approves contracts with suppliers and distributors, and directs the "establishment and organization of the company." As discussed further below, the record shows that, at the time of filing, the petitioner's sole source of income was placing workers to provide "various services" at two client restaurants in exchange for service fees. The petitioner's description of the beneficiary's duties does not define her duties within the context of the petitioner's business, such as by explaining the types of policies and objectives she implements, or the types of reports prepared by subordinate managers. The petitioner does not appear to conduct business with contractors or suppliers on a regular basis so it is questionable to what extent the beneficiary would be required to negotiate or approve contracts.

Thus, while most of the duties broadly described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual day-to-day responsibilities. 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 adequate detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the petitioner has failed to show that the beneficiary's duties as of the date of filing are primarily executive in nature.

Beyond the required description of the beneficiary's job duties, USCIS 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 operational 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.

The petitioner has claimed to be engaged in import-export, cleaning, and staff placement services, but concedes that it has not actually engaged in any import or export transactions. The petitioner indicates that the beneficiary will work at a storage and office space located at [REDACTED] in Jacksonville, Florida, but there is no evidence that the petitioner actually occupies or conducts business from these premises. Rather, all of the company's business activities to date appear to have been conducted from a room in the home of [REDACTED] where the beneficiary, her spouse and at least one of the petitioner's other employees resides. The only evidence of any business activities conducted by the petitioner is invoices issued to two restaurants for "services rendered."

It appears that the petitioner acts as a staff placement agency, providing cleaning or restaurant staff to two client restaurants. Based on the petitioner's latest organizational chart, it has a total of three staff available for placement. The petitioner claims that these staff are supervised by an assistant manager (designated as an operations manager on the petitioner's organizational chart), who in turn reports to a director of marketing. The petitioner also claims to employ a director of exports, notwithstanding its claim that the company is not engaged in export activities and evidence in the record indicating that the company operates from a small room or office in a residential home. The petitioner has not adequately explained its need for four managerial or supervisory employees given the nature of the business and its current stage of development. Although counsel asserts that the petitioner's delay in commencing its intended business activities as an import and export business is immaterial, the AAO notes that when a new office petition is approved, it is expected that the petitioner will immediately proceed with implementing the business plan that formed the basis of the approval.

Furthermore, the AAO notes that the petitioner's initial organizational chart identified two "assistant managers" who, based on the evidence submitted, have not actually worked for the company. Although the individual claimed to be serving as "director of operations" on the subsequent organizational chart was employed by the petitioner at the time of filing, the petitioner did not identify her or the position of "director of operations" on the original organizational chart. 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).

As discussed above, USCIS reviews the totality of the evidence in the record in an attempt to reach a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. Here, the claimed number of managers is out of proportion to the number of workers available to provide the services of the company. Furthermore, two of the claimed "directors," [REDACTED] earned salaries of only \$4,680 and \$6,226 during 2008, considerably less than the earnings reported for the lower-level workers who perform "different duties" for the petitioner's client restaurants.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. 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.* Here, while the petitioner claims that the beneficiary performs the high-level duties described in the statutory definition, the petitioner has

failed to describe the specific tasks the beneficiary performs in light of the nature and scope of the business the petitioner operates.

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, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS 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 USCIS regulations that allows for an extension of this one-year period. If the business is not sufficient operational or 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.

The petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Again, the petitioner has failed to provide a detailed description of the beneficiary's actual duties, such that the AAO could determine whether they are primarily executive in nature. Moreover, the petitioner has not established that it has a reasonable need for an employee who performs primarily executive duties, given that it has only two clients who rely on its staffing services, only three employees available for placement, and no other documented source of income.

The AAO acknowledges counsel's citation to *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, 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.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the petitioner failed to establish that the beneficiary is performing primarily performing qualifying executive duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

The petitioner indicates that it plans to engage in import and export operations, and hire additional managers and employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. 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).

For the foregoing reasons, the petitioner has not adequately supported its claims that the beneficiary would be employed in a primarily executive capacity under the extended petition. Accordingly the appeal will be dismissed.

B. Physical Premises to House the Petitioner's Business

The remaining issue addressed by the director is whether the petitioner established that it has sufficient physical premises for the operation of its business. An employer filing a petition for a "new office" is required to submit initial evidence establishing that it has secured sufficient physical premises to house the new office, pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). While there is no explicit physical premises evidentiary requirement applicable to requests to extend a petition that involved a new office at 8 C.F.R. § 214.2(l)(14)(ii), the petitioner should be able to demonstrate that it has actually occupied the premises secured, commenced operations, and grown to the point where it requires the services of an employee who performs primarily managerial or executive duties.

As noted above, at the time of filing the petition, the petitioner submitted a copy of a commercial lease for premises located at [REDACTED]. The lease was signed on July 13, 2007 and has a term of three years and a monthly rent of \$500.00. The petitioner stated on the Form I-129 that the beneficiary will be working at this location. According to the terms of the lease, the petitioner was authorized to use the space as an office, and for storage. The record contains no evidence that the petitioner actually occupies or does business from these premises. According to the petitioner's IRS Forms 1120 and financial statements, the company paid no rent in 2007 or 2008. The petitioner's claims that the beneficiary works or will work at this address are not supported by the record.

The petitioner submitted a letter dated August 28, 2007 from [REDACTED] who indicated that the beneficiary was residing in her home at [REDACTED] East and was allowed to "use one of the rooms

as her office to receive her correspondence for her new business." The petitioner's evidence shows that the company continues to use this address and does not appear to occupy any premises outside of the beneficiary's home office, which based on the photographs submitted, appears to be set up for use by one or two people.

In the RFE issued on March 3, 2009, the director requested that the petitioner submit clear evidence to show where the primary work location is for the United States entity, and an explanation regarding the petitioner's use of a residential address. In response the petitioner submitted a new lease agreement, and counsel explained that "earlier, an office out of the home was sufficient." Thus, it appears that the petitioner abandoned its claim that the beneficiary actually works at the [REDACTED]. 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. at 591-92.

The new lease the petitioner submitted in response to the RFE was for a "virtual office" located at a Regus HQ business center in Jacksonville, Florida. The lease was for a three-month period commencing on May 14, 2009, for a monthly fee of \$269. The agreement provides that the petitioner will receive mailbox plus, telephone answering and virtual office services, and two days of private office usage per month. On appeal, counsel emphasizes that the petitioner did in fact submit a commercial lease at the time of filing for "storage and office space." Counsel describes the virtual office as "additional office space" which "in no way interferes with the original Commercial Lease, as the intended virtual office was an additional space to serve the company's needs."

Counsel's assertions are not persuasive. Although the petitioner submitted non-descript photographs of a storage facility, the record does not establish that the petitioner rents or occupies these premises pursuant to the terms of the lease agreement submitted at the time of filing. Rather, the record shows that the company uses the beneficiary's home address to conduct business. Furthermore, the virtual office was not in place at the time the petition was filed, and does not actually provide the petitioner with physical premises for more than two days per month. Accordingly, the petitioner has not submitted evidence on appeal to overcome the director's determination. The petitioner has not established that it maintains physical premises to support the stated size and scope of the business. For this additional reason, the appeal will be dismissed.

III. Conclusion

The petition is denied and the appeal is dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.