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U.S. Citizenship
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Services

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FILE: [Redacted]
SRC 06 102 51575

Office: TEXAS SERVICE CENTER Date:

AUG 03 2007

IN RE: Petitioner:
Beneficiary:

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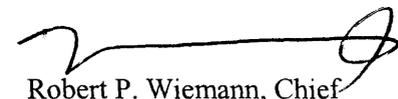
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

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 employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of North Carolina that is described as a private investment company. It claims to operate two gas stations and convenience stores. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition on November 27, 2006 concluding that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; or (2) that the petitioner had been doing business as defined in the regulations for one full year prior to the filing of the petition.

The petitioner subsequently 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 evidence submitted demonstrates that the beneficiary would be employed in a managerial or executive capacity. Counsel contends that the director placed undue emphasis on the size of the petitioner's organization and the number of employees to be supervised by the beneficiary. Counsel further asserts that the petitioner's 2005 corporate tax return is sufficient to establish that the U.S. company has been doing business. Counsel submits a brief and additional evidence in support of the appeal.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily

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

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

The term "executive capacity" means an assignment within an organization in which the employee primarily

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;

- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The immigrant visa petition was filed on February 10, 2006. In a letter dated January 20, 2006, the petitioner provided the following description of the beneficiary's proposed duties as president, and indicated the percentage of time the beneficiary would devote to each duty:

- Locate investment businesses to purchase – 15%
- Establish financial goals for each investment – 35%
- Analyze financial reports of each investment – 6^{1/4}%
- Establishing plans to increase sales - 6^{1/4}%
- Review profit/loss statements - 6^{1/4}%
- Develop marketing strategies - 6^{1/4}%
- Ensure smooth operation of each investment – 25%

The petitioner stated that the company operates a convenience store which employs a manager and four clerks, and indicated that the beneficiary is not involved in the day-to-day operation of the business. The petitioner stated on Form I-140 that the U.S. company has four employees. The petitioner submitted: (1) an organizational chart depicting six employees; (2) its North Carolina Form NCUI 101, Employer's Quarterly Tax and Wage Report, for the third quarter of 2005, which confirms the employment of the beneficiary, the manager, and two clerks, but indicates that only two employees were working for the company as of September 2005; (3) and payroll records for December 2005, which confirm payments to three individuals identified as clerks for part-time employment ranging from 26 to 30 hours per week.

The director issued a request for additional evidence on July 21, 2006, in part, instructing the petitioner to provide a more detailed description of the beneficiary's current duties in the U.S. entity, including clarification regarding the seven duties listed in the initial job description and the exact tasks associated with each duty. The director also requested clear evidence of the staffing level of the U.S. entity, including proof of wages paid, proof of the number of hours worked each week by each employee, and job titles and descriptions for all of the beneficiary's subordinates.

In a response dated October 11, 2006, counsel for the petitioner provided the following description of the beneficiary's duties as president:

- Responsible for decisions affecting profit and loss
- Acts exclusively to develop, direct, and implement overall strategies, policies and procedures of the U.S. Company
- Research summarized data for financial studies on the economic trends, entry barriers, consumer demands and supplies
- Investigate acquisition targets, performing due diligence searches for targets
- Arrange the financing of acquisitions, negotiate prices, payment and structure

- Analyze requirements for new business opportunities and prepare proposals
- Develop and implement various analytical models in collaboration with sales
- Research, compile and prepare data for financial studies of prospective sponsoring agencies and developers, including financial standing, fiscal responsibility, history, compatibility, and potential for long range commitment
- Review solicitations from potential supplies [sic] to determine if potential product or service is viable for the business
- Monitor monthly inventory movement reports prepared by store managers
- Interpret federal and state regulations to develop policy related to the business
- Review and evaluate contracts for compliance with department policies and procedures related to the specific program
- Research, compile, and prepare data for financial studies of prospective insurances for company
- Review and grant advertising/promotions designed by managers for assigned store; review proposals made by store managers to develop, design and review the business marketing plan; develop strategic business plans for marketing product
- Develop high-level cost/benefit analysis to determine return on advertising and promotion dollars
- Develop strategic plans and review store managers' tactical plans and tests
- Summarize data or other non-quantifiable information, setting forth current and long term economic or business trends pertinent to the status of the program
- Analyze financial statements to determine liquidity, earning, earnings potential and overall financial strength
- Perform pricing/sales analyses of the company and compare it to competitors and market standard. Hold monthly meeting with managers to review and provide suggestive prices
- Develop purchasing policies and establish guidelines and measurements for inventory supply and management
- Establish budgets and evaluate cost and quality of goods or services
- Identify vendors, obtain quotations, negotiate purchase of materials, equipment or supplies and manage vendor contracts and relations
- Perform in depth analysis of financial records and summarize performance of business to management during quarterly meetings

The petitioner submitted a new organizational chart depicting the beneficiary as president, the previously identified secretary/manager, and a total of five clerks, including two who work at "KK Food Mart (PURE)" and two who work at "Eagle Mart (BP)." One of the clerks was not identified on the organizational chart submitted in support of the initial petition. Counsel stated that the manager and two of the clerks are employed 40 hours per week, while the other three clerks work 15 hours, 20 hours and 20-25 hours, respectively.

The petitioner also submitted a brief description of each employee's job duties, noting that the beneficiary works to increase business turnover and profit, receives a daily sales report for both gas stations by telephone

from the manager, visits both gas stations once weekly, takes care of the bank account, and "looks up different places for sale to invest more."

The petitioner indicated that the secretary/manager performs the following duties: "She looks at inventory and order [sic] new inventory[;] she visits both stations everyday. She gives advise [sic] to clerk. She is also responsible for hiring new employees and train [sic] new employees. Training includes letting her/him know their daily duties." Finally, the petitioner stated that each clerk is responsible for operating the cash register, keeping the stores and restrooms clean, interacting with customers, and providing opinions to the manager.

The petitioner provided copies of its IRS Forms W-2, Wage and Tax Statement for 2005, along with its state quarterly wage reports and federal quarterly tax returns for the first two quarters of 2006. The AAO notes that none of these documents are signed or dated. During the first quarter of 2006, the quarter in which the petition was filed, the petitioner did not report any payments to the individual identified as the petitioner's manager. The petitioner's Form NCUI 101, Employer's Quarterly Tax and Wage Report, indicates that the petitioner employed six employees in January 2006, five employees in February 2006, and only two employees in March 2006. Only the beneficiary earned wages consistent with full-time employment during the quarter. In the second quarter of 2006, the petitioner reported five employees in April, two employees in May, and three employees in June. Although the manager was reported on the second quarter payroll, this individual received wages of only \$1,250 during the three-month period. Only the beneficiary and one cashier received wages consistent with full-time employment during the second quarter.

The director denied the petition on November 27, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director reiterated the beneficiary's job duties and noted that several of the listed tasks did not fall within the statutory definitions of managerial or executive duties. The director also noted that the record failed to establish sufficient staffing to relieve the beneficiary from performing the daily non-qualifying tasks associated with the operation of a retail business. The director specifically observed the low wages paid to several of the petitioner's employees based on the evidence submitted. The director found that given the limited staffing, and the labor-intensive nature of operating a retail enterprise, that it could reasonably be concluded that the beneficiary would be primarily engaged in the company's daily productive tasks.

The petitioner filed the instant appeal on December 27, 2006. In an appellate brief received on January 25, 2006, counsel for the petitioner contends that the evidence of record is sufficient to establish that the beneficiary will be employed in a managerial or executive capacity. Counsel reiterates the previously provided position descriptions and asserts that the beneficiary "manages the entire organization by carrying out goals setting and policy making duties for essential functions that include responsibility for decisions affecting profit and loss, financing of new acquisitions, inventory management, marketing, purchasing and budgeting." Counsel further asserts that the beneficiary supervises another managerial employee, the store manager and corporate secretary, who in turn supervises five store clerks employed at two locations. Counsel asserts that the store manager and five clerks handle the day-to-day operation of the business so the beneficiary can concentrate on his managerial and executive duties. In support of these claims, the petitioner submits a letter from the corporate secretary and manager, who re-iterates the job description provided in response to the request for evidence, and re-submits the petitioner's organizational chart.

Counsel further contends that the director erroneously based her decision on the number of employees supervised by the beneficiary, contrary to section 101(a)(44)(C) of the Act. Counsel cites unpublished AAO decisions and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988), in support of his assertion that managerial and executive capacity were not intended to be limited to those persons who supervise a large number of employees or large enterprises. Counsel asserts that in this case, the petitioner demonstrated that the beneficiary acts in a managerial or executive capacity, notwithstanding the small size of the corporation, as the beneficiary supervises a managerial employee and as the company's five additional employees are able to perform the day-to-day operations of the business. Counsel asserts that it was improper for the director to substitute her business judgment for that of the petitioner concerning the number of employees a manager should supervise.

Finally, counsel contends that the beneficiary acts as a functional manager by exercising control over essential business functions such as financial planning, marketing, acquisition of new investments, inventory management, purchasing and budgeting.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner's initial description of the beneficiary's duties was vague, nonspecific and failed to demonstrate the beneficiary's day-to-day duties. For example, the petitioner stated that the beneficiary devotes a total of 60 percent of his time to "establish financial goals for each investment" and "ensure smooth operation of each investment." The petitioner did not, however, clarify the specific tasks involved in establishing financial goals or ensuring smooth operations. 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 further indicated that the beneficiary would be responsible for reviewing and analyzing financial reports and profit and loss statements, and locating investment businesses, but did not indicate who would prepare such statements and reports, or perform non-qualifying duties associated with locating potential investment businesses, nor did the petitioner provide documentary evidence related to such investment activities. 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)).

Although the petitioner provided a lengthy list of job duties in response to the director's request for evidence, the longer position description was no more helpful in conveying an understanding of what the beneficiary does on a day-to-day basis. The petitioner expanded the initial description to a list of 23 duties, but failed to indicate how the beneficiary's time would be allocated among the various responsibilities. The definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the

beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Furthermore, several of the listed duties are implausible when considered in context of the totality of the evidence submitted. The beneficiary's job description refers to multiple "store managers" working under the beneficiary's supervision who are responsible for designing advertising and promotions, developing marketing and business proposals, and developing "tactical plans and tests." The petitioner has consistently claimed to employ only one store manager whose stated duties do not include advertising, marketing, or business planning, and the U.S. company reported a total of only \$70.00 spent on advertising in 2005. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, many of the responsibilities attributed to the beneficiary involve research, analysis, and data collection tasks which have not been shown to be managerial or executive in nature, and which have not been clarified in the context of the petitioner's retail gas and grocery business. For example, the petitioner indicates that the beneficiary: researches summarized data for financial studies on economics trends, consumer demands and supplies; develops and implements analytical models in collaboration with sales; researches compiles and prepares data for financial studies of prospective sponsoring agencies and developers, and reviews and evaluates contracts "for compliance with department policies and procedures"; and summarizes "data or other non-quantifiable information, setting forth current and long term economic or business trends pertinent to the status of the program." Moreover, the petitioner does not explain to whom it is referring with respect to "sponsoring agencies and developers," or clarify its "departments" or "programs." Given the petitioner's initial claim that it operated a single gas station and employed a total of four employees, it becomes questionable whether it requires an employee to devote such a significant portion of his time to such research and analysis tasks.

Finally, the AAO notes that while the petitioner's description of the beneficiary's duties indicates that he is responsible for managing the financial planning and budgeting, purchasing and inventory management functions, the petitioner has not established that it had lower-level employees to perform the routine duties related to these functions, such as day-to-day bookkeeping, banking and record-keeping, ordering/purchasing gasoline, food and other items sold in the petitioner's store(s), and monitoring inventory at the two claimed locations. As discussed further below, the evidence submitted does not corroborate the petitioner's claim that it regularly employs a full-time store manager, who is stated to be responsible for monitoring and ordering inventory. Furthermore, the beneficiary himself is described as being responsible for taking care of the petitioner's bank account, identifying vendors and negotiating purchases. Based on the record of proceeding, it has not been established that the beneficiary is relieved from performing non-managerial tasks associated with the petitioner's purchasing, inventory and financial operations. 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).

Thus, while it is evident that the beneficiary exercises discretion over the U.S. company as its president, the petitioner has not established that his actual duties are primarily managerial or executive in nature. 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).

A determination of the beneficiary's actual duties is further hindered by inconsistencies in the record with respect to the scope of the petitioner's business and its staffing levels. At the time of filing in February 2006, the petitioner claimed to operate one gas station/convenience store, KK Food Mart, and submitted a lease for the store located at ██████████ Elizabeth City, North Carolina, that had commenced on June 1, 2005. The petitioner's landlord is identified as "██████████" located at ██████████ Elizabeth City, North Carolina. In response to the director's request for evidence, the petitioner stated that it operated KK Food Mart, and a second gas station/convenience store, "Eagle Mart," also located at ██████████. The petitioner provided no evidence to establish that it had purchased or leased a second store. 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)). The AAO notes that the record does contain bank statements from the second half of 2005 which identify the petitioner as "dba Eagle Mart," however, if the petitioner was operating the store at the time of filing, it is unclear why the petitioner would fail to mention that it operates two stores in its initial submission. 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). Thus, the number of stores operated by the petitioner at the time of filing cannot be determined.

The petitioner's claim that the beneficiary manages a staff of six employees is also not supported by the evidence in the record. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner indicates that the beneficiary supervises a full-time store manager/secretary who in turn supervises the lower-level clerks employed by the petitioner's store(s). The evidence submitted shows that the petitioner employed the manager on a near full-time basis during the third quarter of 2005, did not employ the manager during the pay period ended on December 7, 2005, did not employ the manager during the first quarter of 2006, and employed the manager on a limited or part-time basis during the second quarter of 2006,

during which time this individual received a total of \$1,250 in wages. Thus, the petitioner has not submitted documentary evidence to corroborate its claim that it employed a full-time manager at the time of filing the petition on February 10, 2006. In the absence of a store manager, it is reasonable to conclude that the the beneficiary himself would be required to act as a first-line supervisor to non-professional store clerks. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Therefore, the beneficiary cannot be considered to be acting as a manager based on his supervisory duties.

Furthermore, the record contains discrepancies regarding the number of employees regularly employed by the petitioning company. At the time of filing, the petitioner claimed to have a total of four employees, yet submitted an organizational chart depicting six employees. In response to the director's request for evidence, the petitioner claimed to employ a total of seven employees. However, two of the petitioner's clerks, C. Bowen and W. Key, received minimal wages in the first quarter of 2006 and were not employed by the company in the second quarter of 2006. As noted above, the petitioner's manager was not reported on the company's state quarterly report for the first quarter of 2006. The petitioner's other claimed full-time employees, two of its clerks, did not earn wages consistent with full-time employment during the quarter in which the petition was filed. In addition, the petitioner reported having only two or three employees in three of the first six months of 2006. Again, 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. Overall, the record fails to support counsel's contention on appeal that the petitioner regularly employs a full-time manager and five clerks who relieve the beneficiary from performing the day-to-day operations of two gas station/convenience stores.

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). Instead, an executive's duties must be the critical factor. However, if CIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS* at 15. The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

There is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

The petitioner claims to operate two gas station/convenience stores with gross receipts of \$1,363,022 in 2005. Given the nature of the petitioner's business, it is reasonable to assume that the petitioner's stores are open daily for at least ten hours, or a combined total of 140 hours per week. At the time of filing, the record shows that the petitioner employed the beneficiary as president, and three to four part-time clerks/cashiers. The petitioner reasonably requires employees to be present in its stores during all operating hours to handle customer transactions, as well as employees to order merchandise, receive deliveries, stock the stores, keep the interior and exterior of the premises clean, and handle routine banking, administrative and clerical tasks associated with operating any business. The petitioner has not established that the beneficiary's part-time subordinates, who worked on average a combined total of 98 hours per week during the first quarter of 2006, assuming an hourly wage of \$5.50, could relieve the beneficiary from performing these non-qualifying tasks. The petitioner's claim that the beneficiary merely visits the stores once weekly and receives reports by telephone is not supported by the record, particularly given the petitioner's statement on Form I-140 that the beneficiary's worksite is at one of the stores.

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 several part-time clerks. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel claims on appeal that the beneficiary qualifies as a functional manager by "exercising control over essential business functions such as financial planning, marketing, acquisition of new investments, inventory management, purchasing and budgeting." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). 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 fact that the beneficiary is the only person within the organization responsible for the stated functions is insufficient to establish that he primarily manages these functions.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner

still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Again, the petitioner has not met this burden, given the labor-intensive nature of the petitioner's retail business and the lack of subordinate staff to perform the non-managerial duties associated with operating two stores.

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, the petitioner has not established that the beneficiary primarily directs the management of the U.S. company or is relieved from focusing on the day-to-day operations of the petitioner's business.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. The record does not demonstrate that the beneficiary has a sufficient number of subordinates to perform the day-to-day operations of two gas station/convenience stores. Ascribing a managerial or executive title to an employee does not imbue the employee with managerial or executive duties. Counsel's assertion that the beneficiary works through a management-level employee and does not perform duties necessary to produce the products or provide the services of the company is not supported in the record. 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 section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, counsel cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988). Counsel asserts that in this matter, the District Court found that the terms manager and executive could not be limited to persons who supervise a large number of employees or large enterprises. However, 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. The AAO has interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner, at the time of filing, had been doing business for at least one year, as required by 8 C.F.R. § 204.5(j)(3)(i)(D). "Doing business" means the regular, systematic and continuous provision of goods and/or services by a firm, corporation or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2).

The petitioner was incorporated in September 2002, but appears to have remained inactive until some time in 2005, as it filed its initial tax return for that year. The beneficiary was granted a one-year period in L-1A classification in order to open a new office, which was valid from December 22, 2004 until December 22, 2005, and he made his initial entry to the United States on March 31, 2005, less than 11 months prior to the filing of the instant petition on February 10, 2006. The petitioner must establish that it has been doing business in the United States since February 10, 2005. The evidence submitted with the initial petition showed that the petitioner leased its store and obtained its sales and use tax permit from the State of Texas on June 1, 2005, and no documents in the original submission suggested that the petitioner had commenced operations prior to this date.

The director requested that the petitioner submit further evidence of the petitioner's business volume and frequency during the one-year period immediately prior to February 10, 2006, including evidence of actual business activity during each month. The invoices and receipts submitted in response were dated from July 2005 through 2006, but did not include evidence of business activity during the months of February through June 2005.

Accordingly, the director denied the petition, concluding that the petitioner failed to establish that the petitioner was doing business for at least one year as of the date of filing. On appeal, the petitioner submits its 2005 IRS Form 1120, U.S. Corporation Income Tax Return, and states that the gross receipts and net assets of the company as reflected on the tax return demonstrate that the petitioner was engaged in the regular, systematic and continuous provision of goods and services during 2005.

Upon review, the petitioner has not established that the U.S. company was doing business for at least one year as of the date of filing. The petitioner's tax return, while it shows a significant gross income for the year, does not establish the date on which the petitioner commenced business operations in 2005, and the record is still devoid of evidence that the petitioner commenced operations prior to leasing a gas station/convenience store in June 2005, eight months prior to the filing of the petition. The petitioner has had three opportunities to

present evidence of business activities during the months of February 2005 through May 2005 and has failed to do so. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). For this additional reason, the appeal will be dismissed.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows 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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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

ORDER: The appeal is dismissed.