U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 0 5 2009
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IN RE: Petitioner:
Beneficiary: [redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation incorporated in the State of Delaware that claims to be in the business of technology investment management. The petitioner claims to be a subsidiary of the beneficiary's foreign employer, Inala Technology Investments (Pty) Ltd., a South African company. It seeks to employ the beneficiary as its new business development manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on April 2, 2008, concluding that the petitioner had not established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner initially filed a Form I-290B, Notice of Appeal or Motion, on May 5, 2008, which was rejected by the U.S. Citizenship and Immigration Services (USCIS) on the grounds that the wrong Form I-290B was used. The petitioner filed another Form I-290B on May 14, 2008. On appeal, counsel for the petitioner contends that the beneficiary's proffered position in the United States is indeed "executive" or "managerial" in nature. Additional evidence was submitted in support of counsel's assertions on appeal.

In a decision issued on July 31, 2008, the director noted that the petitioner's appeal was untimely filed. However, the petitioner's motion to reopen the proceedings was granted. Upon review of the record of proceedings, including the motion and its supporting documents, the director determined that the grounds for denial have not been overcome, and affirmed his previous decision.

On August 29, 2008, the petitioner submitted a Form I-290B, appealing the director's July 31, 2008 decision. Counsel for the petitioner again asserts that the director's determination that the beneficiary's position is not executive or managerial in nature is in error; the petitioner submits further evidence in support of this assertion.

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):
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> * * *
>
> (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).

At issue in the present matter is whether the beneficiary would be employed in a primarily managerial or executive capacity by 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
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> (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
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
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> (iii) exercises wide latitude in discretionary decision making; and
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> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated June 26, 2006 filed with the Form I-140, Immigrant Petition for Alien Worker, the petitioner described the beneficiary's position in the United States as follows:

> [The beneficiary] has primary responsibility to seek out, negotiate, and manage investments and strategic partnerships for the entire company. Although [the petitioner] has only one employee in the U.S., [the beneficiary] directly manages accountants, attorneys, professional advisors, and engineers retained by [the petitioner] to qualify and acquire interests in a wide range of technology companies that fit the [company's] vision for growth. He reports directly to the board of directors of both [the U.S. and foreign companies]. [The beneficiary] recommends significant corporate actions to the Board and controls an essential function in locating and negotiating new business relationships. He builds strategic relationships with U.S. and international companies to advance [the company's] objectives. [He] controls daily communication with senior executives and professional personnel of [the company's] strategic partners. He has discretionary decision making authority including hiring and firing professional advisors. [The beneficiary] exercises his discretion over product design and development and key relationships with the management of strategic partners.

On August 2, 2007, the director issued a request for further evidence (RFE) relating to the beneficiary's U.S. position, including: a copy of the petitioner's corporate tax return; 2006 Internal Revenue Service (IRS) Forms W-2 for the beneficiary and any other employee of the U.S. company; an organizational chart for the U.S. company showing the beneficiary's positions in relation to other employees within the company's corporate hierarchy; and a more detailed description of the

beneficiary's duties that should indicate what specific actions the beneficiary is required to carry out in order to fulfill those duties.

In a letter dated October 16, 2007 responding to the RFE, the petitioner added the following expanded description of the beneficiary's job responsibilities:

> **[The beneficiary] builds strategic relationships with U.S. and international companies to advance [the company's] objectives.** Specifically, he identifies and develops emergent business opportunities and negotiates favorable contracts for [the company's] services and expertise. [The beneficiary] investigates key industries for expansion opportunities. He nurtures business contacts with high level managers and executives to obtain introductions to potential client companies and referrals for [the petitioner's] services. He has developed strategic relationships with approximately 30 U.S. companies which range in revenues from $1 million to $180 million.
>
> **[The beneficiary] has discretionary decision making authority including hiring and firing professional advisors**. He directs and manages the professionals retained by the company in the U.S. [The petitioner] currently has two Professional Advisors who are independent contractors and is seeking additional qualified candidates. These Professional Advisors evaluate management structures and procedures of client companies, analyze hiring and training procedures to maximize employee retention, and advise client companies on running their business to maximize profitability. [The beneficiary] has discretionary decision making authority, including hiring and firing of these Professional Advisors, determining which account they handle and their compensation. He evaluates their progress on accounts and provides guidance, direction and expertise in applying the [company's] business model to their client issues. In addition, he manages accountants, attorneys, engineers, and other professionals retained by [the petitioner.]
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> **[The beneficiary] controls daily communication with senior executives and professional personnel of [the petitioner's] strategic partners.** [The petitioner's] client companies view [the petitioner] as a strategic partner for their businesses. [The beneficiary] approves strategies and solutions designed and developed by the Professional Advisors for client companies. These strategies and solutions are then communicated to senior executives and other professional personnel of [the petitioner's] client companies.
>
> **[The beneficiary] exercises his discretion over product design and development and key relationships with the management of strategic partners.** [The beneficiary] is the primary architect of [the petitioner's] proprietary business model. The strength of this business model is that it applies to a variety of companies and is not limited to one industry. [The beneficiary] evaluates the model's continued validity and directs the measurement of its success for client companies. He presides over design modifications to the business model to meet unique industry

> requirements. For example, under [the beneficiary's] direction, the Professional Advisors have used this business model to facilitate the larger scale production of a client's products. To this end, they analyzed the value of the engineering component of the client company's product design and evaluated the manufacturing processes and options from prototype to production. The Professional Advisors worked with the client company to design the prototype, test it, and then found a manufacturer to manufacture the product without requiring the client company to maintain the product in inventory. The manufacturer ships directly from its factory to representatives and stores. This has resulted in a significant increase in profits for the client company.

The petitioner submitted an organizational chart for the U.S. company which shows the beneficiary directly reporting to the company's CEO in South Africa, and directly supervising two individuals identified as "Professional Advisor/Independent Contractor." Other than their names, no other information relating to the CEO and Professional Advisors was provided.

The petitioner also submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for the year 2006, which reports that the company paid $93,616 in salaries and wages, less employment credits, for that year. The beneficiary's IRS Form W-2 for 2006 states that his wages for the year was $112,013.99. The petitioner did not provide Form W-2 for any other employee.

On June 27, 2008, the director denied the petition, concluding that the petitioner had not established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. The director found that while some of the beneficiary's duties may be considered "executive" or "managerial," others are not. The director observed that functions such as business development, contract negotiation, and investigating expansion are closer to the duties of a marketing representative or sales person. The director also determined that the evidence does not clearly demonstrate that the beneficiary supervises subordinate personnel, since the beneficiary only supervised two contractors at the time of filing.

In his first appeal brief dated May 5, 2008, counsel for the petitioner asserted that "the beneficiary's position is indeed 'executive' and/or 'managerial' in nature." Counsel claimed that the managerial nature of the beneficiary's position is confirmed by the descriptions of similar positions in the Department of Labor's Occupational Information Network (O*NET), the Department of Labor's *Occupational Outlook Handbook* (OOH) and *Dictionary of Occupational Titles* (DOT), and current advertisements for comparable positions. Counsel also challenged the director's finding that the beneficiary does not appear to be supervising subordinate employees, claiming that the beneficiary manages the two "professional advisors" as well as accountants, attorneys, engineers and other professionals. Counsel further contended that the regulations do not require that the beneficiary supervises subordinate employees. Moreover, counsel asserted, the beneficiary manages an "essential function" of the company and therefore qualifies as a function manager. Finally, counsel asserted that the USCIS had already adjudicated this issue in the petitioner's favor when it approved the beneficiary's initial petition and two subsequent extension petitions for L-1A status.

Counsel submitted additional evidence in support of his arguments on appeal, including, among other things: an excerpt from O*NET describing the position of "marketing manager"; an excerpt from the OOH discussing the position of "Advertising, Marketing, Promotions, Public Relations, and Sales Managers"; and an excerpt from the DOT relating to the position of "Director, Research and Development." Counsel posited that these positions are similar to the beneficiary's proffered position and demonstrate that the beneficiary's position is managerial in nature. Counsel also submitted various job announcements published on the internet that counsel deemed to be comparable to the beneficiary's proposed position.

In a decision issued on July 31, 2008, the director granted the petitioner's motion to reopen the proceedings, but concluded that the grounds for denial have not been overcome. In response to counsel's contention that the beneficiary supervises the contractors, the director observed that the beneficiary could not be considered to be directly managing the contract personnel, who would answer to their own company's chain of command rather than the beneficiary. With respect to counsel's assertion that the beneficiary qualifies as a function manager, the director noted that the beneficiary did not simply function at a high level in the petitioner's organizational hierarchy; rather, the beneficiary *was* the company's entire organizational hierarchy. The director further found that the job description from O*NET is quite vague and general in nature and does not conclusively demonstrate that the beneficiary's proffered position is a managerial position. The director also highlighted the lack of a subordinate staff for the beneficiary and noted that the duties listed under "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" in the OOH job description indicate that an employee in that position would *coordinate* certain tasks in marketing and sales, thereby implying that there would be a subordinate staff to perform the tasks rather than the manager. With respect to counsel's claim that this petition should be granted based on the approval of previous L-1A petitions, the director noted that "the instant petition is not simply a readjudication of a previously-adjudicated petition" and that "each visa petition must be judged separately, based on its own merit." The director concluded that, based on the record of proceeding, the petitioner has not demonstrated that the beneficiary will be employed in the United States in an executive or managerial capacity and the petition must remain denied.

In an appeal brief dated August 28, 2008, counsel for the petitioner asserts that the director's determination that the beneficiary's position is not executive or managerial in nature is in error and submits further evidence in support of this assertion. Counsel argues that managers are not required to manage employees under 8 C.F.R. § 204.5(j)(2), and, in any event, the beneficiary qualifies as a manager through his supervision of the independent contractors. Counsel asserts that USCIS must take into account the reasonable needs of the company in its analysis of the beneficiary's eligibility. Alternatively, counsel argues, the beneficiary is managing the "new business development" function of the company and therefore qualifies as a function manger. Counsel asserts that the O*NET "Marketing Manager" job description equates that position to the beneficiary's proffered position, and demonstrates that the beneficiary is not a salesman as the director implied. In addition, counsel argues that there is nothing in the OOH description that says that all "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" must have subordinate employees. Counsel argues that, viewed in its entirety, the beneficiary's position is indeed managerial in nature. Finally, counsel states that the two professional advisors have been hired as employees of the petitioner.

Counsel submits the resumes of these two individuals as well as their employment contracts with the petitioner, dated in April and May 2008.

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily executive or managerial 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.*

Initially, the AAO notes counsel's submission on appeal of job descriptions from sources such as O*NET, the OOH and the DOT for marketing and business development management positions that counsel deems to be analogous to the beneficiary's position. While these job descriptions provide some insight into what may be the duties ascribable to persons occupying similar positions in a corporate hierarchy, generally, they do not describe the beneficiary's job duties, specifically. The beneficiary's actual job 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). Further, an employee will not be considered a manager simply because of his job title. As such, the AAO's analysis of the beneficiary's eligibility will be based on the description of the beneficiary's actual job responsibilities, as presented in the record, rather than on any generic equivalence of the proffered position.

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. Here, the petitioner claimed that the beneficiary supervises the work of two "Professional Advisors," both independent contractors. In response to the RFE, the petitioner described in brief and provided an example of the work purportedly performed by these independent contractors. The petitioner explained that the beneficiary "has discretionary decision making authority, including hiring and firing of these Professional Advisors, determining which account they handle and their compensation," and "evaluates their progress on accounts and provides guidance, direction and expertise in applying the [company's] business model to their client issues." In addition, the petitioner claimed that the beneficiary also manages accountants, attorneys, engineers, and other professionals retained by the petitioner.

However, other than the above discussion of the work of the Professional Advisors as it relates to the beneficiary's job responsibilities, the petitioner failed to provide any evidence of the petitioner's contractual relationship with the Professional Advisors, nor is there any evidence of the existence of the accountants, attorneys, engineers, and other professionals purportedly retained by the petitioner and supervised by the beneficiary. Specifically, it is noted that the record, including the petitioner's tax returns and financial statements, contains no documentation of any compensation paid for the services of any independent contractors. 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 acknowledges that Statement 2 attached to the petitioner's IRS Form 1120 for 2006 indicates that the petitioner paid commissions in the amount of $19,560, and a profit & loss statement for January 1 through October 31, 2007 shows that the petitioner paid $9,675 in commissions during that period. However, the recipients of these commissions were not identified. Further, even if the petitioner has established that these commissions were paid to the claimed "Professional Advisors" or other independent contractors, the record lacks evidence to demonstrate how and to what extent the persons so paid were performing the services of the U.S. company.

The AAO also notes that, in July 2008, the petitioner submitted copies of the agreements documenting the petitioner's hiring of two Professional Advisors as of April and May 2008. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The employment agreements do not establish that there existed an employment or contractual relationship between the petitioner and the "Professional Advisors" or any other contracted professional at the time the petition was filed, nor does the record show that, at the time of filing, the petitioner had any employees under the beneficiary's management, such that the beneficiary can be considered a "personnel manager."

The evidence of record is also insufficient to support counsel's claim on appeal that the beneficiary qualifies as a function manager. 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). Further, 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. *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).

Here, counsel claims that the beneficiary qualifies as a function manager because he manages the "new business development" function of the company. The petitioner's initial description of that function includes "locating and negotiating new business relationships," "build[ing] strategic relationships with U.S. and international companies," "daily communication with senior executives and professional personnel of [the company's] strategic partners," having "discretionary decision

making authority including hiring and firing professional advisors" and "exercise[ing] his discretion over product design and development and key relationships with the management of strategic partners." The job description provided in response to the RFE suggests that the Professional Advisors perform the services or produce the work products required by client companies, and a significant portion of the beneficiary's time is devoted to the management of the Professional Advisors and their work product. However, as previously noted, the record does not reveal when and to what extent the Professional Advisors performed work for the U.S. company, nor does it confirm that there was in fact a contractual or employment relationship between the petitioner and the Professional Advisors at the time the petition was filed. Without sufficient evidence to demonstrate that the Professional Advisors actually perform work claimed, the record does not substantiate the petitioner's claim that the beneficiary manages the work of the Professional Advisors, and thereby manages the "new business development" function rather than performing the duties related to the function himself.

Along with showing that the beneficiary performs the high-level responsibilities that are specified in the definitions of "executive capacity" and "managerial capacity," 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). 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. To this end, it is also the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed by the beneficiary as a "function manager" are performed by someone other than the beneficiary.

Here, the petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the portion of time the beneficiary actually performs or will perform the claimed managerial or executive duties. The petitioner explicitly stated in its June 26, 2006 letter that it has only one employee in the United States, namely the beneficiary. Further, as previously discussed, the record contains insufficient evidence to substantiate the petitioner's claim that there are independent contractors providing services to the company. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties if there is no one else on staff to perform non-qualifying duties. As previously noted, 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. at 604. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

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 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). At the time of filing, the petitioner claimed to have a gross annual income of $20 million "worldwide." The firm employed a single employee in the United States and did not submit evidence that it employed any subordinate staff who would perform the actual day-to-day, non-managerial operations of the company. 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 its sole employee. Further, 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.

The AAO notes that 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 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 beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity in the United States. For that reason, the petition will be denied.

Beyond the decision of the director, the AAO finds that the record is insufficient to establish that the beneficiary was employed by the foreign entity for at least one year prior to the filing of the petition, or to the beneficiary's entry into the United States, as required under section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(3)(1) requires the petitioner to demonstrate that:

> (A) *If the alien is outside the United States,* in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
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> (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity.

In its letter dated June 26, 2006, the petitioner stated that the beneficiary was employed by the parent company in South Africa as New Business Development Manager from 1999 until his transfer to the United States in 2001. The petitioner stated:

> In this capacity, [the beneficiary] was a primary architect of the company's approach to implementing its vision. He drafted and oversaw the strategic plans of the company, directing the professionals employed and retained by the company . . . and presented investment opportunities directly to its Board of Directors in consultation with the Managing Director, for direct Board decision.

The record contains no other evidence relating to the beneficiary's position abroad. The AAO notes that the petitioner's statement regarding the duration of the beneficiary's employment by the foreign entity is corroborated by the beneficiary's Form G-325A, Biographic Information, filed in September 2006, which states that the beneficiary was employed by the foreign entity from April 1999 through November 2001. However, absent further details regarding the beneficiary's job responsibilities or his position within the organizational hierarchy of the foreign entity during his overseas employment, the AAO is unable to determine whether the beneficiary in fact was employed by the foreign entity in a managerial or executive capacity, as required by the regulations. For this additional reason, the petition cannot be approved.

Finally, the AAO acknowledges that USCIS has previously approved multiple L-1A petitions filed by the petitioner on behalf of the instant beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approvals by denying the instant petition.

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). 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.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.