

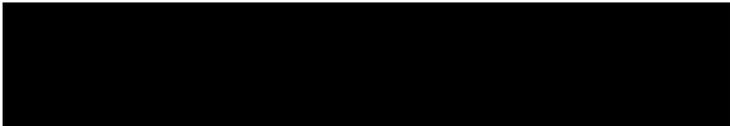


U.S. Citizenship
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File: EAC 06 149 50205 Office: VERMONT SERVICE CENTER Date: APR 05 2007

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:

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, 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 extend the employment of its administrative director as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, states that it is engaged in the import, export and distribution golf apparel and equipment. It claims to be a subsidiary of [REDACTED] located in Brazil. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend her status for three additional years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a managerial or executive capacity; or (2) that the beneficiary was employed in a primarily managerial or executive capacity with the foreign entity prior to her transfer to the United States.

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 director overlooked evidence documenting the petitioner's employment of the beneficiary's subordinate employees, and erroneously concluded that the beneficiary is the only employee of the U.S. company. Counsel further contends that the director placed undue emphasis of the size of the petitioning company without taking into account its reasonable needs and early stage of development. Finally, counsel contends that the beneficiary's duties are comprised of the management of an "essential function." Counsel submits a brief in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

The first issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

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

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

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

The nonimmigrant petition was filed on April 21, 2006. On the Form I-129, the petitioner stated that the U.S. company has three employees, and provided the following description of the beneficiary's duties as administrative director:

Manage the office and employees' needs, manage line of products, manage import/export procedures, manage point of sale and distributors, manage financial arrangements, plans and develops strategies and goals.

In a letter dated April 20, 2006, counsel for the petitioner set forth the beneficiary's qualifications as follows:

[The beneficiary] currently serves as Chief Executive Officer, General Manager and President of the U.S. subsidiary company. . . .

During the first year of the subsidiary's business operations, [the beneficiary] has been responsible for executive and managerial functions as delineated at 8 CFR § 214.2(l)(1)(ii). Her primary duties include the following: (a) she directs management of the organization; (b) she establishes its goals and policies; (c) she exercises wide latitude in discretionary decision making; and (d) she works only under the general direction of high-level executives from the Brazilian parent company.

[The beneficiary's] duties are exclusively executive and functional-managerial in nature – she does not partake in the day-to-day operations of the business. All such operations are performed by the company's Administrative Associate and Assistant Director, Ms. Ana Braga; and the Marketing Specialist, James Londeree.

The petitioner submitted a lengthy and detailed description of the beneficiary's duties and the percentage of time she allocates to each duty in a letter dated April 3, 2006, and summarized these duties in a letter dated April 13, 2006. The petitioner described the beneficiary's duties as follows:

- **Setting strategies and goals:** [The beneficiary] develops strategy and sets goals to better evaluate the progress of the company during its initial period of operation; strategies are based on the business plan and complemented with market research and procurements that [the beneficiary] will utilize to evaluate company performance. (15% of the beneficiary's time)
- **Staff management:** [The beneficiary] is responsible for overseeing staff meetings to inform, explain and delegate duties to the staff and training when necessary; also, she gives rewards to the staff upon completion of duties and goal achievement (10% of the beneficiary's time)
- **Prospecting new clients, distributors and retailers:** [The beneficiary] contacts prospective clients, arranges meetings and visits with distributors and retailers (10% of the beneficiary's time); also, [the beneficiary] participates in Trade Shows, Golf Fairs and engages the Chamber of Commerce, together with additional activities, in order to better communicate and reach all "players" involved in the target market. (5% of the beneficiary's time)
- **Prospecting business interested in partnership, alliances and representations:** [The beneficiary] conducts research over prominent and possible business partnerships, alliances, and representations to increase the possibilities of business deals. (5% of the beneficiary's time)
- **Contacting clients, retailers and distributors for feedback:** [The beneficiary] contacts prospective clients and existing clients to receive feedback on doing business with [the petitioner], which includes entering into agreements, buying and selling merchandise. (15% of the beneficiary's time)

- **Managing meetings, sales and purchases:** [The beneficiary] oversees meetings for sales, purchases, price negotiations, availabilities, payment dates and methods, delivery, etc. Meetings are set by and arranged by the beneficiary or the Asst. Director who will be also present in this meeting acting as secretary formulating the minutes of the meeting (10% of the beneficiary's time)
- **Managing the supply chain and intra-company relations:** [The beneficiary] manages the supply chain of the products and overseeing [sic] the process of import/export of such products as well as taking care of sales, buying price negotiation, availabilities, payment dates and methods, delivery time and dates, of the mentioned products (10% of the beneficiary's time); also [the beneficiary] remains in continuous contact with [the foreign entity's] offices in Brazil in order to coordinate all needs of business deals and formulating actions. In this regard, [the beneficiary] acts as the key officer in charge of bridging the procedures between the Brazilian parent office and U.S. subsidiary office. (10% of the beneficiary's time).
- **Managing the line of products and availabilities for distribution:** [The beneficiary] and the Asst. Director will continue to be responsible for taking care of product availability and its line (type). [The beneficiary] will overlook the stocking process that are going to made by junior assistant that by the end of the year should be entitled Operational Manager. (10% of the beneficiary's time).

The petitioner submitted an organizational chart depicting the beneficiary as "CEO/general manager," supervising an administrative associate and a marketing specialist. The chart indicates that the beneficiary's subordinates would each eventually supervise one junior associate/trainee.

In a letter dated April 3, 2006, the petitioner submitted detailed position descriptions for both of the beneficiary's subordinates. As the letter is part of the record, the job descriptions will not be repeated in their entirety here. Briefly, the petitioner indicated that the assistant director (who is also identified as an "administrative associate") performs the following duties:

- Under the guidance of the director, procure all Golf trademarks, retail shops and distributors, to be refined by the beneficiary (5%)
- Initiate contacts and arrange meetings upon the beneficiary's request (5%)
- Procure all sorts of golf related products and goods, read golf magazines, articles and newspapers, and gather all useful information for presentation to the beneficiary (10%)
- Assist the beneficiary with overseeing the development of a database system to be implemented by a third party, and supervise the system upon its completion (10%)
- When the beneficiary is not available, contact previously contacted clients and prospective clients to get feedback on interest in doing business with the petitioner (10%)

- Act as the beneficiary's secretary at all meetings, and formulate meeting minutes (10%)
- Upon the specific request of the beneficiary, act in her behalf to negotiate sales, buying, price negotiation, availabilities, payment dates and methods, delivery time and dates (10%)
- Take care of all office needs including office supplies, arranging training of employees, creating a good office environment, coordinating and managing office dues, deadlines and payments (30%)
- Conduct any other request made by the beneficiary (10%)

The duties of the petitioner's other employee, who is referred to as a part-time "marketing specialist" or "sales/marketing representative," can be summarized as follows:

- Conduct continuous market research based on quoting of golf goods and accessories, their sizes, colors, type, availabilities, innovations and upcoming products (15%)
- Create a plan and continuously develop and refine a strategy to better position the petitioner's brand in the market, working in trade shows, visiting prospective clients, and "doing a procurement" on new business opportunities (15%)
- Use information gathered from trade shows, golf fairs and client meetings to compose the market research (10%)
- Be responsible for all the marketing and advertisement of the company, including magazine, newspaper and internet ads, cold calls, and the Internet web site. (20%)
- Contact clients, retailers and distributors to inform them about promotions, sales, innovations, upcoming products (10%)
- Contact clients, retailers and distributors to conduct any sales operations and any procedure regarding a sale matter upon a request from the beneficiary (20%)
- Bring any creative idea regarding improvement to current processes or operations (5%)
- Conduct any other request made by the beneficiary (5%)

The petitioner submitted federal quarterly tax returns, state quarterly wage reports, and recent payroll records confirming the employment of the beneficiary and her subordinates, and also provided copies of each employee's resume.

On May 3, 2006, the director issued a request for evidence, in part instructing the petitioner to submit additional evidence to establish that the beneficiary will be employed in an executive or managerial capacity in the United States. The AAO notes that the majority of the evidence requested by the director, including detailed job descriptions for each employee and evidence of wages paid to employees, was actually submitted with the initial petition, and subsequently re-submitted in a May 11, 2006 response to the director's request, and therefore has already been discussed above.

The director denied the petition on May 23, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director incorrectly observed that the record "fails to show any salaries paid to subordinate employees." The director concluded

that the beneficiary is performing the duties of the claimed subordinate employees and other day-to-day functions of the company, and is not involved in the supervision and control of supervisory, professional or managerial employees who will relieve her from performing the services of the company. The director also stated that the petitioner did not provide "a comprehensive description of the beneficiary's duties to enable the Service to make a determination" regarding the beneficiary's managerial or executive authority over the business or a function, subdivision or component.

On appeal, counsel for the petitioner suggests that the director did not review the evidence submitted in support of the petition or in response to the director's request for evidence, as the director clearly overlooked evidence that the petitioner employs two individuals who work under the beneficiary's supervision. Counsel asserts that the evidence already submitted "clearly explain[s] how the employees relieve the Beneficiary from the need to perform any day-to-day activity or other non-qualifying duty." Counsel states that the evidence also establishes that "the Beneficiary's duties are comprised of the management of an "essential function," namely the business development and growth, and management of personnel."

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889, F.2d 1472, n.5 (5th Cir. 1989), *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988), and unpublished AAO decisions in support of the assertion that the statute was not intended to limit the L-1A visa classification to persons who supervise a large number of people or large enterprises. Counsel asserts that the beneficiary can serve as a "functional manager," and is not required to supervise managerial or professional employees.

Counsel further asserts that the director erred by denying the petitioner only or primarily because the petitioner does not possess a hierarchy of executive/managers, middle managers and first-line supervisors. Counsel notes that the statute requires CIS to take into account the reasonable needs of the organization in light of its overall purpose and stage of development if using staffing levels as a factor in a determination regarding the beneficiary's managerial or executive basis. In this regard, counsel asserts:

[The petitioner] is a Golf distributor for all products relating to the sport and has been operating over one year. The petitioner hired two additional employees in 2006 to assume the day-to-day operations once justified since previously hiring more employees did not meet its reasonable needs. Subsequently, as the business was growing and developing, the company hired two other employees in January 2006 to perform "non-qualifying duties." Based on the evidence provided to the Service, it was clear that at the development stage of the organization and functions, the petitioner had enough employees to meets its reasonable needs.

Upon review, and for the reasons discussed herein, counsel's assertions are not persuasive. Preliminarily, the AAO notes that when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). In this case, the AAO agrees that the director's decision with respect to this issue included a misstatement of fact, in that the director failed to acknowledge evidence of the company's subordinate employees. The decision also contained few specific references to the evidence submitted by the petitioner. As the AAO's review is

conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petitioner has not established that the beneficiary's duties for the petitioner will be primarily managerial or executive in nature. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the performance of the duties of another type of non-managerial or non-executive position, or other involvement in the operational activities of the company.

The petitioner has submitted a lengthy and detailed description of the beneficiary's duties and claims that she will be employed in an executive capacity or as a "function manager." However, the petitioner's description of the beneficiary's duties does not demonstrate that the beneficiary will primarily perform the types of high-level responsibilities that are specified in the statutory definitions of managerial or executive capacity, nor does it support counsel's assertion that the beneficiary's duties "are exclusively executive and function-managerial in nature."

For example, the petitioner indicates that the beneficiary will be responsible for the following tasks: prospecting new clients, distributors and retailers; contacting and arranging meets and visits with distributors and retailers; participating in trade shows; researching potential business alliances and representations; contacting clients and prospective clients for feedback; settling contracts, buying and selling merchandise; directly conducting all meetings to arrange deals including sales, buying, prices, product availability, payment and delivery methods; overseeing the supply chain and import/export process, "as well as taking care of sales, buying, price negotiation, availabilities, payment dates and methods, delivery times and date"; and taking care of "product availability." Based on the petitioner's representations, these duties account for approximately 65% of the beneficiary's daily tasks. However, the petitioner has not explained how the beneficiary's direct involvement in the petitioner's purchasing, sales, and marketing activities, and coordination of import, export and supply chain activities, fall under the statutory definitions of managerial or executive capacity. The petitioner did not indicate that the beneficiary manages the performance of these duties through her subordinate employees. 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).

While it is evident that the beneficiary exercises discretion over the day-to-day operations of the company as the senior employee within the three-person organization, and performs some managerial and supervisory tasks, 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. Therefore, although performing tasks necessary to produce a product or service or other non-managerial tasks 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 as required by the statutory definitions. As discussed above, the position description submitted by the petitioner indicates that more than half of the beneficiary's time would be allocated to non-qualifying sales, purchasing and supply chain-related tasks, rather than to managerial- or executive-level duties.

Counsel asserts that the beneficiary qualifies for L-1A classification based on her management of the "essential functions" of "business development and growth," and "management of personnel." 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 detailed position description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

Beyond the required description of the job duties, CIS 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. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary.

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner has neither described the claimed functions with specificity nor established that the beneficiary performs primarily managerial duties. The fact that the beneficiary is the employee primarily

responsible for the "business development and growth" of the company is insufficient to elevate her to the level of a function manager. As discussed above, the beneficiary's responsibilities in this area include non-qualifying sales and purchasing functions.

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). In this matter, the beneficiary's two subordinates are not employed in managerial or supervisory positions. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has neither claimed nor established that a bachelor's degree in a specific field of study is actually necessary, for example, to perform the duties of the administrative associate or marketing specialist.

Counsel for the petitioner asserts that in addition to qualifying as a "function manager," the beneficiary will be employed in an executive capacity. 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 focuses on the broad goals and policies of the organization, as it is evident that she is involved in the day-to-day operations

of the enterprise. The petitioner has not indicated what executive duties the beneficiary performs, and counsel merely paraphrased the statutory definition in support of her claims. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On appeal, counsel asserts that the director denied the petition based primarily on the small size of the U.S. company. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

At the time of filing, the petitioner was a one-year-old import, export and distribution company, which employed the beneficiary as administrative director, an assistant director/administrative associate, and a part-time marketing specialist. Based upon the petitioner's representations, the assistant director performs administrative office functions, secretarial duties, database maintenance, and some market research, and may be asked to assist with sales tasks on occasion. The part-time marketing specialist is primarily responsible for market research, advertising and promotion, and also may occasionally participate in sales. The petitioner has not indicated that either employee will assist the beneficiary with purchasing activities, coordinating import/export activities with the foreign entity, supply chain coordination, or the other non-qualifying duties discussed above, which require more than half of the beneficiary's time. It is also not clear based on the record who in the company is responsible for the day-to-day bookkeeping and financial tasks of the company.

While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other such pertinent factors as the nature of the petitioner's business, which, together, can be used as indicators which help determine whether a beneficiary can remain focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. An analysis of the reasonable needs of the corporation in conjunction with its overall purpose and stage of development undermines the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity, as the record does not show that the beneficiary's subordinates would relieve the beneficiary from performing many of the day-to-day functions of the company.

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's ongoing performance of non-managerial or non-executive duties at the end of the first year of operations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (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. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

Counsel further refers to several unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial capacity, specifically as a function manager, even though he or she supervised few or no employees. Counsel has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished matters. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, counsel indicates that the petitioner intends to hire additional employees in the near future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa

petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Here, the record fails to establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. Accordingly the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that the beneficiary was employed in a primarily managerial or executive capacity with the foreign entity prior to her transfer to the United States. The director determined that the petitioner had not met this requirement, but did not further discuss this issue, or why the petitioner's evidence failed to establish the beneficiary's employment abroad in a qualifying managerial or executive capacity.

On appeal, the petitioner does not challenge the director's finding on this issue. Upon review, the AAO affirms the director's determination. In a letter dated April 13, 2006, the petitioner indicated that the beneficiary served as administrative general manager of the foreign entity from January 2004 to May 2005, with responsibility for: contacting clients and getting the feedback and arranging payments; managing the points of sale and distributors; managing the stock and the provisions; directing import/export procedures; managing the line of products and availabilities; and managing the office and employees needs.

On May 3, 2006, the director requested additional evidence regarding the beneficiary's previous position, including a detailed statement regarding her managerial duties, a complete position description for all managerial and executive employees in the foreign entity, including the beneficiary's position, and a copy of the foreign entity's organizational chart. In response to the director's request, the petitioner submitted the requested job descriptions for the beneficiary, as well as for the foreign entity's director/CEO, marketing manager and operations manager. However, the job description submitted for the beneficiary is essentially identical to that submitted for the CEO of the foreign entity. The petitioner did not explain why the foreign entity required two employees to perform the exact same duties. 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). Although the petitioner submitted an organizational chart for the foreign entity, the chart submitted depicts the foreign organization as of 2006 and did not even include the beneficiary's former position, thus it does not assist in establishing whether the beneficiary was employed in a managerial or executive capacity prior to her transfer to the United States.

The petitioner also submitted copies of contracts purportedly signed by the beneficiary in her capacity as general manager of the foreign entity. The documents, which were dated in 2004, identify the beneficiary by

her married name; however the record contains a copy of the beneficiary's marriage certificate, which confirms that she was married in February 2005, and states that her occupation at the time was "university student." 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). The petitioner also failed to address the director's request for information regarding the beneficiary's salary while employed by the foreign entity, and the record contains no evidence of wages paid to the beneficiary during her employment with the foreign entity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Based on the foregoing discussion, the petitioner has not persuasively demonstrated that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign entity for one year within the three years preceding her transfer to the United States. For this additional reason, the appeal will be dismissed.

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.