

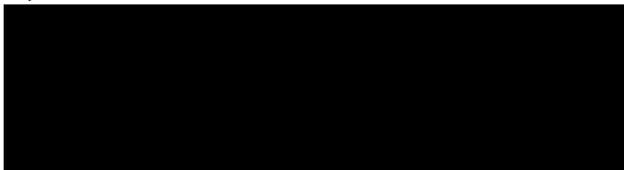
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U.S. Department of Homeland Security  
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U.S. Citizenship  
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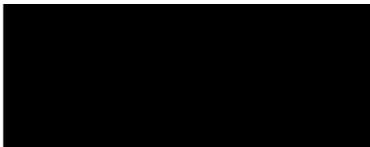
File: EAC 07 035 51562 Office: VERMONT SERVICE CENTER Date: DEC 21 2007

IN RE: Petitioner:  
Beneficiary:



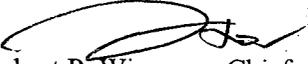
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, is a wholesaler and distributor of metallic balloons. It claims to be a subsidiary of Convertidora Industrial S.A. de C.V., located in Guadalajara, Mexico. The petitioner seeks to employ the beneficiary as its logistic and distribution manager for a three-year period.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

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 erroneously denied the petition based solely on a finding that the beneficiary's subordinates would not be managers or professionals. Counsel contends that the director failed to consider the beneficiary's proposed duties and the beneficiary's management of an essential function of the company. Finally, counsel asserts that the director made incorrect assumptions regarding the beneficiary's subordinates and the nature of the petitioner's business. Counsel submits a brief and additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary 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 November 20, 2006. In an appended statement, the petitioner described the beneficiary's proposed duties as Logistic and Distribution Manager as follows:

[The beneficiary] will direct the warehousing, packaging, and shipping activities of the Houston office. Specifically, [the beneficiary's] responsibilities will include: quality control; supervising, hiring, and training of employees; safety and housekeeping; and receiving, storing and shipping products on-time and accurately in order to continuously replenish customer demand. In addition, he will be responsible for managing the entire warehouse operations through team effort and maintaining department procedures and processes. Further, [the beneficiary] will continuously review logistic flow in order to optimize

warehouse operations, teams, and equipment and assume responsibility and decision-making for warehouse procedures regarding the security of inventory and physical assets.

The petitioner identified the following specific responsibilities associated with this proposed role:

- Quality control;
- Supervising, hiring and training of employees;
- Safety and housekeeping;
- Receiving, storing, and shipping products on-time and accurately;
- Maintaining department procedures and processes;
- Optimizing warehouse operations, teams, and equipment; and
- Assuming responsibility and decision-making for warehouse procedures regarding the security of inventory and physical assets.

The petitioner indicated that the U.S. company had 13 employees as of the date of filing and provided a list of employees by name and job title. The employees list included four warehouse employees, including a coordinator and three assistants.

The director issued a request for additional evidence on December 19, 2006, which, in part, instructed the petitioner to provide additional evidence to establish that the company will employ the beneficiary in a primarily managerial or executive capacity. Specifically, the director requested: (1) a comprehensive description of the beneficiary's duties and an explanation as to how the duties will be managerial or executive in nature; (2) a list of all U.S. employees by name and position title accompanied by a complete position description for each employee and a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; (3) copies of the petitioner's payroll records for the months of October and November 2006; (4) copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2006; and (5) copies of IRS Forms W-2 and 1099 issued by the petitioner in 2005.

In a response dated March 15, 2007, counsel for the petitioner provided a list of duties in response to the director's request for a "comprehensive description" of the beneficiary's proposed position. In response to the request, counsel and the petitioner identified the proposed position as "warehouse and logistic manager" rather than "logistic and distribution manager." The same list of duties was provided in a separate statement that accompanied the petitioner's organizational chart, which indicates that the beneficiary will supervise the warehouse coordinator and three warehouse assistants. The duties were described as follows

- Managing the warehouse employees, including hiring, training and firing (10 hours/week);
- Administering the safety program to comply with zero accidents policy and safety regulations;
- Ensuring that all orders are shipped on time on a daily basis (10 hours/week);
- Verifying and maintaining accurate inventory and shipping reports (10 hours/week);
- Controlling the budget, inventory, and materials for the warehouse (10 hours/week);
- Managing all packaging and shipping within the United States and international destinations; and
- Identifying production and shipping issues and recommending changes to improve productivity, timeliness, and efficiency.

The petitioner indicated that the warehouse coordinator is responsible for: assisting the warehouse and logistic manager (20 hours per week); managing the schedule of the warehouse assistants and other warehouse employees (10 hours per week); and informing the warehouse and logistic manager of any problems and recommending solutions (10 hours per week). The petitioner stated that the three warehouse assistants are responsible for counting inventories and stock availability (5 hours per week); handling products to be shipped for customers (15 hours per week); processing purchase orders for customers (15 hours per week); and handling related tasks as needed (5 hours per week).

The petitioner provided all requested IRS Forms W-2 and Forms 941, as well as its payroll registers for the months of October, November and December 2006. The payroll registers confirm that the beneficiary's proposed subordinates worked for the petitioner on a full-time basis at the time the petition was filed. A review of the evidence submitted shows that the three warehouse assistants were hired during the first and third quarters of 2006.

The director denied the petition on March 22, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. With respect to the beneficiary's subordinate employees, the director, relying on the petitioner's Form 941 for the third quarter of 2006 and on the petitioner's 2005 Forms W-2, determined that the three warehouse assistants "occupy positions which can be deemed fungible at best and part-time at worst." The director determined that persons working in a warehouse would not be required to possess college degrees and therefore could not be considered professionals, and further concluded that the subordinate positions would not be managerial or executive in nature.

The director also observed that the petitioner's descriptions of the beneficiary's duties "identify general managerial functions," and do not specify exactly what the beneficiary will be doing within the context of the petitioner's current staffing structure. The director concluded that "as it is not clear who is actually providing the goods and services of the United States operation to its customers/clients besides the beneficiary, it seems likely that the beneficiary will perform or help to perform these duties." The director determined that the beneficiary would provide services to the petitioner's clients rather than directing a facet of the organization.

On appeal, counsel for the petitioner states the director erroneously denied the petition based on his belief that the beneficiary would not supervise managers or professionals, and provided no legal or factual bases for his conclusions. Counsel states that the director's decision suggests that he focused solely on whether the beneficiary qualified as a manager based on his supervision of managerial or professional employees, while ignoring the rest of the regulatory criteria for "managerial capacity." Counsel asserts that a managerial employee may also manage an essential function within an organization, or a department or subdivision of the organization, and is not required to supervise managerial or professional employees.

Counsel also notes that federal regulations and legal precedents prohibit U.S. Citizenship and Immigration Services from denying an L-1A petition based on the size of the employer or the number of employees to be managed. Counsel cites unpublished AAO decisions and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988) in support of this claim. Counsel alleges that the director did not provide any evidence or discussion to support his conclusion that the beneficiary would be required to provide the goods and/or services of the business, and contends that the director's conclusion that three of the beneficiary's subordinates are part-time employees is based on "an erroneous and egregious interpretation" of the evidence submitted.

Counsel attempts to clarify how the beneficiary will meet all elements of the statutory definition of managerial capacity, in that he will: manage the petitioning company; manage the essential function of the company; have authority over personnel and functions at a senior level within the company; and exercise discretion over day-to-day operations and functions for which he has authority. Counsel asserts that the beneficiary's proposed position also meets the statutory criteria of "executive capacity" pursuant to section 101(a)(44)(B) of the Act, and alleges that the director did not consider his eligibility under such criteria.

Finally, counsel asserts that the director did not look at the entirety of the job duties the beneficiary will perform, nor consider whether the duties were essential and controlling to the function of the petitioner's business. Counsel alleges that the director applied an "imaginary statute and regulation" under which only a beneficiary who supervises professionals could qualify as a manager or executive.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity. The AAO agrees with counsel that certain comments made by the director, as discussed further below, were flawed; however, the AAO must concur with the director's ultimate conclusion that the petitioner did not meet its burden of proof with respect to establish that the beneficiary's duties would 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(1)(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 separate requirements. 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 petitioner initially provided only a general overview of the beneficiary's proposed duties that failed to establish what specific managerial or executive tasks he would be performing as logistic and distribution manager. For example, the beneficiary's responsibilities included such undefined tasks as "quality control," "safety and housekeeping," "maintaining department processes and procedures," "managing the entire warehouse operations, teams and equipment," reviewing "logistic flow," and "optimizing warehouse operations." These duties convey little understanding as to what the beneficiary will do on a day-to-day basis in the proposed position, and did not clearly establish that the beneficiary's responsibilities or his level of authority would be managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Furthermore, the beneficiary's responsibility for "receiving, storing, and shipping products on-time and accurately," suggested that he would be directly performing certain routine duties of his department, rather than primarily managing the warehousing, packaging and shipping function as claimed by the petitioner.

Accordingly, the director reasonably requested a comprehensive description of the beneficiary's proposed duties to expand upon the list of seven general duties initially submitted. In response, the petitioner assigned

the beneficiary a new position title, and provided a new list of seven vague duties, yet provided no explanation for these revisions. The response fell significantly short of the comprehensive description requested by the director. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). While the petitioner initially indicated that the beneficiary would perform such potentially non-managerial duties as "quality control," "safety and housekeeping," and "receiving, storing and shipping products," these duties were absent from the revised position description. Instead, the petitioner indicated that the beneficiary would "administer the safety program," "manage all packaging and shipping," and "ensure" that all orders are shipped on time on a daily basis. The petitioner also added responsibility for controlling budgeting, inventory and materials, a duty which was not included in the initial position description. The initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the work done in the petitioner's warehousing and shipping department.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

Regardless, neither position description clearly identifies what the beneficiary's primary tasks will be on a day-to-day basis. The petitioner did not clarify the managerial or executive duties associated with "administering the safety program," "ensuring that all orders are shipped," "maintaining inventory and shipping reports," or "managing packaging and shipping." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Furthermore, although the petitioner attempted to indicate how the beneficiary's time would be allocated among his responsibilities, based on the petitioner's representations, he would devote all of his time to only four of the seven duties listed. The AAO cannot consider this a complete description of how the beneficiary's time would be allocated.

Overall, the petitioner provided two somewhat different job descriptions, two different job titles, and an incomplete account of how the beneficiary's time would be allocated among his various responsibilities. Based on the current record, the AAO is unable to determine the actual duties to be performed by the beneficiary, whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary would primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not clearly establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

While the director specifically addressed the inadequacy of the submitted position descriptions, neither counsel nor the petitioner have offered additional evidence on appeal to clarify the beneficiary's actual duties.

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)). Counsel merely recites the statutory requirements and insists that the beneficiary meets all criteria for both managerial and executive capacity. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 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).

The petitioner does not claim that the beneficiary's four subordinate employees would be employed in a professional or managerial capacity. While the warehouse coordinator is senior to the warehouse assistants, the petitioner has made little distinction between his duties and those to be performed by the beneficiary, noting that this employee would spend at least half of his time "assisting" the beneficiary, which raises questions as to whether there would be overlap between their job duties. As the beneficiary's position appears to be newly created, it is reasonable to assume that the warehouse coordinator is currently the senior employee in the warehouse department and likely performs many of the duties to be undertaken by the beneficiary. The AAO concurs with the director that the beneficiary cannot be considered a "personnel manager" based on the petitioner's current staffing levels. However, as correctly noted by counsel, the beneficiary does not have to supervise and control supervisory, managerial or professional personnel in order to meet the statutory requirements for "managerial capacity."

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 position description 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. § 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

On appeal counsel states that "an essential function of the company is to meet the consumers' demand by packaging balloons according to customized requirements, making sure there is enough inventory to meet orders, and shipping to customer throughout the United States and worldwide." The fact that the beneficiary will be the senior person within the petitioner's warehouse and logistics department does not automatically establish that he should be deemed a function manager. Whether the beneficiary is a function manager turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. *See* sections 101(a)(44)(A) of the Act. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As discussed above, the record contains little information regarding the nature of the beneficiary's day-to-day job duties.

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. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was an 11-year-old wholesale distribution company with annual gross sales of nearly \$14 million. The company's warehouse currently employs a coordinator who will primarily assist the beneficiary and three assistants who process purchase orders, handle products for shipping and periodically count inventories and stock availability. Based on the limited position descriptions provided for the beneficiary and his proposed subordinates, it is not been demonstrated that the beneficiary's subordinates would relieve him from involvement in the day-to-day duties of his department. It is not clear who on the petitioner's staff would be responsible for interfacing with shipping and trucking companies to schedule pick-ups and deliveries to and from the petitioner's warehouse, purchasing inventory to replenish stock, purchasing warehouse supplies and equipment, quality control, and other tasks associated with the warehousing, inventory and distribution requirements of the business. The AAO can not assume that these duties would be assigned to the beneficiary's subordinates.

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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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. On appeal, counsel asserts that the beneficiary's proposed position will be in an executive capacity, but offers no support for this claim. Upon review, the AAO finds no evidence that the beneficiary's proposed role would be primarily focused on the broad goals and policies of the organization. Without documentary evidence to support the claim, the

assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 long 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. As discussed above, the petitioner has not met this burden.

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 CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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

A remaining issue in this matter is whether the petitioner established that it is doing business as defined in the regulations. See 8 C.F.R. § 214.2(l)(1)(ii)(H). In his decision dated March 20, 2007, the director made observations regarding photographs submitted by the petitioner at the time of filing which "depict no easily identifiable individuals" working at the day-to-day functioning of the United States entity, and which depict no customers. The director acknowledged in his decision that the petitioner's evidence establishes that the U.S. company is actively doing business. However, based on the photographs, the director stated that "the veracity of the instant petitioning entity as a functioning business entity for immigration purposes can be called into question."

On appeal, counsel for the petitioner objects to the director's findings and notes that the petitioner is a wholesaler and therefore would never have customers present in its warehouse. Counsel submits new photographs depicting various employees at work in the petitioner's warehouse and offices.

Upon review, the petitioner has established that the U.S. company is doing business as defined in the regulations. The petitioner has submitted substantial evidence of its business activities, including all evidence that was requested in this regard in the director's request for evidence. The AAO notes that the photographs in question, while they do not show any employees at work at the time the photographs were taken, clearly depict the petitioner's office and warehouse premises and show what appears to be an active business. If the director had specific questions regarding the photographs, then new photographs should have been requested

prior to the decision. The director specifically acknowledged that the evidence submitted in response to the request for evidence established that the company is doing business, and there was no basis for questioning the petitioner's credibility in this regard based on the photographs. The director's comments regarding the submitted photographs will be withdrawn.

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.