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

D7



File: EAC 07 019 50303 Office: VERMONT SERVICE CENTER Date: **OCT 02 2007**

IN RE: Petitioner:
Beneficiary:



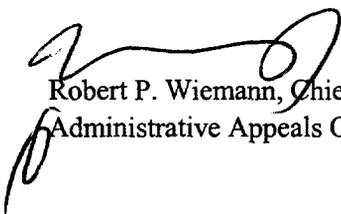
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, states that it intends to import Mexican and Latin American products. The petitioner seeks to open a new office in the United States and has requested that the beneficiary be granted a one-year period in L-1A classification to serve as its general manager.

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 within one year.

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. In addition, counsel alleges "the 'new office' regulations have been ignored and not applied in the case at hand." 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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The sole issue addressed by the director is whether, within one year, the petitioner will employ the beneficiary in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

The nonimmigrant petition was filed on October 26, 2006. In a letter dated October 10, 2006, the petitioner noted the U.S. company's plans to import Mexican and Latin American products and to provide prepared Mexican and Latin American food to U.S. consumers. The petitioner stated that as general manager of the new office, the beneficiary will perform the following duties:

- Opening of new office in Houston, Texas;
- Managing finances;
- Planning, developing, and implementing policies and procedures for company operations;
- Negotiating contracts;
- Formulating pricing policies for sale of goods;
- Approving the budget for the company and determining allocation of funds;
- Planning and implementing new operating procedures to improve efficiency and reduce costs; and
- Supervising and training of employees (including hiring, and firing).

In support of the petition, the petitioner submitted a business plan dated October 2006, which indicated the petitioner's intention to import programs from Mexico and to provide "mobile restaurant services to worksites." The business plan indicates that the company also intends to import onyx, silver and glass jewelry and decorative items and sell such items through a "main warehouse and store," exclusive dealers, eBay and the company web page. According to the business plan, food products will be sold through the "main store," foods stores, supermarkets, vending trucks, and catering services. The plan indicates that

initially, the petitioner will have one company-owned store at "the main production location," as well as a company-owned vending truck.

The petitioner's business plan also includes a "human capital plan" indicating that the company employees will include the beneficiary as general manager, an outsourced accountant, sales representatives and cooks, who will initially be employed on a part-time basis. The business plan did not include any financial information, such as anticipated start-up costs or financial projections and objectives for the first year of operations.

The director issued a request for additional evidence on December 11, 2006, which, in part, instructed the petitioner to provide additional evidence to establish that the company will require the services of a manager or executive within one year. Specifically, the director requested an organizational chart for the U.S. company, and complete position descriptions for the beneficiary's proposed subordinates, to include a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis. The director further requested a detailed explanation outlining how the subordinates' duties would require the expertise of a manager or professional.

In a response dated December 28, 2006, counsel for the petitioner stated that the beneficiary would initially be responsible for the following duties:

- Planning, developing and implementing policies and procedures for company operations;
- Analyzing the market to determine what products to import;
- Negotiating contracts with suppliers;
- Formulating pricing policies for sale of goods;
- Negotiating contracts with consumers;
- Approving the budget for the company and determining allocation of funds;
- Hiring and supervising and training of employees including the positions of Sales Manager, Warehouse Manager, and Supply/Administrative Manager.

Counsel indicated that the above-referenced employees, as well as sales personnel and warehouse employees, would be hired within the first year of operations, and noted that the beneficiary would delegate several duties to other managers. Counsel stated that the beneficiary's remaining duties would include:

- Planning, developing and implementing policies and procedures for company operations;
- Approving the budget for the company and determining allocation of funds;
- Maintaining communication amongst the different departments of the company;
- Supervision of subordinate managers; and
- Final authority on major company decisions.

Counsel provided the requested position descriptions for all the proposed subordinate positions, and noted that the three managers would all be required to have a bachelor's degree and five years of management experience.

The director denied the petition on February 28, 2007, concluding that the petitioner failed to establish that the petitioner would employ the beneficiary in a primarily managerial or executive capacity within a one-year period. The director acknowledged the proposed subordinate staff as described in response to the request for evidence, but found insufficient evidence that the positions subordinate to the beneficiary would require the services of bona fide managers or professionals. The director observed that the beneficiary's proposed salary of \$36,000 further supports a conclusion that she is not being hired to manage professionals or other managers. The director also found that the petitioner had failed to establish that the beneficiary would manage or direct a function within the organization. The director concluded that the beneficiary would not perform the stated job duties on a full-time basis, but would likely be engaged in the non-managerial, day-to-day operations of the petitioner's business.

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 her 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 further argues that the director's consideration of the beneficiary's salary in determining her employment capacity is inconsistent with the regulations and legal precedents.

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 asserts that the duties the beneficiary will perform "are essential and controlling functions and are of a type contemplated by the statute and the federal regulation, for the position of manager and/or executive." Counsel alleges that the director did not provide any evidence or discussion to support his conclusion that the beneficiary would not perform the stated duties on a full-time basis, but rather would be engaged in the day-to-day operations of the business.

Counsel attempts to clarify how the beneficiary will meet all elements of the statutory definition of managerial capacity, in that she will: manage the petitioning company; manage the essential function of the company and supervise and control subordinates with professional-level expertise; have the authority over personnel and functions at a senior level within the company; and exercise discretion over day-to-day operations and functions for which she 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 her eligibility under such criteria.

Finally, counsel asserts that the director failed to apply the "new office" regulations, and the "more lenient threshold" established by such regulations.

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 within one year. However, as a preliminary point, the AAO concurs with counsel that the director's decision suggests that only a cursory review of the record was conducted, and reflects an incomplete application of the regulations governing new office petitions. Furthermore, the director's conclusory statement

that USCIS is "not convinced" that the beneficiary and her proposed subordinates will perform the duties stated is not adequately supported by a discussion of the petitioner's evidence, why such evidence was deemed insufficient, or why its probative value was limited. 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). As the AAO's review is conducted on a *de novo* basis the AAO will herein address the petitioner's evidence & 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 AAO also concurs with counsel that the director's denial of the petition based, in part, on the director's opinion that an employee earning \$36,000 could not be supervising managers or professionals, was inappropriate. The director should not hold a petitioner to his undefined and unsupported view of what salary would be commensurate with a managerial or executive position. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. The regulations contain no minimum salary requirements. The director's comments with respect to the beneficiary's salary are withdrawn.

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.*

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary coming to the United States to open or be employed in a new office. Such evidence includes the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 the new business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to commence doing business in the United States. *Id.*

The petitioner has provided only a general overview of the beneficiary's proposed duties which fails to establish what specific managerial or executive tasks she would be performing within one year of approval of the petition. For example, the beneficiary's responsibilities for "opening new office," "managing finances," "planning, developing and implementing policies and procedures," "maintaining communication amongst the different departments," and "planning and implementing new operating procedures," convey little understanding as to what she will do on a day-to-day basis as the general manager of the petitioner's import and "mobile restaurant" business. 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 her daily routine. The actual duties themselves will 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).

In response to the director's request for evidence, counsel indicated that the beneficiary would initially be responsible for analyzing the market, and negotiating contracts with suppliers and consumers, duties that, without further explanation, do not fall within the statutory definitions of managerial or executive capacity. Counsel indicated that such duties would soon be delegated to the petitioner's three "other managers." However, for the reasons discussed in more detail below, the AAO is not persuaded that the petitioner intends to hire three managers during the first year of operations, and thus it has not been established that these non-qualifying duties would be delegated. In addition, although the petitioner indicates that the beneficiary will "manage finances" the petitioner has not indicated its intent to hire a bookkeeper or other lower-level employee who would be responsible for the day-to-day financial operations of the company.

Overall, the duties described suggest that the beneficiary will exercise the appropriate level of authority over the new office; however, the definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary will *primarily* perform these specified responsibilities and will 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 fact that the beneficiary will manage a business, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

As noted above, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. Upon review, the petitioner has failed to provide a clear, consistent description of its intended business activities, its intended organizational structure, and its hiring plan for its first year of operations.

The evidence submitted at the time of filing, specifically, the petitioner's business plan, included an outline of the nature of the petitioner's intended business activities, targeted markets, and personnel needs. The business plan, as noted above, indicates that the petitioner intends to hire part-time cooks and one or more sales representatives. According to the business plan, the petitioner's primary business will be importing food from Mexico and Latin American, and selling prepared food products through "mobile restaurants." The business plan also contemplates the sale of products to supermarkets, through a company-owned store which would serve as the "main production location." Counsel affirms on appeal that the petitioner will be providing "mobile restaurant services to worksites."

However, in response to the request for evidence, counsel asserted that the petitioner intends to hire a sales manager, a warehouse manager, an administrative manager, two sales personnel and two warehouse employees within the first year of operations. Counsel offers no explanation as to why the petitioner's business plan indicates a completely different proposed structure, or how the newly identified personnel, specifically, the three warehouse employees, would reasonably fit into the organizational structure of a company that will primarily sell prepared food from a vending truck and/or a retail store. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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 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 make material changes to the underlying facts of the petition. The facts as presented with the initial petition, were that the petitioner intended to hire part-time cooks and sales representatives, not three managers and four sales and warehouse staff. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the AAO's analysis of the petitioner's proposed staffing levels will be limited to the information provided within the petitioner's October 2006 business plan, which indicates that it includes the company's plans for the years 2006 through 2010.

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 CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the petitioner intends to import, prepare and sell Mexican and Latin American food through "mobile restaurants" or "vending trucks," through a company-owned store, and through supermarkets. Therefore it reasonably requires employees to purchase food from suppliers, ensure adherence to regulatory requirements for the import of food products, maintain inventory, prepare food, sell food to customers through its various outlets, drive its vending trucks, staff its "company-owned store," maintain relationships with suppliers and third-party distributors, market the business, and perform the day-to-day administrative, financial, and clerical duties inherent to operating any business. These assumptions do not even take into account the petitioner's stated intentions to also import and sell jewelry and decorative items through various outlets. Based on the personnel requirements outlined in the petitioner's business plan, the company intends to hire part-time cooks and sales people. The petitioner has not established that the proposed staff would reasonably relieve the beneficiary from performing non-qualifying duties associated with the petitioner's day-to-day purchasing, import, marketing, administrative, and financial functions.

The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. *See Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003). Given the absence of employees who would perform many of the non-managerial or non-executive operations of the company, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary would need to spend a significant portion of her time directly performing non-qualifying duties associated with the company's day-to-day operations. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act

(requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel correctly states that 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 has not established that the part-time cooks and sales representatives to be hired by the U.S. company would be performing duties requiring the educational background of a professional, nor does the petitioner's business plan indicate that the company is contemplating hiring managerial or supervisory employees who would work under the beneficiary's supervision.

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. § 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 employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

On appeal counsel states that "the essential function for the business concern of this nature rests on the company's marketing strategy to create a demand and ensurety [sic] of an efficient operational plan to ensure the efficient running of the major processes." Counsel appears to be stating that the beneficiary manages the "essential function" of developing a marketing strategy and overseeing the efficient operation of the company. The fact that the beneficiary will manage the company does not automatically mean that the beneficiary is a function manager as contemplated by the statutory definition. Regardless, whether the beneficiary is a function manager turns on whether the petitioner has sustained its burden of proving that her 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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. Again, as discussed above, the petitioner has not established that the beneficiary would be relieved from spending the majority of her time on the day-to-day operations of the company within a one-year period.

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 within one year, or that the U.S. company would support such a position. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the evidence of record does not establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one continuous year within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner indicates that the beneficiary was employed as human resources and legal manager of the foreign entity with responsibility for: administration, human resources and legal areas of the company; hiring and recruiting, compensation, training, and government relations with respect to human resources; and contracts, government relations, permits and licenses in the legal department. This brief description is insufficient to establish that the beneficiary's role was primarily 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). The record contains no evidence of the size of the foreign entity or the type of business it operates, nor did the petitioner provide evidence of the organizational structure of the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(3).

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)). Absent a detailed description of the beneficiary's actual duties while employed by the foreign entity, and more information regarding her role within the organizational hierarchy, the AAO cannot determine that she was employed in a primarily managerial or executive capacity. For this additional reason, the petition cannot be approved.

The record also contains insufficient evidence to establish the size of the United States investment and the financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner merely stated that the petitioner "plans to make a substantial investment in order to open a new office, establish a business presence, make overhead expenditures, secure inventory, and make all of the necessary investments for the office in Houston, Texas." The petitioner's business plan does not identify the company's anticipated start-up costs or financial plans or objectives, nor does it indicate how the company will be financed. It appears that the company has submitted an application to open a business checking account, but there is no evidence that any investment has been made. 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. For this additional reason, the petition may not be approved.

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 she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.