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U.S. Citizenship and Immigration Services

D7

[redacted]

File: EAC 08 082 51685 Office: VERMONT SERVICE CENTER Date: FEB 02 2009

IN RE: Petitioner:
Beneficiary: [redacted]

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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

for

John F. Grissom, Acting 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 visa petition seeking to extend the employment of 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 is a corporation organized under the laws of the State of Alabama and allegedly manages a convenience store. The beneficiary was granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States 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 to the petitioner asserts that the director erred and that the beneficiary will perform primarily qualifying duties in the United States. In support, counsel submits a brief.

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 primary issue in the present matter is whether 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.

It is not clear whether the petitioner is claiming that the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner describes its business in a letter dated January 24, 2008. The petitioner claims that, in June 2007, it began managing a convenience store owned by [redacted]. The petitioner also claims that it has an option to purchase the convenience store and that it intends on exercising this option in March 2008. The instant petition was filed on January 28, 2008.

The petitioner also described the beneficiary's proposed job duties in the United States in a document titled "Executive Summary" attached to the petition as follows:

- Financial Management: His duties will include supervision of all financial and administrative operations for the company, as well as entering into contracts, over which he will exercise complete discretionary authority. He will be responsible for major decision making for Petitioner relating to financing, marketing, personnel administration, etc. He will negotiate delivery contracts with clothiers and other manufacturers. He will hire professional advertising agencies to promote the new business with ad campaigns and special promotions in connection with exposing the new market segment. Educate staff on promotions and organizes employee meetings regarding policy on customer service, dress code, etc. Develop expansion plans and instruct his subordinates to deal with municipal and state agencies, making the business decisions on how to comply with the licensing requirements, preparing and submitting the required applications[;]

- Management Decisions: possesses all rights to execute all the managerial decisions of the Company, including purchasing goods and equipment and hiring, firing and promotion of employees; assess mangers [sic] performance and assist with management issues;

- Company Representation: acts in the name of the Company in all kinds of business

contacts and relations; coordinate with state governmental office to ensure compliance regulations;

- Has total managerial and executive authority over the company and all of its activities and employees without limitation[;]

- Directs and formulate financial strategy to provide funding in developing and continuing and operations to maximize returns on investments; set sales and product cost targets for managers and monitor progress;

- Supervision of the company's day-to-day operations; oversee store standards regarding goods and customer satisfaction policy; provide support to Sales managers and support staff;

- Organizational Development: projects the Company's future development and executes steps to accomplish the desired growth; prepare publicity and promotional campaigns; plan business strategy and target new business investments.

Finally, the petitioner asserts in the "Executive Summary" that it will hire a variety of store managers, assistant managers, sales clerks, and cashiers in the future. The petitioner claims in the Form I-129 to currently employer three persons. However, the record is devoid of evidence that any of these workers has been hired. Rather, it appears that the beneficiary is the petitioner's only employee and that he is engaged in "managing" a convenience store still owned, operated, and staffed by a third party. The record is also devoid of evidence that the owner of the convenience store has ever paid the petitioner for these "management services."

On March 20, 2008, the director requested additional evidence. The director requested, *inter alia*, a complete position description for the beneficiary, including a breakdown of the number hours to be devoted to each ascribed duty on a weekly basis; more detailed descriptions of the duties of the beneficiary's subordinate workers, if any; and an organizational chart for the United States operation.

In response, the petitioner submitted a letter dated April 29, 2008 in which it claims that it purchased the convenience store being managed after the filing of the instant petition. The petitioner also claims that it will hire a variety of workers in the future and that it currently relies on a staffing agency to provide workers to operate the convenience store.

The petitioner also submitted a materially identical job description for the beneficiary's proposed position in the United States. The petitioner did not submit a breakdown of the number of hours to be devoted by the beneficiary to each of the ascribed duties on a weekly basis as requested by the director.

Finally, the petitioner submitted a vague organizational chart showing the beneficiary supervising a variety of vacant positions or positions allegedly being filled by staffing agency workers.

On May 30, 2008, the director denied the petition. The director concluded that the petitioner failed to

establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary will primarily perform qualifying duties in the United States.

Upon review, counsel's assertions are not persuasive.

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 will be either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position will entail executive responsibilities, while other duties will be managerial. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Title 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 U.S. Citizenship and Immigration Services (USCIS) regulations that allows for an extension of this one-year period. If the beneficiary is not performing qualifying duties within one year of petition approval, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not established that the United States operation has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

As a threshold issue, it is noted that business expansion strategies and future hiring plans may not be considered in determining whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. It is also noted that the petitioner's claimed acquisition of the convenience store after the filing of the instant petition may not be considered by the AAO. 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). Accordingly, only those duties ascribed to the beneficiary at the time the instant petition was filed, e.g., the duties pertaining to the "management" of a convenience store owned by an unrelated third party, may be considered in determining whether the record establishes that the beneficiary will more likely than not primarily perform qualifying managerial or executive duties in the United States. The petitioner's claim that it will hire more workers in the future, or that it acquired the convenience store after the filing of the petition, is not relevant to these proceedings.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will manage a convenience store for a third party. In performing this duty, and pursuant to a management agreement, the petitioner claims that the beneficiary will supervise "all financial and administrative operations," make decisions regarding purchasing and personnel issues, formulate "financial strategy," supervise day-to-day operations, project "future development," and plan "business strategy." However, the petitioner does not specifically describe these

strategies and developments and fails to explain what, exactly, the beneficiary will do to supervise operations, purchasing, and personnel. Furthermore, the petitioner failed to submit a breakdown of the number of hours to be devoted to each ascribed duty on a weekly basis, even though this evidence was specifically requested by the director. 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). The fact that a petitioner has given a beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that a beneficiary will actually perform managerial or executive duties. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties in his "management" of the business. Not only are the ascribed duties so vaguely described that it cannot be determined whether they are qualifying in nature, the record is not persuasive in establishing that the beneficiary will be relieved of the need to perform the non-qualifying duties inherent to his purported management of a convenience store owned by a third party by a subordinate staff. In this matter, it appears that the beneficiary is the petitioner's only employee. Although the third party appears to employ clerks and other convenience store workers, the petitioner does not employ anyone who can relieve the beneficiary of the need to perform the tasks necessary to the provision of "management" services to its client, [redacted] Regardless, as the "management" of a convenience store owned by someone else is the service being provided, the provision of this service is in itself a non-qualifying task. Accordingly, it appears that the beneficiary will not "primarily" perform qualifying managerial or executive duties. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As noted above, it appears that the beneficiary is the petitioner's only employee. Even if his purported supervision of convenience store workers employed by a third party could be considered potentially qualifying, the record is not persuasive in establishing that any of these workers is a bona fide supervisory, managerial, or professional worker. Arbitrarily arranging workers in an artificial, multi-tiered organizational chart, or simply alleging that one worker "supervises" another, will not establish that a worker is a bona fide managerial or supervisory employee. Rather, it must be established that the worker has control over the employment of one or more subordinates and that the business needs of the enterprise could reasonably require and support such an organizational structure. In this matter, the petitioner has not described the convenience store workers employed by [redacted] as being managerial or supervisory employees. To the contrary, it appears that all of these workers will more likely than not perform the tasks necessary to the operation of a single-location convenience store. Therefore, it appears that the beneficiary would be, at most, a first-line supervisor of convenience store workers, even assuming that his supervision of employees of a third party could be a qualifying duty, which it cannot. A managerial employee must have

authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. § 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.[1]

Similarly, the petitioner has failed to establish that the beneficiary will act 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. 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 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. As explained above, it appears instead that the beneficiary will primarily perform non-qualifying tasks in his operation of a convenience store owned by a third party. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or

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[1]Counsel also argues on appeal that the beneficiary will manage an essential function of the organization. However, the record does not support this argument. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage 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 will manage the function rather than perform the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks related to the operation of the convenience store. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within even the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from having to primarily perform operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Furthermore, it is important to note that, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, there are significant discrepancies which undermine the credibility of the petition. First, the petitioner claims to employ three workers in the Form I-129. However, as noted above, the record is devoid of evidence that the petitioner has ever employed anyone other than the beneficiary. Second, the petitioner claims that it manages a convenience store owned by a third party. However, the beneficiary's job description indicates that he will negotiate contracts with "clothiers." Furthermore, the "management agreement" submitted by the petitioner indicates that it will manage a "jewelry store business known as 'Gold N Diamonds.'" The petitioner offers no explanation for these discrepancies in the record. 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).

Third, the petitioner's claim that it was formed to "manage" a single-location convenience store owned by Milk-N-Stuff of Alabama, Inc. by and through a sole worker, the beneficiary, is simply not a credible and viable business arrangement. To the contrary, it is obvious that the beneficiary is being *de facto* employed by a third party and that the petition is an attempt to disguise, and gain approval for, this unauthorized employment relationship. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).[2]

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.[3]

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary was employed abroad in a position that was primarily managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iv).

The petitioner described the beneficiary's job duties abroad in a letter dated January 24, 2008 as follows:

> From 1991 [the beneficiary] was in charge of all administrative operations and management of the Parent Company. He had assumed overall responsibility of purchasing the goods, expanding the company's product lines and distribution channels. He entered into contracts on behalf of the company's advantage. He has entered into contracts with suppliers and wholesalers as well as with banks. He trained sales personnel, established new business contracts, negotiated with clients and purchasers, and administered new and existing business contracts. He prepared expenditure and revenue documents, supervised the finance of the company and prepared cash flow statements. He computed taxes owed according to the

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[2]It is noted that counsel cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of his contention that the beneficiary will be primarily employed as an executive or manager. In that decision, the AAO recognized that the sole employee could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Third, as explained above, the petitioner has not established that the beneficiary will primarily be employed in an executive or managerial capacity. This is paramount to the analysis, and a beneficiary may not be classified as a manager or an executive if he or she will not primarily perform managerial or executive duties regardless of the number of people employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if binding or analogous.

[3]Counsel also cited the Foreign Affairs Manual (FAM) as authority. It must be noted that the FAM is not binding upon USCIS. *See Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

> prescribed rates and ensured that the establishment complies with periodic tax payment, information reporting and other taxing authority requirements.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity. The beneficiary's vague job description fails to describe the beneficiary as primarily performing managerial or executive duties abroad. Furthermore, the record is devoid of evidence pertaining to the duties of any subordinate workers. Absent job descriptions for the subordinate workers, it cannot be determined whether the beneficiary supervised other managerial, supervisory, or professional workers or whether he was relieved of the need to perform non-qualifying tasks by a subordinate staff. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Accordingly, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign employer are qualifying organizations.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Likewise, the regulation at 8 C.F.R. 214.2(l)(14)(ii)(A) requires petitioners seeking to extend "new office" petitions to submit "[e]vidence that the United States and foreign entities are still qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." A "subsidiary" is defined in part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K). An "affiliate" is defined in part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(L)(*1*).

In this matter, the petitioner claims in a letter dated January 24, 2008 that both it and the foreign employer are owned and controlled by the same "shareholders." However, the petitioner claims in the Form I-129 to be 100% owned by the parent company in India. Not only are these two statements inconsistent, the record is devoid of evidence establishing the ownership and control of either entity. The record is also devoid of evidence establishing that either the petitioner or foreign employer is "doing business" as defined in the regulations. There is no evidence that the petitioner has been paid anything for the beneficiary's provision of "management services." Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. If all required initial evidence is not submitted with the petition, USCIS in its discretion may deny the petition for lack of evidence. 8 C.F.R. § 103.2(b)(8)(ii). Once again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Accordingly, the petition shall be denied for this additional reason.

The previous approval of an L-1A petition does not preclude USCIS from denying an extension based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.