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File: EAC 08 059 50859 Office: VERMONT SERVICE CENTER Date: MAR 04 2009

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)

IN 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.

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

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 Texas and is allegedly a health food manufacturer and distributor. 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's duties will be primarily those of a manager or an executive.

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.

The petitioner does not clarify in the initial petition whether 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 as a manager *or* an executive and will consider both classifications.

The petitioner describes the beneficiary's proposed duties in the United States in a letter dated December 19, 2007 as follows:

[The beneficiary] functions as General Director in the U.S. involve [sic] representing the company in the media; establishing, maintaining and setting the company's goals and objectives; overseeing marketing, product development, production and finance, and customer service operations; supervising management personnel; approval all financial obligations; seeking business opportunities and strategic alliances with other companies and organizations; planning, developing, and establishing policies and objectives of business organization in accordance with board directives and company charter; directing and coordinating financial programs to provide funding for new or continuing operations in order to maximize return on investments, and increase productivity; overseeing the company's business plan; hire and supervise a Marketing Analyst; negotiate credit lines with key suppliers; and procuring financing required to operate.

In addition to the beneficiary, the petitioner claims to employ a marketing analyst. The petitioner describes the duties of the marketing analyst in the December 19, 2007 letter as follows:

- Coordinate product presentations with customers across country.
- Develop sales promotions and present them to the Director for approval.
- Identify market trends and suggest actions that have a positive impact in the business growth.
- Provide assistance to customers on product orders payment and shipment.

The petitioner also submitted the resume of the current marketing analyst. In the resume, the marketing analyst claims to be studying marketing at the University of Texas at San Antonio and to have most recently worked as an "administrative assistant" for a different employer. It does not appear from the resume that the

marketing analyst has graduated from a university.

Furthermore, the petitioner claims to have engaged a variety of professional service providers to assist the beneficiary in the operation of the business. For example, the petitioner claims to have engaged the services of an import/export broker, a logistics company to pack and ship goods, lawyers, a customer call center, a staffing agency, and an accountant.

On January 4, 2008, the director requested additional evidence. The director requested, *inter alia*, evidence that the beneficiary's subordinate workers are supervisory, managerial, or professional in nature.

In response, counsel argues that the beneficiary's claimed supervision of both the single subordinate employee and the various "independent contractors" and service providers constitutes the supervision and control of managerial and professional employees. Counsel asserts in a letter dated February 8, 2008 that the beneficiary is responsible for the "coordination and supervision of professionals and managers in different areas such as financial, office professionals, accounting and tax, customer service, hiring, training and promotions, information technology (website), media promotion, U.S. logistics for product shipping, [and] import and export from the manufacturing to the distribution facility in the United States." Counsel further asserts that the beneficiary "exercises the authority of directing and supervising the performance of all the above mentioned functions."

Counsel also claims that the beneficiary "manages" the distribution and marketing of the business through 95 non-employee "independent business associates" who agree to sell the petitioning organization's product. Although the petitioner submits a copy of its "independent business associate agreement," the record does not indicate that the sales associates are required to devote their efforts full-time to the sale of the petitioner's goods. In fact, the record does not indicate that the sales associates are required to meet any minimum sales quotas.

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary supervising the marketing analyst and all the independent contractors and service providers.

Finally, it is noted that the record is devoid of evidence addressing the amount of time the various contractors, service providers, and "independent business associates" devote to serving the petitioner. The record is also devoid of evidence pertaining to the amount of supervision or control the petitioner exercises over any of these intermittent contractors, service providers, and sales associates in the provision of their services.

On February 27, 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's duties are primarily those of a manager or an executive. Counsel argues that the beneficiary will manage various functions and will supervise and control managerial and professional employees and independent contractors in her operation of the business.

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 are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are 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.

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 set goals, objectives, and policies and will "oversee" marketing, product development, production, finance, customer service operations, financial programs, and the company's "business plan." The petitioner also claims that the beneficiary will supervise all personnel and seek business opportunities and strategic alliances. However, the petitioner does not specifically define these goals, objectives, and policies or explain what, exactly, the beneficiary will do to "oversee" the operation of the business other than to act as a first-line supervisor of the petitioner's single subordinate employee and to retain the intermittent services of a variety of vendors, professional service providers, and salespersons. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the 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, it has not been established that the beneficiary will primarily perform qualifying duties in her operation of the business as its sole administrative employee and principle owner. It has not been established that her ascribed duties, e.g., "overseeing" the various administrative and operational aspects of the business and retaining outside service providers to perform certain tasks and to provide professional services, are qualifying managerial or executive duties. It has also not been established that the beneficiary will be relieved from performing the administrative, operational, and first-line supervisory tasks inherent to her duties by the subordinate employee or by the various independent contractors. For example, while the task of preparing and packing the products for shipment to customers will allegedly be performed by a vendor called World Wide Express, it has not been established that the beneficiary's administration of the provision of this

service by a third party service provider, e.g., contracting, monitoring, and liaising, constitutes a qualifying managerial or executive duty. To the contrary, it appears more likely than not that the beneficiary's administration of this product sales business through the engagement of third party service providers and commission-based sales agents, as well as the supervision of a single non-professional marketing employee, "primarily" constitutes the performance of the tasks necessary to provide a service or to produce a product. The tasks inherent to locating third party service providers, contracting with those providers, and working directly with the providers to provide services to the petitioner are, contrary to the petitioner's assertions, non-qualifying administrative or operational tasks necessary to the provision of a service or the production of product, and the record does not establish that the beneficiary will be relieved of the need to perform these administrative tasks by subordinates. While making policy decisions about outsourcing work to third party service providers could involve the performance of managerial or executive duties when the day-to-day administration of these contracts has been delegated to subordinates, it has not been established in this matter that the beneficiary will, or even could, devote a majority of her time to performing such duties given the petitioner's organizational structure or that the type of intermittent contractual relationships described in the record would reasonably require oversight by a managerial or executive employee. 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 asserted in the record, the beneficiary will directly "supervise" a single marketing analyst as well as various third party contractors, professional service providers, and independent sales associates in her administration of the business. However, the petitioner has failed to establish that any of these relationships constitutes the supervision and control of supervisory, managerial, or professional employees.

First, the petitioner has failed to establish that the market analyst is a supervisory, managerial, or professional employee. The market analyst is not described in the organizational chart, or in her job description, as having supervisory responsibilities over other employees or contractors. Accordingly, the market analyst is not a supervisory or managerial employee. The record is also not persuasive in establishing that the market analyst is a "professional" employee. In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In this matter, it does not appear as if the person currently employed as a market analyst has received a bachelor's degree. As noted above, the market analyst's resume indicates that she is currently studying marketing at the University of Texas at San Antonio. Therefore, it does not appear as if the market analyst

position is a "professional" position. Furthermore, the record is not persuasive in establishing that a bachelor's degree in marketing is necessary to perform the ascribed tasks, e.g., preparing product presentations, developing sales promotions, identifying market trends, and providing customer service. As the market analyst most recently worked as an administrative assistant and has not yet earned a bachelor's degree, the record is not persuasive in establishing that this is a "professional" position, and it appears that the beneficiary will be a first-line supervisor of a single non-professional employee. 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.

Second, it has not been established that the beneficiary's claimed "supervision" of various third party contractors, professional service providers, and independent sales associates constitutes the supervision and control of managerial, supervisory, or professional "employees." The supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. *See* section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). Although the engagement of contractors could be relevant in some situations in ascertaining whether beneficiaries will likely be relieved of the need to perform certain non-qualifying tasks, the Act is quite clear that only the management of *employees* may be considered a qualifying managerial duty for purposes of this visa classification. Therefore, even if the petitioner could establish that the independent contractors are performing professional duties, the beneficiary's supervision of such contractors would not constitute a qualifying managerial duty.¹

Equally important, the petitioner has failed to establish that the beneficiary will truly "supervise and control" any of the contractors, professional service providers, or independent sales associates. As noted above, it appears that the petitioner's engagement of these various companies and individuals is intermittent at best, and that their compensation is either fee-for-service or commission-based. It has not been established that the beneficiary plays any role in the supervision of the performance of any of the tasks being performed. To the contrary, it appears that the petitioner is interested only in the results of the engagement, e.g., the creation of a website, the distribution of its products, or the preparation of its tax forms. The mere fact that the beneficiary has the authority to engage third party service providers does not establish that she will "supervise and control" the provision of these contracted services. Furthermore, it has not been established that the beneficiary supervises and controls the independent sales associates. Based on the "independent business associate agreement," it appears that these 95 associates are merely sales agents who have agreed to use reasonable efforts to sell the petitioner's products. It does not appear as if the beneficiary has any modicum of control over the day-to-day manner in which these agents sell the petitioner's product, or not.

Furthermore, the petitioner has not established that the beneficiary will manage an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or

¹Counsel cited the Foreign Affairs Manual (FAM) as authority for the proposition that the supervision of independent contractors constitutes a qualifying duty for purposes of this visa classification. 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.

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 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 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 how the beneficiary's duties will be primarily managerial. As explained above, the record fails to establish that the beneficiary will primarily perform qualifying managerial duties as a first-line supervisor of a single non-professional employee and as the sole administrator of the business. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her 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).

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

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. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor of a single employee and will perform the tasks necessary to produce a product or to provide a service. 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

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)). As such, 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).²

²It is noted that counsel cites several unpublished AAO opinions in support of his contention that the beneficiary will be primarily employed as an executive or manager. In those decisions, the AAO recognized that employees of small businesses could be employed primarily as managers or executives provided they are primarily performing executive or managerial duties. However, counsel's reliance on these decisions 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.

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.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary will be "employed" by the petitioner, or that she will be an "employee" of the petitioner, as required by the Act and regulations.

The regulation at 8 C.F.R. § 214.2(l)(3)(ii) requires that the petitioner establish that the beneficiary will be primarily "employed" in the United States as an executive, managerial, or specialized knowledge capacity. Furthermore, section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the L-1 classification. Section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Neither the legacy Immigration and Naturalization Service nor USCIS has defined the terms "employee," "employer," or "employed" by regulation for purposes of the L-1 classification. *See, e.g.*, 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of the L-1 classification, these terms are undefined.

The Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also* *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

Therefore, as the petitioner has not established this essential element, these unpublished decisions would be irrelevant even if binding or analogous.

In considering whether or not one is an "employee," USCIS must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Within the context of L-1 nonimmigrant petitions, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, as is the case here, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." *See Clackamas*, 538 U.S. at 449-450; *see also New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, such as the beneficiary in this matter, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Again, it is important to note that this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Id.* at 450 (citing *Darden*, 503 U.S. at 324). Moreover, in applying the above test, the mere fact that a "person has a particular title – such as partner, director, or vice

president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; cf. *Matter of Church Scientology International*, 19 I&N Dec. at 604 (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" of the petitioner in the United States. The beneficiary appears to be the 99.99% owner of the foreign employer, a Mexican business organization, which, in turn, is the 100% owner of the petitioner. While the beneficiary claims to be "employed" by the petitioner, the beneficiary allegedly draws a portion of her salary from the Mexican business. The beneficiary also appears to be an officer of the petitioner. The petitioner did not submit an agreement, employment contract, or any other document describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an "employee" as defined above. It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. She will control the organization; she cannot be fired; she will report to no one; she will set the rules governing her work; and she will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be "employed" as an "employee," and the petition may not be approved for that reason.

Accordingly, the petitioner has failed to establish that the beneficiary will be "employed" by the petitioner or that she will be an "employee" of the petitioner as required by the Act and regulations.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was "employed" abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii)-(iv). The petitioner failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties were 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, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad, if any. Absent detailed descriptions of the duties of both the beneficiary and her purported subordinates, it is impossible for USCIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Finally, and for the same reasons given above, the record is not persuasive in establishing that the beneficiary was an "employee" of the foreign entity, even if it was established that she performed qualifying duties. As noted above, the beneficiary is a 99.99% owner of the foreign entity. The record is devoid of evidence establishing that she was "controlled" by anyone but herself in the performance of her duties. Consequently, it does not appear that the beneficiary was "employed" abroad as an "employee."

Accordingly, as the petitioner failed to establish that the beneficiary was "employed" abroad for at least one continuous year as an "employee" of the foreign entity in a position that was managerial or executive in nature, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, and as noted above, the petitioner claims to be 100% owned and controlled by a Mexican business organization which is 99.99% owned and controlled by the beneficiary. As the purported owner of the petitioning organization, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that she will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. 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).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved 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 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, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act, 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.