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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090

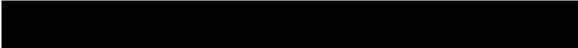


U.S. Citizenship  
and Immigration  
Services

87



File: EAC 09 067 50328    Office: VERMONT SERVICE CENTER    Date: **MAY 14 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to 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 Tennessee corporation, states that it intends to operate a retail hardware store. It claims to be a subsidiary of [REDACTED] located in Ahmedabad, India. The petitioner seeks to employ the beneficiary as the manager of its new office in the United States for a period of one year.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. The director based the decision, in part, on a conclusion that the petitioner did not establish that the U.S. company currently has the staff in place to relieve the beneficiary from performing non-managerial tasks.

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, the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval of the petition. Specifically, counsel asserts that the petitioner established that the beneficiary will hire five employees during the first year of operations, and will directly supervise subordinate supervisors and managers. Counsel submits a lengthy 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(1)(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 (1)(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 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.

As a preliminary matter, the AAO notes that the director erred by adjudicating the instant matter as a petition involving an established U.S. entity, rather than applying the regulations pertaining to new offices at 8 C.F.R. § 214.2(l)(3)(v). When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This 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. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

Although the director acknowledged in the request for additional evidence issued on January 7, 2009 that the petitioner is a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), the director nevertheless based the adverse decision, in part, on the petitioner's staffing levels at the time of filing, rather than applying the regulatory provisions applicable to new offices at 8 C.F.R. § 214.2(l)(3)(v). Accordingly, the director's analysis of the beneficiary's proposed position was flawed as it did not take into account the petitioner's business plan and other evidence submitted to establish that the U.S. company would support a managerial or executive position within one year. Although the director's analysis with respect to the petitioner's current staffing levels will be withdrawn, the AAO concurs with the director's ultimate conclusion that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991).

The primary issue in this matter is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition.

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 filed the Form I-129, Petition for a Nonimmigrant Worker on December 31, 2008. In a letter dated December 30, 2008, the petitioner stated that the beneficiary would perform the following duties as manager of the new office in the United States:

- Establish physical office in the States of Tennessee to promote [the petitioner's] hardware material, home improvement items, and related products business within the U.S., Canada, and Central and Latin America.
- Establish warehouse for efficient and timely distribution of [the petitioner's] range of products within the U.S., Canada and Central and Latin America.
- Establish/liaise on a regular basis with the Petitioner's key customers and distributors.
- Ensure that timely and efficient after sales services is provided to customers in the U.S.
- Business development.

The beneficiary would be responsible for overall operations including but not limited to promoting the company's products in the United States, Canada, Central and South Americas. Specifically, the Beneficiary would be responsible for expanding its market base in these areas. Additionally, the Beneficiary would lead in the development of marketing strategies. The Beneficiary will also spearhead and direct business development and sales of [the petitioner's] products. In addition, [the beneficiary] will oversee the timely distribution of products in these countries.

[The beneficiary] would also be responsible for hiring personnel for the Petitioner. He would be responsible for supervising the sales operations of the Petitioner. His specific functions include, but are not limited to overseeing the creation of plans to accomplish sales and profitability, primarily achieved by calling on new and established accounts, identifying sales opportunities and other business partners, developing sales forecasts and managing the allocated sales budget.

In addition, he would be responsible for overall management of [the petitioner], including hiring and firing personnel, overseeing training programs, reviewing and developing progressive and proactive compensation and benefits programs to provide motivation and incentives to deserving employees, overseeing development, implementation and management of human resources (HR) policies and procedures, and ensuring HR administrative legal compliance with federal and state regulations.

In a letter dated December 30, 2008, counsel for the petitioner stated that the beneficiary would devote 100% of his time to the following duties:

- Correspond with offshore departments for carrying out the operations of the Company;
- Receiving the latest updates n the functioning of the different departments and resolving issues;
- Review Budgets, Financial Reports and other financial documents;
- Keeping track of achieving the company's goals;
- Attend and preside over meetings and oversee the functioning and development of ongoing projects.
- Supervising and monitoring the project team and is responsible for hiring and firing employees.

The petitioner submitted a proposed organizational chart for the U.S. company which indicates that the beneficiary's direct subordinates would include a purchase manager/supervisor, a sales manager, and a part-time accountant. The chart shows that the sales manager would supervise a salesman and a technician.

The petitioner also submitted a business plan for the U.S. company, noting that its mission is "to offer quality hardware products in a customer-friendly shopping environment." The petitioner's business plan, at section 6.1, includes a personnel plan, where the petitioner indicates that it will have the following staff members: manager, assistant manager, office manager/accountant, checkers (full-time and part-time), two customer assistants, and stockers (full-time and part-time). On the same page of the business plan, the petitioner presents its personnel plan in table form, along with projected salaries for each employee. The petitioner indicates that it will employ the following workers in 2009: manager, purchase manager/supervisor, sales manager, sales man, technician, and part-time accountant, and pay total salaries of \$240,000. The petitioner's "start-up summary" lists total start-up expenses and asset requirements for the new company as \$230,000.

The petitioner also submitted a lease agreement for "a portion of the building" located at [REDACTED] in Cookeville, Tennessee. An addendum to the lease agreement indicates that the petitioner may use 1,200 square feet of the premises.

The director issued a request for additional evidence (RFE) on January 7, 2009. The director instructed the petitioner to submit the following evidence related to the beneficiary's proposed position and the establishment of the new office: (1) photographs of the interior and exterior of the leased premises; (2) a business plan that provides specific dates for each proposed action to be taken by the new company for the next two years; (3) a more detailed description of the beneficiary's proposed duties, listing specific tasks to be performed; (4) information regarding the size of the United States investment; and (5) evidence to document the transfer of any funds between the foreign and United States entity.

In a response dated February 20, 2009, counsel for the petitioner further described the beneficiary's proposed position as follows:

Beneficiary will set up the new business in the United States, establish its policies and procedures, hire employees, commence business, try to obtain large customer accounts, market

the business, promote sales, ensure the smooth running of the new business, manage it, supervise employees, hire and fire employees, authorize their leave, etc., and generally exercise discretion over the day-to-day running of the business. . . . Beneficiary will manage the business and supervise his supervisory personnel who will ultimately relieve him from performing non-qualifying duties.

Counsel further stated that the beneficiary's specific duties would include the following:

- Ultimate supervisory control of all employees including Purchase Manager/Supervisor, Sales Manager, Accountant.
- Make decisions regarding hiring and firing of employees.
- Correspond with offshore departments for carrying out the operations of the Company.
- Receiving the latest updates on the functioning of the different departments (i.e., Assistant Manager and Sales Manager) and resolving issues.
- Review budgets, Financial Reports and other financial documents provided by the Operations Manager and Accountant.
- Keeping track of achieving the company's goals.
- Attend and preside over meetings and oversee the functioning and development of ongoing projects.
- Supervising and monitoring the project team and hiring and firing employees.
- Judgment and Decision Making by considering the relative costs and benefits of potential actions to choose the most appropriate one.
- Management of Personnel Resources by motivating, developing and directing people as they work, identifying the best people for the job.
- Making business decisions and solving problems to choose the best solutions.

In response to the director's request for information regarding the size of the U.S. investment, the petitioner stated that the proposed investment in the U.S. company would be approximately \$230,000. Counsel stated that the foreign entity's bank statements establish that the company has the financial ability to commence business in the United States. Counsel noted that the beneficiary would also "acquire personal loans from friends and family in the amount of \$100,000 to \$110,000 and supplement the balance from his savings. The petitioner submitted bank statements for the foreign entity's account and noted that "total deposits in the account" as of July 31, 2008 were approximately \$9,400.

Finally, in response to the director's request for photographs of the interior and exterior of the premises where the business will be conducted, the petitioner submitted photographs of a Citgo gas station and what appears to be a convenience store.

The director denied the petition on February 26, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. As discussed, insomuch as the director's decision was partially based on a finding that the petitioner had not established that it currently has staff to provide the services of the company, the director's comments regarding the staffing of the company will be withdrawn.

On appeal, counsel for the petitioner asserts that the petitioner has established that the beneficiary will serve as a bona fide manager pursuant to the statutory definition of "managerial capacity," and that he will function at a senior level within the organization's hierarchy. Counsel asserts that the beneficiary will manage five employees during the first year of operations, including three supervisors, as well as contractors and vendors. In addition, counsel notes that, by the end of the first year, the beneficiary will be seeking additional business locations, with responsibility for "the due diligence of mergers and acquisitions."

Counsel acknowledges that the petitioner will be a small company initially, but notes that there will be two full-time supervisors (a purchase manager and a sales manager), as well as a part-time accountant. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5<sup>th</sup> Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988), in support of her claim that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises.

With respect to the duties to be performed by the beneficiary's subordinates, counsel states:

[T]he Purchase Manager will spend at least forty hours per week on ordering and maintaining inventory, stock checking, handling customer complaints, quality assurance, recommending popular items, etc. The Sales manager will set up means of promoting products of the business and establishing new accounts, and coordinating the sales team. The Sales Man and Technician under the Sales Manager will work for thirty to thirty five hours per week and, as the Organization Chart says, the Accountant will start working part-time. Petitioner's employees will carry out the listed duties on a full-time basis.

\* \* \*

Petitioner is not simply making assertions; this fact has been established by the business plan, a critical supporting document as required by *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The company included the expenses of its employees salaries as demonstrated by its business plan will be able to bear them.

Upon review, the petitioner in this matter has failed to establish how the United States operation 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. The petitioner has failed to sufficiently describe the beneficiary's proposed duties after the petitioner's first year in operation; has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office; and has failed to establish that a sufficient investment has been made in the United States operation, as required by 8 C.F.R § 214.2(l)(3)(v)(C).

As a preliminary matter, the AAO notes that, while the petitioner has submitted a fairly detailed business plan outlining the petitioner's proposed retail hardware business, the petitioner's lease and photographs indicate that the company would be doing business from the premises of an existing gas station/convenience store.<sup>1</sup>

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<sup>1</sup> An Internet search for the petitioner's address at [REDACTED] reveals that a Citgo gas station is located at this address. See <http://www.citgo.com> (accessed on April 22, 2010).

According to the submitted lease agreement, the petitioner has leased only a portion of the premises. However, the AAO finds it unlikely that the petitioner will be operating a hardware store from a gas station, and the submitted photographs do not show an available 1,200 square feet of rentable space on the premises. Therefore, it is reasonable to conclude that the petitioner will either be operating the gas station, or that the petitioner has yet to secure any viable physical premises for its hardware 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. *Id.* at 591. Based on the evidence submitted, the AAO cannot determine the nature of the business intends to operate. However, the submission of a lease agreement for a gas station raises significant questions regarding the probative value of the petitioner's business plan for a hardware store.

Further, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

Here, the petitioner's and counsel's descriptions of the beneficiary's proposed duties, while lengthy, are vague and provide little insight into what types of duties the beneficiary would primarily perform as manager of the company at the end of one year. For example, the petitioner stated that the beneficiary will be "responsible for overall operations," "responsible for overall management," and "hiring and firing personnel," while counsel noted that the beneficiary will be "keeping track of achieving the company's goals," supervising and monitoring "the project team," and will "preside over meetings and oversee the functioning and development of ongoing projects." These general statements do not convey an understanding of what the beneficiary would be doing on a day-to-day basis. 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).

Moreover, several of the duties attributed to the beneficiary appear to be incompatible with the type of business the petitioner stated it would be operating. For example, counsel stated that the beneficiary would be establishing an office and warehouse for promotion and distribution of hardware products within the U.S., Canada and Latin America, overseeing the distribution of products in these countries, establishing and liaising with key customers, and ensuring the provision of after-sales services to U.S. customers. Given the petitioner's business plan indicating that it will initially operate one retail hardware store to service the local community in Cookeville, Tennessee and other evidence in the record indicating that the petitioner may actually intend to operate a gas station, the petitioner has not established that it will be engaged in international distribution and promotion activities, or providing after-sales services to retail buyers of consumer hardware products or gasoline.

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner submitted a description which included many of the same vague duties, and added that the beneficiary would be "making business decisions and solving problems," exercise "judgment and decision making," establish the company's policies and procedures, manage the business, "ensure the smooth running of the new business," and "generally exercise discretion over the day to day running of the business." This description did not provide any additional insight into the beneficiary's actual duties, and, like the previous descriptions, is vague and non-specific in describing the position. 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 proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While it appears that the beneficiary would exercise the requisite level of authority over the U.S. company as its manager, the vague position descriptions provided fall significantly short of establishing that the beneficiary's primary duties would be managerial or executive in nature.

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(1) requires the petitioner to provide evidence regarding the proposed nature of the business describing the scope of the entity, its organizational structure, and its financial goals. The petitioner must also establish that there is a realistic expectation that sufficient staff will be hired within one year to relieve the beneficiary from performing the non-qualifying duties associated with operating a retail hardware store.

The petitioner has submitted a detailed business plan outlining its plans for its proposed hardware store. However, as discussed above, the petitioner has signed a lease for a gas station and convenience store, and the nature of the intended business is in question. Furthermore, the "personnel plan" summarized in the business plan contains two different planned organizational structures. The petitioner states that it intends to hire an assistant manager, office manager/accountant, checkers, customer assistants and stockers. On the same page, it indicates that it will hire a purchase manager, a sales manager, a salesman, a technician, and a part-time accountant. 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. The AAO cannot determine which personnel plan, if either, represents the petitioner's anticipated organizational structure.

Furthermore, the petitioner's plan indicates that the petitioner intends to be fully staffed and paying salaries of \$20,000 per month as of January 2009. Given that the petition was filed on December 31, 2008, this hiring plan does not appear to be realistic. As noted above, the petitioner does not appear to have acquired premises

suitable for a hardware store and there is nothing in the record to suggest that the company is prepared to commence business operations immediately upon approval of the petition. For example, the petitioner did not have a federal employer identification number as of the date of filing nor has it purchased any inventory. In light of the uncertainty regarding the nature of the petitioner's business, the two different personnel plans included in the business plan, and the lack of a realistic timeline for hiring additional staff, the petitioner has not demonstrated that the beneficiary would be supervising two or more subordinate supervisors within one year.

Even if the AAO accepted the anticipated structure indicated in the petitioner's organizational chart as the petitioner's likely structure after one year in operation, it is noted that a retail store with three "managers" and only one salesperson would likely require its managers to regularly perform non-qualifying duties related to the day-to-day operations of the store, rather than performing primarily managerial or executive duties. In addition, notwithstanding the job title assigned to the "purchase manager supervisor," the petitioner does not indicate that this individual would supervise any subordinate workers.

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 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 performing 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 failed to establish that beneficiary will be primarily performing managerial duties within one year, due to the many deficiencies discussed above; our decision does not rest on the proposed size of the petitioning entity. 889 F.2d at 1472, n.5.

Overall, the conflicting evidence regarding the proposed nature of the business, the anticipated staffing of the U.S. company, and the petitioner's financial ability to support the proposed organizational structure, undermines the petitioner's claim that the petitioner will hire sufficient staff within the first year of operations to relieve the beneficiary from performing primarily non-managerial and non-executive duties.

Finally, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to provide information regarding the size of the U.S. investment and financial ability to commence doing business in the United States. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner has consistently maintained that it requires \$230,000 in start-up funds for the new U.S. company, but it has not provided evidence that it has obtained the required funding. Counsel indicates that the beneficiary intends to use "personal loans" in the amount of \$100,000 to \$110,000, and will rely on his savings. The foreign entity had only \$9,400 in its bank account based on the most recent statements submitted, and the petitioner has not disclosed the balance of the U.S. company's account. Based on this evidence, the petitioner has not established that it has obtained or will be able to obtain the funds needed to cover its start-up costs, which further undermines the petitioner's claim that the company will achieve its financial objectives and proposed staffing levels for the first year of operations.

Based on the foregoing discussion, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for that reason.

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

The petitioner indicated at the time of filing that the beneficiary's duties as proprietor/manager of the foreign entity are as follows:

[T]he beneficiary directs and manages the purchase manager, sales manager and accounts department of [the foreign entity's] overall business in India. The Beneficiary supervises three managers, all of whom work in a professional capacity. The Beneficiary supervises a manager in Sales, a Purchasing Manager, and an executive in Finance (Accountant). Specifically, this responsibility entails overseeing the development of marketing initiatives both in India and overseas, the advertising of company products, specifically the marketing of hardware items, the streamlining of logistical operations, pricing and accounts payable.

The petitioner submitted an organizational chart for the foreign entity which indicates that the beneficiary supervises a purchase manager, sales manager and accountant. The chart indicates that the sales manager supervises two salesmen. The chart does not identify any employees by name, other than the beneficiary.

In response to the director's request for a more detailed description of the beneficiary's position with the foreign entity, the petitioner submitted a list of job duties that was essentially the same as that provided for the proposed U.S. position, and therefore suffers from the same deficiencies discussed above. Duties such as "oversee the functioning and development of ongoing projects," "kept track of achieving the company's goals," and "making managerial and business decisions," are not sufficiently detailed to establish that the beneficiary's duties were 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).

Furthermore, the petitioner indicated that the beneficiary was required to use technical skills such as: "inventory ordering, merchandising, overstocking"; balancing cash drawers and maintaining a proper balance of coin and paper monies"; "assisting customers: answering phone inquiries, bookkeeping, service, handling customers' complaints"; and "securing premises at closing." These duties suggest that the beneficiary was directly involved in the non-managerial, day-to-day operations of the foreign entity's store. The AAO will not conclude that the beneficiary was employed in a qualifying capacity based on his job title and his ownership of the foreign company. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act.

Finally, although the petitioner indicates that the beneficiary supervised a sales manager and a purchase manager, the petitioner has not established that either of these employees was employed in a managerial, supervisory or professional capacity. 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)(ii)(B)(2). Here, the job descriptions submitted for the beneficiary's subordinates indicate that they were directly involved in customer service, sales, inventory, and other routine store functions. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*Cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)).

As noted above, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While it appears that the beneficiary in this matter exercised the appropriate level of authority over the foreign entity, the evidence in the record is insufficient to establish that his actual duties were primarily managerial or executive in nature. For this additional reason, the petition cannot be approved.

Beyond the decision of the director, because the beneficiary is also the sole owner/proprietor of the foreign entity, the record does not establish that the parent company will continue to do business abroad and maintains a qualifying relationship with the U.S. entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In addition, the record does not contain evidence that the beneficiary's services are to be used for a temporary period and

that he will be transferred to an assignment abroad upon the completion of the temporary services in the United States pursuant to 8 C.F.R. § 214.2(l)(3)(vii). For these additional reasons, the appeal must be dismissed and the petition denied.

Finally, the remaining issue in this matter is whether the petitioner established that it has acquired sufficient physical premises to house the new office in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner maintains that it intends to operate a retail hardware store. The petitioner has submitted a lease for 1,200 square feet of space apparently located on the premises of a gas station and convenience store, and has not provided evidence that this space is suitable for the intended business. For this additional reason, the petition cannot 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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. 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. v. United States*, 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, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.