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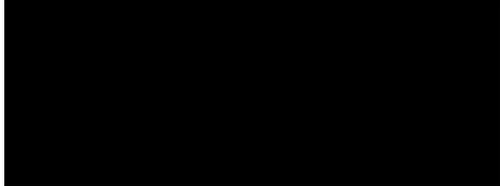
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



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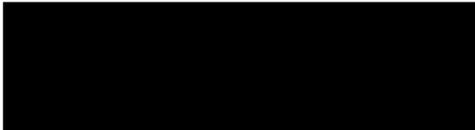
File: WAC 09 037 50399 Office: CALIFORNIA SERVICE CENTER Date:

**MAY 19 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, California 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 seeks to employ the beneficiary temporarily in the United States 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 California corporation, operates a corporate leadership and team training business, and states that it is an affiliate of [REDACTED] located in Australia. The petitioner seeks to employ the beneficiary as its chief executive officer for a period of three years. The beneficiary is currently employed by the petitioner in E-3 status.

The director denied the petition, determining 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 for the petitioner asserts that the director erred by failing to take into account the petitioner's stage of development as "a small business in its first full year of operation." The petitioner submits additional evidence in an effort to "offer further clarification" regarding the nature of the beneficiary's managerial duties.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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 filed the Form I-129, Petition for a Nonimmigrant Worker, on November 24, 2008. The petitioner stated on Form I-129 that the U.S. company was established in 2005 and has six employees. The record shows that the beneficiary's E-3 visa was issued on January 10, 2007, and he was first admitted to the United States as an E-3 nonimmigrant performing services in a specialty occupation on February 7, 2007.

Therefore, although the petitioner claims that the petitioner is in its "first full year of operations," the AAO must conclude that the petitioner was doing business for at least one year at the time the petition was filed and is not a "new office," as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F).

In a letter submitted in support of the petition, the petitioner's co-founder and director stated that the beneficiary, upon approval of the L-1A classification petition, will "continue to manage our entire US operations based in California including the supervision of all employees, recruitment and termination of employees, and the assignment of duties to these employees."

The petitioner submitted an organizational chart depicting the structure of the U.S. operations. It identifies the beneficiary as "co-founder" at the top of the structure, and shows that he directly supervises an assistant and a business development manager/lead facilitator. Under the business development manager, the petitioner identifies two U.S.-based contract employees, whose job titles are "facilitator/process consultant" and "lead facilitator/process consultant." The chart also identifies four "license holders," including two based in the United States, one in South Africa, and one in New Zealand. Finally, the chart indicates that there are two position openings for full-time U.S. facilitators, and a vacant office manager position.

The petitioner also submitted an organizational chart in which employees are organized by "functions," which includes U.S.-based, Australian, and other foreign-based employees, contractors, and licensees. The beneficiary and Ian Schubach are identified as co-founders, supervising the human resources, business development, office and administration, legal, sales, program design and facilitator departments or functions. The beneficiary is also listed among the facilitators, program designers, and sales employees.

The director issued a request for additional evidence (RFE) on December 2, 2008, in which she requested, *inter alia*, additional evidence to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director instructed the petitioner to: (1) indicate the total number of employees at the location where the beneficiary will be employed; (2) provide a more detailed organizational chart for the U.S. company which clearly identifies the beneficiary's position and all employees working under his supervision; (3) a brief description of job duties, educational level and annual salaries/wages for the beneficiary's subordinates, including an explanation of the source of remuneration for each employee; (4) a more detailed description of the beneficiary's duties in the United States, including the percentage of time the beneficiary allocates to each specific duty; (5) copies of the petitioner's California Forms DE-6, Quarterly Wage Reports for the last five quarters, and copies of IRS Forms W-2 and W-3 evidencing wages paid to employees; and (6) a list of specific discretionary decisions that the beneficiary has made over the last six months and a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a response dated January 9, 2009, counsel for the petitioner stated:

We have submitted previously submitted [*sic*] org charts showing the hierarchy and employees of the company globally, in the U.S., and in Australia. Please note as shown in the charts, [the beneficiary] as CEO overseas [*sic*] all of the employees. In addition, he is responsible for directing the growth of [the petitioner]; he establishes the goals of the company, in addition to managing the entire U.S. operations including supervision,

recruitment, and termination of all employees.

Counsel stated that evidence submitted "clearly shows . . . that [the beneficiary] is and has been [the company's] chief executive employee both in Australia and in the United States."

The petitioner re-submitted the above-referenced organizational charts and letter from [REDACTED], highlighting the sentence which describes the beneficiary's U.S. duties, as quoted above. The petitioner also provided copies of its payroll summary and IRS Forms W-2, Wage and Tax Statements, issued by the company in 2008, which indicate that it paid wages to three individuals - the beneficiary, [REDACTED] and the business development manager/lead facilitator.

Finally, the petitioner submitted copies of three recent contracts with clients, which include projected staffing for each project. The materials include "credentials of key personnel," including the following information regarding the beneficiary:

[The beneficiary] is co-founder of [the petitioner] and is the principal designer of [the company's] mountain and ocean themed [REDACTED]

He was the lead facilitator and designer of the Base Camp Experience for [the client's] SUMMIT program and is also the lead facilitator for the Prime Brokerage event in London in October 2008.

[The beneficiary's] unique combination of personal experiences, design expertise and global perspective has laid the foundation for highly customized programs delivered across five continents.

[The beneficiary] works with Executive Committees, Global Leadership Teams, SVPs of Learning and Development and Line Managers from all areas of business. . . .

The submitted materials included proposals and contracts for implementation of the petitioner's "virtual adventure metaphor" programs at clients' employee conferences and events. The documentation shows that the petitioner collaborates with the client to design customized presentations, which include video footage, customized voiceover, decision scenarios, facilitative questions, dramatic music, introductory and follow-up commentary, supporting material and handouts, input on design ideas for theming materials, and facilitation of the presentation by the petitioner's facilitators.

The director denied the petition on January 27, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director observed that the beneficiary's claimed duties are too broad and nonspecific to convey any understanding of his day-to-day activities, and further observed that the petitioner's wage records show only three employees in the United States, including the beneficiary. In addition, the director found that it appears that the beneficiary has been and will be performing many aspects of the day-to-day operations of the business, noting that the beneficiary is identified in the record as a facilitator, product designer, and member of the sales team. The director emphasized that, as the petitioner had not provided

evidence of a staff that would relieve the beneficiary from producing and providing the petitioner's product and services to clients, it appears that the beneficiary would perform these duties, rather than managing subordinate professional, supervisory or managerial staff or an essential function of the organization.

On appeal, counsel for the petitioner suggests that the director "was confused by the record of evidence and did not adequately take into account the stage of development of [the petitioner] as a small business in its first full year of operation." Counsel states that the beneficiary is employed in the petitioner's top position and supervises subordinate employees in professional positions. With respect to the size of the company, counsel cites to an unpublished decision to stand for the proposition that a person may be a manager or executive even if he is the sole employee of the company. Counsel further states:

As founder of [the petitioner], [the beneficiary] is part of the brand image. A very large client, such as UBS, one of the world's largest banks, requires confirmation that [the beneficiary] will have a leadership role in the product. [The beneficiary] takes a team with him that he oversees to the client. This is much like Steve Jobs presenting Apple's new product. While Apple was a start up, Jobs played a significant role in the face time for Apple. . . .

\* \* \*

[The petitioner] is a small business in its first full year of operation in the US. Like any small business trying to grow, [the petitioner] has focused on strategies to keep costs down and increase revenue. To keep payroll costs down, [the beneficiary] decided to hire consultant contractors that could be employed when needed. . . .

To grow revenue while keeping payroll costs down, [the beneficiary] agreed on sales commissions and incentive bonus arrangements for [REDACTED] and consultant contractors.

To help build a bigger client database and leverage existing market knowledge [the petitioner] entered into license arrangements with companies in California and Georgia.

In support of the appeal, the petitioner submits additional client contracts and evidence of contract/consulting and licensing arrangements with individuals named on the company's organizational chart, as well as copies of IRS Forms 1099, Miscellaneous Income, issued in 2008.

The petitioner also submits a lengthy position description for the beneficiary's U.S. position, along with a breakdown of the approximate percentage of time he devotes to six overall responsibilities, which include: managing design and development of training programs, managing client relations, managing staff and contractors, delivery of training programs, training staff and contractors, and managing business operations. In addition, the petitioner submits a description of "specific discretionary decisions" the beneficiary has made in his role as the petitioner's director.

Upon review, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

As a preliminary matter, the AAO notes that the majority of the evidence provided on appeal, including the detailed description of the beneficiary's job duties, and evidence pertaining to the beneficiary's subordinates, was specifically requested in the request for evidence issued on December 2, 2008. In response to the director's explicit and detailed requests for additional evidence regarding the beneficiary's specific job duties, his position within the organizational structure, and the duties performed by the company's other employees and contractors, the petitioner referred the director to review the one-sentence job description submitted at the time of filing, and to review the organizational chart that the director had already found to be deficient.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director and counsel's arguments on appeal.

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.*

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 show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9<sup>th</sup> Cir. July 30, 1991). While the AAO does not doubt that the beneficiary and the petitioner's co-founder jointly exercise the appropriate level of authority over the petitioner's business, the totality of the evidence submitted does not demonstrate that the beneficiary's actual duties will be primarily managerial or executive in nature.

As noted by the director, the position description submitted prior to adjudication of the petition were overly general and failed to identify the specific duties the beneficiary would perform on a day-to-day basis that would qualify as managerial or executive in nature. The petitioner stated that the beneficiary will "continue to manage our entire US operations based in California including the supervision of all employees, recruitment

and termination of employees, and the assignment of duties to these employees." While this statement suggests that the beneficiary has general oversight authority over the business, such statement provides little insight into what the beneficiary does during a typical workweek. 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).

Accordingly, the director reasonably requested a detailed description of the beneficiary's duties, including a list of specific tasks and the percentage of time he allocates to each duty. The director also requested a specific day-to-day description of the duties the beneficiary has performed over the last six months. This evidence was critical, as the functional organizational chart submitted at the time of filing indicated that the beneficiary also performs sales functions, is a program designer, and directly provides the petitioner's services by serving as a facilitator.

In response to the director's request, the petitioner referred the director to the sentence quoted above, which the director had already reviewed and found to be inadequate to establish eligibility. 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Based on the petitioner's failure to provide the requested detailed description of the beneficiary's duties, the director properly denied the petition. The beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of the beneficiary's job title, placement on a general organizational chart, or broadly-cast business responsibilities. 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; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9<sup>th</sup> Cir. 2008). The petitioner clearly did not meet this burden.

The brief job description the petitioner provided suggested that it intended to classify the beneficiary as a personnel manager. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the petitioner claims to employ six employees, it only documented the employment of the beneficiary, the company's other co-founder, and its business development manager/lead facilitator when responding to the request for evidence. Furthermore, the petitioner has provided no position description for the business development manager, and as such, it cannot be determined whether this position is managerial, supervisory or professional in nature. 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)).

In evaluating whether the beneficiary manages 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. Again, without a description of the duties performed by the business development manager, the AAO cannot conclude that this position is professional. This employee appears to hold a number of roles within the company, as he is listed as a "co-facilitator" and keynote speaker on client project documentation. Regardless, the petitioner failed to specify the amount of time the beneficiary devotes to supervising the company's sole full-time employee and it could not be concluded that personnel management duties would constitute the beneficiary's primary function within the company.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description describing the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Here, the petitioner has not identified an essential function that is managed by the beneficiary, nor has it sustained its burden of proving that his duties are "primarily" managerial or executive. As discussed, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The evidence of record indicates that the beneficiary's responsibilities include both managerial and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because the petitioner indicated that the beneficiary acts as a designer, facilitator and member of its sales staff in addition to performing his duties as chief executive, and such duties do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing 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).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. 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.* Although the beneficiary exercises discretion over the U.S. company and shares authority to establish its goals and policies, the petitioner has not established that his primary focus is on the goals and policies of the organization, or that he is relieved from participating in the day-to-day operations of the company.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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 (9<sup>th</sup> 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)). Even though the petitioning enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from establishing that the beneficiary meets the statutory definitions of either managerial or executive capacity. Based on the limited documentation furnished, it

cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity.

The AAO acknowledges counsel's claim that the beneficiary is part of the petitioner's "brand image," and is expected by clients to play a leadership role in the delivery of its products. However, the petitioner has not provided a detailed account of the extent to which the beneficiary is involved in the marketing, sales, research and design aspects of its services, or the extent to which he is relieved from performing non-qualifying duties associated with the company's products and services. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. Based on the petitioner's failure to provide a detailed description of the beneficiary's actual day-to-day duties, and its failure to provide critical substantiating documentation regarding the company's organizational structure, the AAO concurs that the petitioner has failed to support its claim that the beneficiary will be employed in a primarily managerial or executive capacity. We emphasize that our holding is based on the petitioner's failure to submit requested evidence needed to establish eligibility; our decision does not rest on the size of the petitioning entity.

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

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.