U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: JUN 2 4 2013 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 filed this nonimmigrant petition to extend the beneficiary's employment as an 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 Michigan corporation, states that it manufactures, imports and distributes hardware products. It claims to be a subsidiary of [redacted] located in Zhejiang, China. The beneficiary was previously granted one year in L-1A classification in order to open the petitioner's new office as its general manager, and the petitioner now seeks to extend his status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a 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 placed undue emphasis on the size of the petitioning company and erroneously interpreted the beneficiary's job duties as overly vague in concluding that the petitioner will not employ the beneficiary in a qualifying capacity. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended 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;

(ii) 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.

A. Facts and Procedural History

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the U.S. company was established in 2005, has three employees, and estimated gross annual income of $1.8 million. The petitioner explained that the U.S. company sells hardware, fasteners, storage equipment and bathroom fittings produced by its Chinese parent company and other Chinese factories.

The petitioner stated on the Form I-129 that the beneficiary's duties as general manager under the extended petition will be to "[o]pen new markets and expand." In a supplemental statement, the petitioner stated that the beneficiary's major responsibility is "to take charge of the daily operation and management of the company and to coordinate between the US company and the Chinese parent company."

With respect to the company's staffing, the petitioner stated that "we have employed 2 sales in the US to directly contact potential customers in the US and to exploit market share." The petitioner indicated that it would add up to four additional sales staff and an after-sales customer service employee within two years. The petitioner provided copies of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, documenting payments to three employees in 2010.

After reviewing the limited evidence provided regarding the beneficiary's duties and the petitioner's staffing at the end of its first year in operations, the director issued a Request for Evidence (RFE). The director instructed the petitioner to provide: (1) a more detailed description of the beneficiary's duties, including the percentage of time he would allocate to specific tasks; (2) an organizational chart identifying all employees by name, job title, job duties, educational level and salary; and (3) a copy of its Michigan quarterly wage report for the quarter preceding the filing of the petition.

The petitioner's response to the RFE included the following description for the beneficiary's position as general manager:

(1) Instituting and implementing the development strategy.
Making necessary adjustments according to the change of environment. Exploiting new market opportunity.

(2) Instituting and implementing annual sales plan
1) Implementing annual sales plan according to the requirement of the Chinese parent company.
2) Supervising the process of implement [sic], and taking responsibility of the result.
3) Monitoring the budgeting and profit allocation.

(3) Constructing a proper way to communicate with Chinese parent company
1) In charge of communicating with Chinese parent company. Making periodical report to the parent company about the implement [sic] of sales plans, allocation of capital, financial status, and the governing of human capital.
2) Constructing a proper communication channel with customer, suppliers, supervisors, governments, financial institution and media.
3) Coordinating the work among internal subordinate managers.

(4) In charge of the daily operation of the US company
1) Enrolling staff and organizing an efficient structure of human capital. In charge of periodical meeting with staff and making necessary decisions.
2) Dealing with emergency and reporting to the Chinese parent company.
3) Examining and approving important decision of capital allocation.

The petitioner indicates that the beneficiary's "empowered rights" include approving important decisions, making suggestions to the parent company, hiring or dismissing employees, monitoring the company's daily operations, resolving disputes between subordinate managers, assessing work performance of his subordinates and approving the allocation of capital.

In a separate statement, the petitioner provided the following summary of how the beneficiary allocates his time on a weekly basis:

Monday:
Morning – Meeting with all staff (10%)
Afternoon – Daily operation (10%)

Tuesday:
Morning – Communicating with customer (5%)
Afternoon – Meeting with Sales Manager (15%)

Wednesday:
Morning – Reporting to Chinese parent company (15%)
Afternoon – Discussing with procurement manager about the requirement of Chinese parent company. (5%)

Thursday:

Morning – Flexible (10%)
Afternoon – Flexible (10%)

Friday:
Morning – Conclusion of weekly work (10%)
Afternoon – Construction of plan for next week (10%)

The petitioner submitted an organizational chart which identifies the beneficiary as general manager overseeing a sales manager [redacted], a procurement manager [redacted], and an accountant [redacted]. The chart depicts open positions for a logistic manager who would report directly to the beneficiary, a warehouse management employee who would report to the logistic manager, and an after-sales management employee who would report to the sales manager.

The petitioner provided position descriptions for each position identified on the chart. The petitioner described the duties of the sales manager as: assisting general manager with the daily operation and key decision making related to development strategy, budgeting, and implementation of sales targets; constructing the marketing network; choosing sales agencies in different districts; monitoring the implementation of sales targets; and communicating with customers.

The petitioner stated that the procurement manager is responsible for assisting the general manager with the company's daily operation and key decision making with respect to business strategy, and is responsible for the purchasing and delivery of products, including selecting and assessing suppliers, signing purchase contracts, and monitoring their implementation.

Finally, the petitioner indicated that the accountant: assists with the construction of the budgeting control plan; assists with capital allocation decisions, provides financial analysis; makes periodical financial status reports; participates in pricing decisions; assesses operational costs; prepares annual financial statements; analyzes investment decisions; records the receipt and payment of bills; records the budget of daily operations; and monitors the company's financial status.

The petitioner did not provide the requested information regarding the education level for these employees. The petitioner identified the "salary type" for each employee as "Part Time."

Finally, the petitioner provided the requested Michigan Employer's Quarterly Tax Report for the quarter preceding the filing of the petition. The petitioner paid wages to three employees: the beneficiary and the employees identified as sales manager and procurement manager. The AAO notes that the tax report was prepared by the employee identified on the organizational chart as the accountant, although the petitioner did not pay wages to him during the quarter.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director found that the petitioner failed to provide a detailed description of the beneficiary's actual duties sufficient to establish what he primarily does on a day-to-day basis. In reviewing the petitioner's organizational structure, the director noted that all of the beneficiary's subordinates have managerial or professional job titles, and thus the petitioner had failed to establish who actually carries out the day-to-day, non-managerial duties associated

with the operation of the business. The director concluded that based on the structure described the beneficiary would be assisting his subordinates with the day-to-day, nonsupervisory duties of the business.

On appeal, counsel asserts that the petitioner submitted "overwhelming documentary evidence" that supports a finding that the beneficiary will be employed in a qualifying managerial or executive capacity. Counsel suggests that the director placed undue emphasis on the size of the petitioning company, and cites *Mars Jewelers v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga 1988) and an unpublished AAO decision in support of his assertion that USCIS cannot impose a minimum size requirement on a firm seeking to classify an employee as a manager or executive.

Counsel objects to the director's conclusion that the petitioner's description of the beneficiary's duties was non-specific, emphasizing that the director failed to acknowledge the list of the beneficiary's "empowered rights" which include approving important decisions, making suggestions to the parent company, hiring, firing and assessing the work performance of employees; monitoring daily operations of the business, and approving the allocation of capital. Nevertheless, the petitioner submits a "revised detailed position description" in support of the appeal.

Finally, the petitioner clarifies that its accountant, is a contractor and thus does not appear on the company's regular payroll records. The petitioner provides a copy of an IRS Form 1099, Miscellaneous Income, that it issued to in 2010 for $915.00 in non-employee compensation. Counsel concludes by stating:

> In the instant case, the beneficiary manages two full-time employees and one independent contractor who are subsequently responsible for the function of an entire department, namely, sales, procurement and accounting. It should be reasonably inferred that the beneficiary primarily performs high level executive and managerial duties and spends little or no time on day-to-day functions.

The petitioner submits the following position description on appeal:

> (1) Institute and implement the business development strategy
>
> Review and approve the marketing strategy proposed and prepared by the sales manager meeting and visit potential strategic customers based on recommendation of the sales manager; review and approve the sales promotions proposed by the sales manager.
>
> (2) Institute and implement annual sales plan
>
> Review the monthly, quarterly and yearly sales plan prepared by the sales manager; set and adjust the sales goal and plan based on sales volume and pricing data provided by the sales manager; approve the commission plan prepared by the accountant; monitor and review the sales reports prepared by sales manager;
>
> (3) Responsible for communications with the affiliate in China and the members/shareholders

Take high level and general direction from the members/shareholder. Coordinate the business development efforts with the affiliate in China that is the sole supplier to the company. Prepare summary report to the members/shareholders based on reports prepared by sales, procurement and accounting department.

(4) Manage the day-to-day operations of the company

Review the job performance of the employees and the contractors; decide the promotion and demotion of employees and merit increase, review and manage the cash flow and accounts receivable based on report prepared by accounting; review and approve the quarterly and annual budget; communicate with members/shareholder on budget issues[.]

B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

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 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 petitioner failed to provide any meaningful description of the beneficiary's proposed duties at the time of filing, and simply stated that he would be responsible to "take charge of the daily operation and management of the company" and "coordinate between the US company and the Chinese parent company" with the assistance of two sales personnel hired during the first year of operations. The petitioner submitted copies of e-mail correspondence between the petitioner and its clients in support of the petition which reflected that both the beneficiary and the employee later identified as the sales manager) directly communicate with customers and potential customers with regard to inquiries, price quotations, product samples and sales negotiations. Thus, the initial evidence suggested that the beneficiary would perform non-qualifying duties in addition to being in charge of the overall management of the company. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

While the petitioner submitted a lengthier description of the beneficiary's duties in response to the RFE, the AAO concurs with the director's finding that the description fell significantly short of providing a detailed description of the specific duties the beneficiary performs on a day-to-day basis and the amount of time he allocates to specific tasks. The description was primarily comprised of vague duties such as "exploiting potential market opportunity," "implementing annual sales plan" "supervising the process of implement[ing]" the sales plan, establishing communication channels with the parent company, customers, and suppliers, and being "in charge of the daily operation of the U.S. company." The petitioner did not describe, for example, what specific duties are associated with implementing sales plans and exploiting market opportunities, or sufficiently describe the beneficiary's role in the daily operation of the company. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature,

otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The AAO acknowledges that the petitioner's response to the RFE included a weekly breakdown of the beneficiary's duties; however, this delineation of the position bears little resemblance to the narrative job description that accompanied it and offers no additional insight into what types of duties the beneficiary primarily performs. The petitioner stated that the beneficiary allocates 10% of his time to "daily operation," 5% of his time communicating with customers, 20% of his time to "flexible," and 10% of his time to "conclusion of weekly work." Based on this vague information, the AAO cannot determine that these tasks, which require 45% of his time can be considered to be managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Counsel asserts on appeal that the director overlooked the beneficiary's "empowered rights" as described in the record, and states that this list of rights clearly defines the beneficiary's duties. The AAO acknowledges that the petitioner indicated that the beneficiary has been granted authority for approving decisions, making suggestions to the parent company, monitoring the company's daily operations, hiring, firing and evaluating employees, and approving the allocation of capital. All of these authorities reflect that the beneficiary possesses the appropriate level of authority over the company; however, these rights or authorities cannot be accepted in lieu of a detailed description of the beneficiary's actual duties and evidence that he allocates the majority of his time to duties that fall within the statutory definitions of managerial or executive capacity. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The definitions of executive and managerial capacity 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). Here, while the evidence establishes that the beneficiary is the senior employee in the petitioning company and that he performs some qualifying duties based on his level of authority, the petitioner has not established that he is relieved from performing non-qualifying duties within the context of the company's current staffing arrangement and stage of development.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

With respect to the petitioner's staff, the AAO notes that, at the time of filing the petition, the petitioner stated that it employed three employees, including the beneficiary and two sales employees that had been hired

during the first year of operations. The petitioner expressed intent to hire additional sales staff and an after-sales service employee in the future. In response to the director's request for additional evidence, the petitioner described its two payroll employees as holding the titles of "sales manager" and "procurement manager," and further stated that the company employs an accountant, with future openings for a logistics manager, a warehouse manager, and "after-sales management." The petitioner offered no explanation for the significant differences between these two descriptions of the company's current and future personnel structures. Further, the petitioner indicated in response to the RFE that the sales manager and procurement manager received a "part time" salary and on appeal, counsel describes them both as full-time employees. 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).

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*).

Even if the AAO accepts the petitioner's assertion that the beneficiary's subordinates hold the positions of sales manager and procurement manager, rather than sales positions as stated at the time of filing the petition, the record does not support a finding that these employees are managers, supervisors or professionals. Though requested by the director, the petitioner did not provide the level of education required to perform the duties of these positions. Any 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). Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals.

Further, the record does not establish that either the sales manager or the procurement manager has subordinates and thus they do not qualify as supervisors. Despite the petitioner's statement that the sales manager chooses and oversees sales agents in different markets, there is no corroborating evidence establishing the petitioner's use of such agents. There is, however, corroborating evidence of the sales manager's and the beneficiary's direct involvement in sales transactions. The petitioner's evidence must substantiate that the duties of the beneficiary and his subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

The totality of the record does not support a conclusion that the beneficiary's subordinates are managers or that they are supervising departments or functions of the company as suggested by counsel on appeal. Rather, it is evident that both employees perform the day-to-day non-managerial functions associated with sales and

procurement. The petitioner has not provided evidence that the beneficiary's supervisory responsibilities over non-professional personnel rise to the level of qualifying managerial duties.

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 that clearly explains 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. The petitioner has not articulated a claim that the beneficiary manages an essential function. Further as discussed, the petitioner has not provided a detailed position description of the beneficiary's duties or clearly established how the beneficiary's time will be allocated among specific duties, such that the AAO could conclude that he performs primarily managerial duties. Accordingly, the record does not support a finding that the beneficiary is qualified for the benefit sought as a function manager.

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.*

On appeal, counsel emphasizes the beneficiary's "empowered rights" as evidence of his executive duties, and the petitioner submits a revised position description which seeks to establish how the beneficiary directs the company through subordinate managers, and receives only "general direction from the members/shareholders." Upon review of the totality of the evidence, however, the record does not establish that the beneficiary's subordinates are managers or that they actually relieve him from involvement in the day-to-day operations of the enterprise. The AAO acknowledges that the beneficiary is the senior employee and decision-maker for the petitioning company, but the petitioner must still establish that his primary duties are qualifying managerial or executive duties and it has failed to do so.

Counsel cites *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, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *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 *Mars Jewelers, Inc.*, the court 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 *Mars Jewelers, Inc.* 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 primarily performing operational and/or administrative tasks.

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.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. S*ee* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). It is appropriate, however, 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 operational duties of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 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 USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner initially claimed to employ only two sales employees along with the beneficiary, and submitted evidence of correspondence between the company and customers which suggested that the beneficiary and his subordinates were performing the same types of duties. While the petitioner subsequently indicated that the beneficiary's subordinates are managers, based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and two additional managerial employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

IV. Conclusion

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.