



U.S. Citizenship
and Immigration
Services

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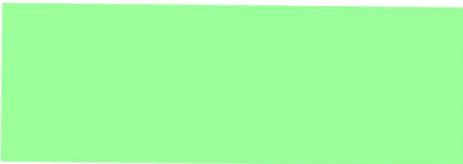
DATE: **JUN 28 2013** Office: VERMONT SERVICE CENTER

FILE:

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 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, Vermont Service Center ("the director"), 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 (L-1A) 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 South Carolina corporation established in 2009, states that it is engaged in the management and development of retail operations. It claims to be a subsidiary of [REDACTED] located in India. The beneficiary was previously granted one year in L-1A classification in order to open the petitioner's new office, and the petitioner now seeks to extend his status so that he may continue to serve in the position of vice president.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying 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 failed to take into consideration the petitioner's reasonable needs and current stage of development in determining that the beneficiary would not be employed in a managerial or executive capacity. Counsel contends that the petitioner established that the beneficiary will spend more than 90% of his time performing managerial duties. 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.

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.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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.

A. Facts and Procedural History

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it is engaged in the management and development of retail operations, with 10 employees, \$550,000 in gross annual income in 2010, and expected income of \$1.1 million in 2011. On the L Classification Supplement to Form I-129, the petitioner stated that the beneficiary will "supervise and control entire US operations at Florence and Darlington, South Carolina office."

In a job description appended to the petition, the petitioner stated that the beneficiary is employed as its "Vice President – Executive & Functional Manager" performing the following duties:

- Supervising manager who manages Finance, Accounts, and Sales and Operations.
- Complete managing the responsibilities of major operations in the United States which include the following:
 - a) Providing key strategic management discretionary directives for the business operations to stay ahead in the business.

- b) Manage finance, accounts policies and operations strategies.
- c) Set guidelines for accounting, financial and operations management.
- Communicate company's financial status to top management and implement management recommendations regarding accounting and finance.
- Makes hiring, discharging and promotion decisions for the Finance, Accounts and Sales and Operations.
- Develops effective human resources management plans and strategies for the company.
- He is responsible for overseeing and managing new business implementation and business integration related activities
- He provides input to strategic planning process. Analyzes business systems and processes, both individually and holistically, and ensures they are documented.
- He provides direction, guidance, momentum and vision for the organization and focuses on advancing the mission and goals of the organization.
- Manage creation of motivating environment so as to increase sales and ensure efficiency.
- Managing and making key decisions about stock control.
- Strategize analysis of sales figures and forecasting future sales volumes to maximize profits.
- Strategize use of information technology to record sales figures and for data analysis and forward planning.
- Develop strategy on dealing with staffing issues and provide direction on training and development.
- Manage standards for quality, customer service and health and safety.
- Develop strategy for promoting the organization locally by supervising liaising with local schools, newspapers and the community in general.
- Develop and manage strategy on organizing special promotions, displays and events.
- Update management on business performance, new initiatives and other pertinent issues.
- Maintain awareness of market trends in the retail industry, understanding forthcoming customer initiatives and monitoring what local competitors are doing.
- Initiate changes to improve the business.
- Develop strategy to retain both consumer and business client relationships through effective sales and service management.
- Develop communication strategy for the company.
- Develop Etailing (Retailing + Electronic Systems) strategy.

The petitioner's initial evidence included an organizational chart which depicts the beneficiary as vice president. The beneficiary's direct subordinates are a Manager, Accounts & Finance, and a Manager (Operations & Sales), who are both identified by name. Reporting to the Manager, Accounts & Finance are an accountant and bookkeeper, while the Manager (Operations & Sales) is depicted as supervising an unidentified number of sales associates working at two locations: [REDACTED] in Florence, South Carolina, and [REDACTED] in Darlington, South Carolina. The organizational chart does not include the names of the accountant, bookkeeper or sales associates. The petitioner provided detailed duty descriptions for the beneficiary's direct subordinates.

Based on the submitted evidence of business activities, the petitioner began operating a gas station and convenience store, doing business as [REDACTED] at the Florence, South Carolina location in June 2010. On its IRS Forms 941, U.S. Quarterly Federal Tax Return, the petitioner reported two (2) employees for the second quarter of 2010, and six (6) employees for the third quarter. The petitioner also submitted copies of cancelled checks issued by "[REDACTED]" which list this company's location as [REDACTED] Darlington, South Carolina. However, most of the submitted evidence related to the [REDACTED] business.

The director issued a request for additional evidence (RFE) in which he instructed the petitioner to provide a more detailed description of the company's staff, including the number of employees and wage paid to each, the job titles and duties (with percentage of time spent on each duty) for all employees, and a description of the company's personnel structure. The director also requested a copy of the petitioner's IRS Form 941 for the last quarter of 2010, additional evidence of the staffing of the company, and color photographs of the interior and exterior of all premises secured for the company.

In response to the RFE, counsel for the petitioner emphasized that the beneficiary devotes 100 percent of his time to performing managerial functions for the petitioning company, and noted that the company had hired three additional employees since the date of filing, which should "alleviate all concerns regarding shorthanded staffing." The petitioner provided a multi-page description of the beneficiary's duties, which indicates that he allocates 70% of his time to the overall management of the company, 10% of his time on financial management, and 20% of his time to "overall supervision and personnel management."

The petitioner also provided a separate document providing a breakdown of the job duties performed by all claimed company employees. The petitioner indicated that the president of the company is the chairman of the management board (40% of his time), "oversees corporate issues (40% of his time) and "watches over the culture and brand of [the petitioner] (20% of his time). The petitioner included the following breakdown for the beneficiary:

- a) Manage Accounts, Operations & Sales departments at [the petitioner] in the United States. (15% of the time)
- b) Provide key strategic management discretionary directives for the business operations to stay ahead in the business. (15% of the time)
- c) Communicate company's financial status to top management of [the petitioner] (20% of the time)
- d) Negotiate with suppliers of products and marketing firms. (10% of the time).
- e) Determine the demand for products and services offered by [the petitioner] and its competitors and identify potential customers. (10% of the time)
- f) Develop pricing strategies, keeping in mind [the petitioner's] goals and customer satisfaction. (10% of the time)
- g) Develop and implement strategic planning for expansion of business and opening of new stores. (10% of the time)

The petitioner provided names of employees and job duty descriptions for the positions of Accounts and Finance Manager, Operations and Sales Manager, Accountant/Bookkeeper, three Sales Associates, a Kitchen Manager/Head Cook, an Assistant Cook, and a Stock Keeper. The petitioner also provided an organizational chart in which it identifies two of the sales associates and the kitchen manager as "new employees" and indicates that the kitchen manager reports directly to the beneficiary. Whereas the initial organizational chart indicated that the Operations and Sales Manager oversees two separate locations in Florence and Darlington, South Carolina, the updated chart makes no such distinction.

The petitioner submitted copies of its 2010 IRS Forms W-2 Wage and Tax Statement for the following employees: the beneficiary (\$35,000); the Operation and Sales Manager (\$841); Accounts and Finance Manager (\$4,982.94); Accountant/Bookkeeper (\$1,065.75); Sales Associate (\$930.18); Assistant Cook (\$2,117); and the Stock Keeper (\$1,260). Despite submitting only seven Forms W-2 for 2010, the petitioner reported nine employees on its IRS Form 941, Employer's Quarterly Federal Tax Return for the fourth quarter of the same year.

The petitioner also submitted photographs of its business premises, which includes a gas station, convenience store, and fast food counter, as well as drive-through window.

The director ultimately denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner failed to establish that the beneficiary would primarily direct and control a subordinate staff comprised of professionals, supervisors or managers, or that he would otherwise be sufficiently relieved from involvement in providing the sales and services of the company.

On appeal, counsel for the petitioner asserts that the beneficiary allocates at least 90% of his time on managerial functions on a day-to-day basis. In a separate brief, the petitioner maintains that the beneficiary's duties as stated in the record are clearly those of a senior level manager, and states that he "has autonomous control over; and exercises wide latitude and discretionary decision-making in establishing the most advantageous course of action for the successful management and direction of [the petitioner]." The petitioner further asserts that the beneficiary "has been exercising broad discretion over day-to-day operations," which the petitioner states is "an essential function" of the company.

The petitioner further notes that the company's operations "only really kicked off at the end of June 2010," and thus "in all fairness, the Vice President should be given a couple of years to show some better results in terms of hiring more professionals and increasing profitability of the company." The petitioner reiterates the position description provided in response to the RFE, and provides additional documentation as evidence of the duties performed, such as evidence that he secured the petitioner's fictitious business name, applied for required licenses needed to sell beer, wine, tobacco and lottery tickets, and obtained USDA authorization to accept food stamps.

Counsel asserts that the beneficiary's role is to "manage the organization as a whole," to supervise "macro level functions of the organization," specifically the accounts and finance department, and to exercise discretion over the day-to-day operations of the company through its "various departments." The petitioner indicates that the company has outsourced all of its accounting needs to an accounting firm, and explains that the beneficiary works more closely with his vendors on a regular basis, rather than involving himself in the day-to-day operations of the company. In this regard, the petitioner states that "he has to constantly evaluate and negotiate prices of merchandise and gas," and when he is able to obtain discounted merchandise, he must "get in touch with his marketing and advertising agents and has them prepare the appropriate indoor and outdoor advertising." The petitioner explains that this function requires "constant contact with all the different entities."

In support of the appeal, the petitioner submits: (1) a copy of its [REDACTED] Commercial Lease with Obligation to Purchase for the Florence, South Carolina gas station and convenience store which commenced on June 15, 2010; (2) a copy of its Real Estate Purchase Contract for the same property; and (3) copies of various permit and licensing applications signed by the beneficiary.

Finally, the petitioner submits an affidavit from the beneficiary, who describes his duties consistent with other duty descriptions in the record and asserts that "all non-managerial functions of the company are done by other support staff."

B. Analysis

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

When examining the executive or managerial capacity of the beneficiary, USCIS (U.S. Citizenship and Immigration Services) 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.* Beyond the required description of the beneficiary's job duties, USCIS reviews the totality of the record, 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.

Here, the petitioner has submitted a number of lengthy descriptions of the beneficiary's duties which suggest that he possesses the appropriate level of authority over the petitioning company and likely allocates a portion of his time to qualifying duties. However, a review of the evidence in its entirety fails to support the petitioner's claims that the beneficiary allocates 90 percent of his time, or even more than 50% of his time, to duties that fall within the statutory definitions of managerial or executive capacity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services or other non-qualifying tasks 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Based on inconsistencies in the record regarding the staffing of the company as of the date of filing and the scope of the company's operations, the petitioner has not established that the petitioning company has grown to the point where it could employ the beneficiary in a qualifying managerial or executive capacity at the time the petition was filed in January 2011.

At the time of filing, the petitioner claimed to have ten employees. The petition was signed on December 29, 2010. The petitioner reported nine employees on its IRS Form 941 for the fourth quarter of 2010. However, the petitioner provided only seven IRS Forms W-2 for 2010 and failed to explain this discrepancy. Further, the petitioner had ten named employees on the organizational chart submitted in response to the RFE only after it hired three new employees in March 2011.

Further, the petitioner expressly stated in its initial letter that the beneficiary "has already been progressive in setting up 2 stores in South Carolina, one in Florence and the other in Darlington." The petitioner's initial organizational chart also identified sales associate positions located at these two different locations. The petitioner submitted, without further explanation, copies of canceled checks issued by "[REDACTED]" at the claimed Darlington, South Carolina address, which were for beer, soda and wine purchases, and these checks appear to bear the beneficiary's signature. The petitioner's response to the RFE contained no references to or documentation of this separate business, and again, the petitioner provided no explanation for this apparent change in the scope of the company's operations. Instead, the evidence submitted suggested that all claimed employees have always worked for the business known as "[REDACTED]" in Florence, South Carolina.

In addition, a comparison of the petitioner's initial and updated organizational chart reveals additional discrepancies. The original chart included the positions of president, vice president, accounts and finance manager, operations and sales manager, accountant, bookkeeper, and sales associates. The chart submitted in response to RFE indicated that there is a single accountant/bookkeeper. In addition, the chart adds an entire kitchen department, and the record reflects that employees identified as holding the positions of "assistant cook" and "stock keeper" appear to have been employed at the time of filing, so it is unclear why their positions did not appear on the initial organizational chart. Finally, the petitioner has identified two different individuals as holding the position of accounts and finance manager. At the time of filing, the petitioner stated that the position was held by "[REDACTED]" and in response to the RFE, the petitioner indicated that "[REDACTED]" holds the position. "[REDACTED]" was employed by the company at the time the petition was filed, but there is no evidence that "[REDACTED]" was ever an employee of the company.

Overall, the petitioner's evidence relating to its organizational structure and the scope of its operations contains a number of inconsistencies that have not been resolved. 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.

The petitioner's evidence must substantiate that the duties of the beneficiary and his or her 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 manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals, despite the fact that two of the employees have managerial job titles. Instead, as discussed further below, the record indicates that the beneficiary's subordinates, as of the date of filing, were required to perform the actual day-to-day tasks of operating the petitioner's gas station, retail store and fast food outlet.

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. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., 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 size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

In addition, 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

An analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. The petitioner provided evidence that it operates a gas station and a convenience store that has a fast food counter, a prepared food counter and a drive-through window. The petitioner indicates that the store serves breakfast, lunch, and dinner daily. The petitioner has documented the employment of seven workers as of the date of filing, including the beneficiary, an accounts and finance manager, an operations and sales manager, one sales associate, one assistant cook, an

accountant/bookkeeper, and a stock keeper. Based on the pay stubs submitted, all of the beneficiary's subordinates, including the employees identified as managers, receive minimum wage and work varied hours, typically significantly less than full time.

On appeal, the petitioner submitted a copy of the USDA Food Stamp Application for Stores completed by the beneficiary. He indicated on page 3 of this application that the petitioner's business is open for 125 hours per week. Given the business's operating hours, the nature of the business, and the number of employees documented in the record, it is evident that one part-time kitchen/food worker and one part-time cashier are not sufficient to perform the routine operational functions of the business. Accordingly, the evidence considered as a whole casts doubt on the job descriptions provided for the petitioner's employees, particularly for the beneficiary and the two claimed managers who report to him. The petitioner clearly does not claim to have staff to operate a cash register, prepare food, maintain the hot food counter, clean the store and kitchen, staff the drive-through window, etc. during the majority of its operating hours. In light of these facts, the petitioner's claim that the beneficiary spends the majority of his time in high-level negotiations, policy-making, and developing strategies is simply not supported by the record, particularly in light of the fact that the petitioner also claims to employ a president to whom the beneficiary reports.

The beneficiary appears to have the appropriate level of authority to make decisions for and on behalf of the U.S. company. While the beneficiary appears to have some degree of discretion and decision-making authority over the company, the petitioner has not shown how he is relieved from involvement in the day-to-day operations of the business or first-line supervision of non-professional employees. The petitioner has not shown that the company has developed to the point where it requires him to spend the majority of his time performing the claimed managerial duties.

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, 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*, USCIS 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 USCIS, 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. Consistent with both the statute and the holding of *National Hand Tool Corp.*, a petitioner must 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 beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Based on a review of the totality of the evidence, the petitioner has not established that it had a reasonable need for the beneficiary to perform primarily managerial or executive duties as of January 2011, at the conclusion of its first year of operations. USCIS will not consider the contributions of the three employee hired in March 2011, or the petitioner's assertions that it intends to hire additional staff in the future. The critical facts to be examined are those that were in existence at the actual time of filing the petition. It is well-established in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

For the foregoing reasons, the petitioner has not established that the beneficiary would be employed in a qualifying executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

III. ADDITIONAL ISSUES

A remaining issue in this matter is whether the petitioner maintains a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to provide evidence that the United States and foreign entities are still qualifying organizations.

Upon review, the record contains inconsistencies regarding the ownership of the U.S. company which cast doubt on the petitioner's claim that it is a majority-owned subsidiary of the Indian entity, [REDACTED]

The petitioner submitted two stock certificates and a stock ledger, which indicate that the foreign entity owns 51% of the company's shares and [REDACTED], the petitioner's claimed president, owns the balance of the shares. However, on several of the license applications submitted on appeal, the beneficiary identified himself as the owner of the company. For example on page 1 of the SCEL Retailer License Application, Schedule A, Owner Information, the applicant is instructed that, if it is a corporation, it must list all officers and all directors, as well as all shareholders with a 10% or more ownership interest. The beneficiary listed only his own name in this section. He provided the same information on the above-referenced USDA Food Stamp application. 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. For this additional reason, the petition cannot be approved.

In addition, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner indicates that the business "only really kicked off at the end of June 2010." However, the petition was approved in January of that year. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from January through June of 2010. For this additional reason the petition may not 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).

IV. CONCLUSION

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. 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.