



U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

D7



File: WAC 04 104 50750 Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, 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 seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a California company that claims to be engaged in retail outlets, investments and real estate. It operates a retail perfume store. The petitioner claims that it is an affiliate of [REDACTED] located in Mumbai, India. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and was subsequently approved for a two-year extension of stay. The petitioner now seeks to extend the beneficiary's status for a three-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; or (2) that the U.S. entity is a qualifying organization.

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 disputes the director's findings and asserts that the petitioner and the foreign entity are qualifying affiliates. Counsel contends that the beneficiary supervises both professional and managerial employees, and manages numerous functions of the organization. Counsel contends that the U.S. company has sufficient staff to relieve the beneficiary from performing the day-to-day operations of the business. Counsel submits a brief in support of the appeal.

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

The regulation at 8 C.F.R. § 214.2(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 AAO will first address the issue of whether the United States company is a qualifying organization as required by 8 C.F.R. § 214.2(l)(3)(i).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

(G) *Qualifying organization* means a United States or foreign firm, corporation or other legal entity which

- (1) meets exactly one of the qualifying relationships in the definitions of a parent, branch, affiliate or subsidiary specified paragraph (l)(1)(ii) of this section;
- (2) is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee. . . .

* * *

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner submitted evidence to establish that both the foreign entity, an Indian partnership, and the U.S. company, a domestic general partnership registered in California, are 50-50 partnerships owned by the beneficiary and another individual, an Indian national. The director did not question the claimed affiliate relationship between the two companies, but, on October 12, 2004, denied the petition on the basis that the United States company is not a qualifying organization as it cannot be considered "an employer in the United States." See 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The director explained his determination as follows:

In the Matter of United Investment Group, 19 I&N. Dec. 248, (Comm'r 1984), the Commissioner of the legacy Immigration and Naturalization Service held that neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners. In addition,

for the purpose of a visa petition, the actual partnership which existed when the job offer was made and certified must continue and intend to employ the beneficiary as certified. A separately entered partnership or newly constituted partnership may not be a successor of interest for this purpose.

It is fundamental to this non[-]immigrant visa classification that there be a United States entity to employ the beneficiary. . . The petitioner provided an IRS Form 1065 with Schedule K-1 which demonstrates that the beneficiary is the general partner of the petitioning partnership. Unlike a corporation, a partnership does not exist as an entity apart from [sic] the individual proprietor. If the beneficiary is actually the general partner of the petitioning partnership with no authorized branch office of the foreign employer or separate legal entity in the United [sic] States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization.

On appeal, counsel asserts that the petitioner submitted sufficient evidence to establish that the United States and foreign entities are qualifying affiliates based on common ownership and control. Counsel does not address the director's finding that the petitioner is not a United States employer for the purposes of this nonimmigrant visa petition.

Upon review, the AAO concurs with counsel's assertion that the U.S. and foreign entities are qualifying organizations.

The Commissioner's decision in *Matter of United Investment Group* should not be construed as a prohibition on the filing of visa petitions by U.S. organizations that are structured as partnerships. *Matter of United Investment Group* involved an immigrant visa petition filed pursuant to section 203(a)(6) of the Act, 8 U.S.C. § 1153(a)(6), following a grant of labor certification from the U.S. Department of Labor. The petitioner, a partnership, was not the same partnership that had filed the labor certification application on behalf of the beneficiary, although it used the same trade name. *Matter of United Investment Group* focused on the specific question of whether a separately entered partnership or newly constituted partnership may be a successor in interest for the purposes of an immigrant visa petition.

Contrary to the director's findings in this case, there was no determination in *Matter of United States Investment Group* that would prohibit a domestic partnership, including one that is partially owned by the beneficiary, from filing an employment-based petition. The facts of the instant matter can clearly be distinguished from those in *Matter of United Investment Group*. There is sufficient evidence in the record to establish that the U.S. and foreign entities are qualifying organizations. Accordingly, the director's decision with respect to this issue will be withdrawn.

The second issue in the present matter is whether the petitioner established that the beneficiary would be employed by the United States entity in a 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;
- (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 nonimmigrant petition was filed on March 2, 2004. In a February 19, 2004 letter appended to the petition, the petitioner stated that the beneficiary has responsibility for "over all finance, marketing and administrative operations of the company – over which he has been exercising complete discretionary authority." The petitioner further described the beneficiary's duties as follows:

Since transferring on the L-1A, he has successfully negotiated business acquisitions and entered into contractual obligations on behalf of the company with vendors and distributors. He has executed legally binding documents and obtained financing in connection with our acquisitions. [The beneficiary] will continue to manage all financial and developmental aspects of our company, from public relations and marketing to the development of company policy, financial management and the implementation of procedures for the efficient running

of the company. Ultimately, it will be his responsibility to market the operations of these investments and continue the financial success of [the petitioner]. [H]e will continue to recruit and train the staff and have hiring and firing authority over them, as well as further development and execution of our marketing strategies. In addition, he will continue to have responsibility for obtaining contracts and entering contractual obligations for and on behalf of [the petitioner].

The petitioner stated on Form I-129 that the petitioner had three employees as of the date of filing. The petitioner submitted its most recent California Form DE-6, Quarterly Wage and Withholding Report, confirming employment of five part-time employees earning wages between \$385 and \$1,323 for the quarter ended on December 31, 2003.

On April 16, 2004, the director requested additional evidence to establish that the beneficiary would be performing the duties of a manager or executive in the United States. Specifically, the director instructed the petitioner to provide: (1) an organizational chart clearly identifying the beneficiary's position and names, job titles, brief job descriptions, annual salary/wages, and educational level for the beneficiary's subordinates; (2) a copy of IRS Forms 941, Quarterly Federal Tax Return for the first quarter of 2004; (3) a copy of California Form DE-6, Quarterly Wage and Withholding Report, for the first quarter of 2004; (4) copies of the U.S. company's payroll summary, Forms W-2 and W-3 evidencing wages paid to employees in 2002 and 2003; (5) a list of the goals and policies established by the beneficiary, and examples of specific discretionary decisions made by him, over the last six months; and (6) a specific day-to-day description of the duties the beneficiary has performed over the last six months.

Counsel for the petitioner submitted a response to the director's request on June 28, 2004. The response included a June 16, 2004 letter from the petitioner, in which it provided the following description of the beneficiary's duties as "managing partner & CEO":

- Has total managerial and executive authority over the company and all of its activities and employees without limitation;
- Management Decisions: possesses all rights to execute all the managerial decisions of the Company, including purchasing goods and equipment and hiring, firing and promotion of employees; assess store managers [sic] performance and assist with management issues;
- Company Representation: acts in the name of the Company in all kinds of business contacts and relations; coordinate with state governmental office to ensure compliance;
- Directs and formulates financial strategy to provide funding in developing and continuing the operations to maximize returns on investments; set sales and chemical cost targets for managers and monitor progress;
- Supervision of the company's day-to-day operations; oversee store standards regarding food quality and customer satisfaction policy; provide support to plant manager and support staff;
- Organizational Development: projects the Company's future development and executes steps to accomplish the desired growth; prepare publicity and promotional campaigns; plan business strategy and target new business investments

The petitioner further indicated that the beneficiary would allocate his time to the following responsibilities:

Management Decisions	25%
Company Representation	15%
Financial Representation	15%
Supervision of the company day to day operations	20%
Business Negotiations	10%
Organizational Development	15%

The petitioner provided a list of its employees by name, job title, and job description, and provided an organizational chart depicting the same employees. The list included: a manager, perfume stores; a retail sales manager; two front desk/cashier employees; four retail sales representatives; and a human resources consultant. The petitioner also provided a letter from Expanbiz., Inc. signed by its claimed human resources consultant, confirming that it provides bookkeeping, payroll and human resources consultation services to the petitioning company on a contract basis. The petitioner's California Form DE-6 for the first quarter of 2004, the quarter in which the petition was filed, confirmed the employment and wages of the following staff: the manager, perfume stores (\$1,400); a "front desk/cashier" employee (\$491); and two sales representatives (\$1,577 and \$1,620). The beneficiary's spouse is also listed on the Form DE-6, but she is not identified on the list of employees or organizational chart. She received wages of \$84.00 during the quarter.

The petitioner stated that the "manager, perfume stores" manages the store, prepares work schedules, assigns employees to specific duties, formulates pricing policies, coordinates sales promotion, manages inventory levels, coordinates activities of workers, and reviews actions of her subordinates. The petitioner noted that the front desk/cashier greets customers, assists customers with purchases, answers the telephone and takes messages, and keeps the store clean. The petitioner indicated that the retail sales representatives welcome clients to the store, explain product specifications to clients, display merchandise, organize the store and display shelves, attend to customers, and pack materials and merchandise for delivery.

Finally, the petitioner provided a list of the specific discretionary decisions, goals and policies that the beneficiary had exercised over the past six months:

- Major decision making for Petitioner related to financing, marketing, personnel and advertising
- Approved renovations, remodeling and repairs for business
- Educated staff on promotions and organized employee meetings
- Developed expansion plans
- Obtained all licenses permits and renewals
- Hired, fired and reviewed performance of employees
- Made final decisions on what perfumes will be sold at the store and negotiating contracts with buyers and sellers.
- Reported to the parent corporation in India on the companies performance
- Negotiated and signed all business contracts

- Provided specialized administration relating to contracts for purchasing, sale, administrative accounting and management controls.
- Reviewed bids for conformity to contract requirements in determining acceptable bids. Negotiated contract with bidders
- Provide management leadership relating to establishing human resources policies and procedures and to administered employee health, insurance, savings and hiring programs.

The director denied the petition on October 12, 2004, concluding that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. The director observed that the evidence did not demonstrate that the beneficiary will be supervising managers, professionals or supervisors who would relieve him from performing non-qualifying duties. The director also noted that all of the beneficiary's subordinates were employed on only a part-time basis. The director concluded that the U.S. entity does not have the organizational complexity to support an executive position, nor does the record establish that the beneficiary's daily activities would be primarily managerial or executive.

On appeal, counsel for the petitioner claims that the beneficiary manages a professional human resource consultant and a manager who in turn manage four skilled workers and other staff. Counsel claims that the petitioner also hires additional employees through a staffing company and has sufficient staff to operate its retail store. Counsel reiterates the beneficiary's job duties, and those of his subordinates, and asserts that the beneficiary "is a functional manager having responsibility over numerous disciplines within the organization: human resource management, marketing and financial authority to select suppliers, vendors, financial advisors, accountants, [and] legal advisors." Counsel notes that the beneficiary may perform some functions which would be performed by non-managerial employees in a larger business, but asserts that the petitioner is has sufficient staff to relieve the beneficiary from performing the daily tasks of running the store. Counsel concludes that the additional evidence establishes that the beneficiary is acting as an executive who exercises significant authority over generalized policy, and cites unpublished decisions to stand for the proposition that an employee who develops new business ventures and negotiates contracts may qualify as a managerial or executive employee.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. 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.* In the instant case, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that

the beneficiary devotes 25 percent of his time to “management decisions,” including purchasing goods, hiring and firing employees and assessing the performance of the petitioner’s store manager, but did not explain how “purchasing goods” qualifies as a managerial or executive duty. Although the beneficiary’s responsibility for hiring and firing employees may be considered a qualifying duty, the evidence does not establish that this duty would realistically require a significant portion of the beneficiary’s time, given that the petitioner has never had more than five employees. The petitioner also stated that the beneficiary devotes 20 percent of his time to supervising the company’s operations including “overseeing the store standards regarding food quality” and “providing support to the plant manager and support staff.” However, since the petitioner does not claim to employ a plant manager or operate a food service business, these duties are not credible. Similarly, the petitioner indicates that the beneficiary devotes 15 percent of his time to formulating financial strategies and setting sales and “chemical cost targets” for managers. Again, this duty does appear to be related to the type of business operated by the petitioner, which operates a retail store. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Other portions of the petitioner’s job description are equally vague, including the beneficiary’s responsibility for “project[ing] the company’s future development and executing steps to accomplish the desired growth.” The petitioner fails to specify the beneficiary’s plans for the company or the actual tasks he performs or will perform to develop the business. The petitioner also states that the beneficiary “prepares publicity and promotional campaigns” but, again, fails to clarify how these marketing and advertising tasks qualify as either managerial or executive in nature. Finally, the petitioner asserts that the beneficiary is “target[ing] new business opportunities” but provided no additional explanation as to the specific duties performed within this broad responsibility.

While the petitioner has provided a fairly lengthy job description and a breakdown of the amount of time the beneficiary devotes to each area of responsibility, the petitioner has described the position in only general terms, and has included responsibilities that are not consistent with the type of business operated by the petitioner. Thus, the petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). The petitioner is required to substantiate its vague claims with a detailed description of how the beneficiary’s responsibility of running and managing the company would satisfy the requirements of either 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The provided job descriptions do not allow the AAO to determine the actual tasks the beneficiary will perform such that they can be classified as managerial or executive. *See* 8 C.F.R. § 214.2(1)(3)(ii).

As the petitioner failed to provide a detailed account of the beneficiary’s day-to-day duties, the director reasonably looked to the petitioner’s staffing structure to determine whether the petitioner’s business could support the beneficiary in a primarily managerial or executive position. Although the director based his decision partially on the size of the enterprise and the number of staff, counsel asserts that the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the

Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

On appeal, counsel claims that the petitioner has sufficient staff, including a manager, a professional human resources consultant, four skilled employees, and "additional employees hired through a staffing company" to relieve the beneficiary from operating the company's retail store. The AAO notes that the petitioner, in response to the request for evidence, claimed to employ two managers, six additional employees, and a human resources consultant, and at the time of filing, claimed to employ only three workers. 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 petitioner's Form DE-6, Quarterly Wage and Withholding Report for the first quarter of 2004 confirms that the employees identified as "manager, perfume stores," a "front desk/cashier" and two retail sales representatives were employed on a part-time basis at the time the petition was filed. The front-desk employee received only \$491 in wages during the three-month period, while the other employees received wages ranging from \$1,400 for the "manager" to \$1,620 for one of the sales representatives. Assuming that the employees received the California minimum wage of \$6.75 per hour, none of the employees worked more than 20 hours per week. There is no evidence to document the employment of the retail sales manager, the other front desk/cashier employee, or the two additional sales representatives, nor is there any evidence to substantiate the petitioner's claim on appeal that the petitioner utilizes an employment staffing agency to hire additional workers. Again, 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. at 165.

The petitioner operates a retail perfume store located in a shopping mall. Although the petitioner did not provide its operating hours, it is reasonable to assume that the store is open during regular shopping center hours, from 10:00 a.m. until 9:00 p.m. from Monday through Saturday, with additional hours on Sunday, or approximately 70 hours per week. Based on the evidence submitted, all of the beneficiary's subordinates' hours combined do not add up to 70 hours. The petitioner requires employees to order merchandise, receive deliveries, arrange store displays, monitor inventory, assist customers, handle sales transactions and perform administrative functions such as paying bills, making bank deposits, and reconciling daily receipts. 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 president and four part-time employees. At best, the beneficiary's subordinates would barely relieve him from performing the most basic operational task of waiting on customers. The lack of staff working in the store to perform non-qualifying duties brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. The reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. 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 Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

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. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO acknowledges counsel's assertion that the beneficiary supervises a professional employee and a managerial employee. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The 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. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the petitioner's retail store. Thus, the beneficiary's supervisory duties cannot be considered managerial in nature. See section 101(a)(44)(A)(iv) of the Act.

The claimed “professional” employee, whose position is identified as “human resource consultant” appears to be employed as the office manager for a company called [REDACTED]. While this individual has provided a letter from [REDACTED] confirming that the company provides the petitioner with bookkeeping and payroll services and “human resources consultation,” there is insufficient evidence that the beneficiary actually supervises the claimed employee, or that the services provided are professional. The petitioner's job description for the “human resources consultant” position portrays this employee as a full-time staff member responsible for maintaining equipment and systems, “executive recruitment,” evaluating financial and information systems, and several other duties that are not credible within the context of the petitioner's business. Furthermore, the petitioner's 2003 financial records account for payment of professional fees for bookkeeping, payroll and tax preparation services in the amount of approximately \$4,149.88, but reflect no other payments for outside services or independent contractors. The petitioner has not established that the beneficiary supervises a professional “human resources consultant.” Again, 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. at 165.

Counsel claims for the first time on appeal that the beneficiary is a “function manager” because he has responsibility over “numerous disciplines within the organization.” 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 job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to **managing the essential function**. 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 employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has neither provided a detailed description of the beneficiary's actual duties, nor established that he performs primarily managerial duties. Furthermore, counsel's blanket assertion that the beneficiary manages "numerous disciplines" is insufficient to establish his eligibility for classification as a manager of an essential function. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The petitioner has not established that the beneficiary would be employed primarily as a function manager.

Nor has the petitioner established that the beneficiary is employed in a primarily executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 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-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.*

In sum, the lack of a detailed description of the beneficiary's actual duties, considered in conjunction with the absence of employees to relieve the beneficiary from performing day-to-day activities of the company, precludes a finding that the beneficiary would be performing primarily managerial or executive duties under the extended petition. The fact that an individual manages a small business and is assigned an executive job title does not necessarily establish eligibility as an intracompany transferee. While the beneficiary may exercise discretionary authority over the U.S. company, the record is not persuasive in demonstrating that the beneficiary performs primarily qualifying duties. Further, regardless of the beneficiary's position title, the record is not persuasive in establishing that the beneficiary will function at a senior level within an organizational hierarchy.

The petitioner indicates that it plans to open additional locations and hire additional employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Finally, counsel's reference to unpublished decisions is not persuasive. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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

Finally, the AAO acknowledges that CIS approved a previous request for an extension of L-1A status filed on the beneficiary's behalf. However, each nonimmigrant petition has a separate record of proceeding with a separate burden of proof; each individual petition must stand on its own merits. *See* 8 C.F.R. § 103.8(d). The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's and beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the prior approval would constitute material and gross error on the part of the director. Due to the lack of required evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approvals by denying the present extension petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.