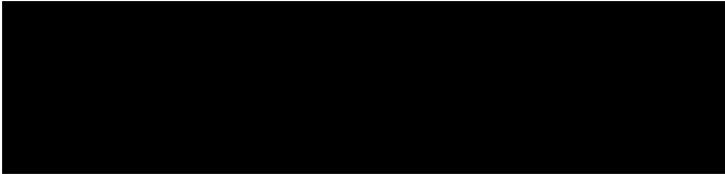




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Services

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FILE: WAC 05 170 50513 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2007

IN RE: Petitioner:
Beneficiary:

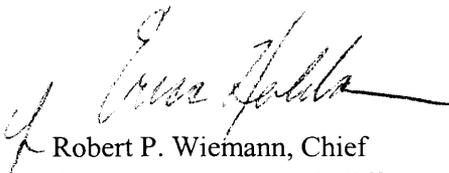


PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 appeal will be dismissed.

The petitioner is a California company and claims to be engaged in the import, distribution and wholesale of rattan and wicker products. The petitioner states that it is a wholly-owned subsidiary of Cris Native Products, located in the Philippines. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant 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 seeks to extend the beneficiary's stay in order to continue to fill the position of vice president of sales and marketing for a two-year period.

The director denied the petition on November 15, 2005, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to maintaining the sales and marketing department. In addition, the director noted several discrepancies between the organizational chart of the U.S. company and the U.S. company's employer quarterly wage reports.

On appeal, counsel for the petitioner acknowledges the director's statements concerning the discrepancies between the petitioner's statement on the Form I-129 regarding the U.S. entity's current employees, and the information provided in the U.S. company's quarterly wage reports that indicates fewer individuals employed by the U.S. company. Counsel asserts that the "petitioner submits that it has had to make changes to meet the changing demands of business." In addition, counsel asserts that the beneficiary supervises 13 independent sales representatives, and that the beneficiary will manage an essential function of the U.S. entity. Counsel submits a brief and supporting documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 May 31, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of vice president of sales and marketing for the petitioner. In a letter of support dated May 25, 2005, the petitioner explained the beneficiary's proposed duties in the U.S. as the following:

[The beneficiary] fills the position of Vice President of Sales and Marketing for our U.S. entity. In this executive capacity he will be in control of the Sales and Marketing operations of the business. He will coordinate and direct the activities of the managers who in turn will control the workers and will control the strategy of the Sales and Marketing methods and techniques. [The beneficiary] will be responsible for the short and long term planning of the Sales/Marketing Department and will report to the Board of Directors of the business on progress in his Department and he will make recommendations to the Board as regards the policy and safety to be employed in increasing sales and the profitability of the business.

In the aforesaid capacity the beneficiary has been in control of the Production of the business. As a Manager he has been involved in making decisions at an authoritative level, having same implemented by his supervisors and in turn the workers. [The beneficiary] has had full authority to hire and fire employees as well as the authority to recommend to ownership of the business leave authorization of employees and promotions or demotions. [The beneficiary] exercised day to day discretion and authority of the operations of the business. He was responsible for the supervisors ensuring that workers in the business implement the strategy and policy of the ownership.

The petitioner also submitted the U.S. company's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004. The document indicates that in 2004, the petitioner paid \$116,587 in wages, \$49,800 in compensation to its officers, and \$21,293 in commissions. The petitioner also submitted an organizational chart of the U.S. entity. The chart indicates the president as the head of the company who supervises the beneficiary as vice president of sales and marketing, and the vice president of operations. The chart indicates that the beneficiary supervises the sales and marketing manager, who in turn supervises the national sales coordinator, who in turn supervises 29 sales agents. The petitioner indicated on the Form I-129 that the U.S. entity had nine full-time employees and 21 additional sales agents. The petitioner attached a list identifying 21 sales agents to its organizational chart.

The director determined that the petitioner submitted insufficient evidence to process the petition. On July 7, 2005, the director requested that the petitioner submit the following documentation: (1) information regarding the sales agents employed by the U.S. entity since the organizational chart for the U.S. entity indicated 29 sales agents but the list of agents supplied by the petitioner only indicated 21 sales agents; including a complete list of the sales agents, a copy of the contract or agreement between the petitioner and each sale agent, a brief description of the service provided by each agent, and proof of payment or a copy of Form 1099; (2) a copy of the United States company's organizational chart, including the name, job title, job duties, educational level and annual salary of all employees supervised by the beneficiary; (3) copies of the U.S. company's payroll summary, Forms W-2 and W-3 evidencing

wages paid to employees for 2003 and 2004; (3) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for all employees for the last four quarters; (4) copies of the U.S. company's California Employment Development Department Form DE-6, Quarterly Wage Reports for all employees for the last four quarters; and, (5) further evidence to establish that the beneficiary 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.

The petitioner submitted a response to the director's request for additional evidence. In a letter dated September 20, 2005, counsel for the petitioner resubmitted the job description previously submitted for the position offered to the beneficiary in the United States, and asserted that it should be apparent that the beneficiary managed both supervisory personnel and an essential function of the organization. In addition, the petitioner submitted a new organizational chart for the U.S. entity. The chart indicates that the president supervises the vice president of production/development, and the beneficiary as the vice president of sales and marketing. The chart shows that the beneficiary supervises a warehouse manager who in turn supervises 13 sales agents. The beneficiary is also depicted as supervising the national sales representative and 10 representatives. It appears that a separate company, [REDACTED], employs the national sales representative and the ten sales representatives under the beneficiary. The new organizational chart indicates different job titles and names of employees from the chart previously filed with the petition.

The petitioner did not submit the job duties of the sales agents or the beneficiary's other subordinates as requested by the director. Furthermore, the petitioner did not submit copies of contracts or agreements between the U.S. entity and the sales representatives. Counsel for the petitioner stated in the letter dated September 20, 2005 that the "petitioner makes oral agreements with its sales agents. It has operated successfully in this manner for years earning millions of dollars annually in sales and does not need to change. As such, there are no written contracts to submit."

The petitioner submitted copies of check vouchers issued by the U.S. entity to the individuals listed as sales representatives, from January 2004 through July 2005. It is not clear if the checks were issued to these individuals for payment of services provided by these individuals. Moreover, if these individuals are in fact employed by the U.S. entity, it is not clear the length of time of employment, and if the individual was employed part-time or full-time. The petitioner submitted its 2004 Forms W-2, Wage and Tax Statement, but did not provide copies of Form 1099, as requested by the director.

The petitioner submitted the U.S. company's California Employment Development Department Form DE-6, Quarterly Wage Reports for the quarters ended in September 2004 through June 2005. During that time, the U.S. entity employed the maximum of 7 employees and the minimum of 5 employees. In the quarter ended in June 2005, the quarter in which the instant petition was filed, the U.S. entity employed five employees. The employees at the time of filing included the president, the beneficiary, the vice president, production and development, the warehouse manager, and an employee who was identified as a driver on the petitioner's initial organizational chart.

The director denied the petition on November 15, 2005 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director noted the discrepancy between the Form I-129 that indicated 9 full-time employees and 21 sales agents from the U.S. company's state quarterly wage reports that only indicated five full-time employees. In addition, the

director noted that the petitioner did not submit sufficient documentation to evidence the employment of 21 sales agents, and observed that the petitioner had provided evidence of payments to only nine representatives. The director also stated that the petitioner failed to provide a complete list of all the employees supervised by the beneficiary and their duties. The director determined that it appeared that the beneficiary will perform the duties required for the functions and day-to-day operations of the business, rather than oversee the functions and/or the personnel that perform those duties.

On appeal, counsel for the petitioner notes that the beneficiary's job duties listed in the decision were for an individual that is not the beneficiary in the instant petition. Counsel for the petitioner also asserts that the 10 representatives listed under [REDACTED] in the U.S. entity's organizational chart are "independent sales men," who "order Petitioner's products from catalogs and distribute Petitioner's products to retail stores." Counsel states that the beneficiary will supervise 13 independent representatives who will "market Petitioner's products to companies in their geographic area." Counsel further asserts that the beneficiary is employed by the U.S. entity in an executive and managerial capacity since he is "in control of the Sales and Marketing operations of the business." Counsel for the petitioner reiterates the job duties previously submitted for the beneficiary's position in the United States.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. As a preliminary matter, the AAO acknowledges that the director's decision cited a job description belonging to an unknown individual who is not the beneficiary of the instant petition. The AAO notes that although this error is regrettable, upon review of the director's decision as a whole, it is clear that the director carefully reviewed the evidence submitted by the petitioner, including descriptions of the beneficiary's duties.

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(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity 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 beneficiary evidently exercises discretion over the day-to-day operations of the sales and marketing department, the petitioner's description of his proposed duties suggests that the beneficiary's actual duties as of the date of filing were and would continue to be providing the services of the business.

The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's proposed job description includes vague duties such as the beneficiary "will be in control of the Sales and Marketing operations of the business;" "will be responsible for the short and long term planning of the Sales/Marketing Department;" and "will make recommendations to the Board as regards the policy and strategy to be employed in increasing sales and the

profitability of the business." 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, although the petitioner stated that the beneficiary "will coordinate and direct the activities of the managers who in turn will control the workers...and the strategy of the Sales and Marketing techniques," the record does not contain evidence of any subordinate managers responsible for sales and marketing functions. The only "manager" under the beneficiary's supervision is a warehouse manager whose duties have not been described. 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).

As noted above, in the request for evidence, the director requested that the petitioner submit additional evidence to establish that the beneficiary would serve in a primarily managerial capacity including evidence that the beneficiary would supervise managerial, supervisory or professional personnel, or an essential function. The petitioner failed to address these concerns in its response. This evidence is critical, as it would have established if the beneficiary will perform primarily managerial or executive duties while employed by the U.S. company. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the petitioner did not submit a detailed job description of the duties the beneficiary will perform at the U.S. entity and thus AAO cannot determine if the beneficiary will be employed by the U.S. entity in a 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. at 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of providing that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first," principally,' or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also be "principally" or "chiefly" perform managerial or executive duties.

As the beneficiary supervises a warehouse manager and 13 sales agents, who as discussed below, are not confirmed to be actually employed by the U.S. entity, it is reasonable to assume, and has not been proven otherwise, that the beneficiary is directly performing sales, client relations, and marketing development and implementation. The record does not evidence a subordinate staff supervised by the beneficiary who would relieve him from performing non-qualifying duties associated with the company's day-to-day sales and marketing functions. 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). Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The organizational chart submitted by the petitioner indicates that the beneficiary will supervise a national sales representative and 10 sales representatives that appear to be employed by Zimmerman & Co. These individuals are not listed in the company's tax returns and there is no evidence in the record to demonstrate that the individuals are employed by the U.S. entity. On appeal, counsel for the petitioner clarifies and asserts that the national sales representative and the 10 representatives are "independent sales men." Counsel states that the independent representatives "order Petitioner's products from catalogs and distribute Petitioner's products to retail stores." In addition, counsel states that "these independent sales men report directly to Beneficiary with respect to their sales and updates on the products." The petitioner did not explain why the U.S. entity did not complete a Form 1099 for the independent sales representatives. Furthermore, the petitioner failed to provide a job description for each sales representative employed by the U.S. entity, as requested by the director. 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). Although counsel states on appeal that the petitioner has contractual employees in the areas of sales, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (Comm. 1998).

The petitioner also indicated that the U.S. company employs 13 sales representatives that are directly supervised by the beneficiary. Again, the petitioner did not submit sufficient documentation to evidence that these employees are actually employed by the U.S. entity. The petitioner submitted copies of checks issued to nine of the thirteen individuals listed as sales representatives on the organizational chart. It is not clear if the checks were issued to the individuals for services they provided. In addition, if the checks were issued for services provided by these individuals, it is not clear as to the length of time the individuals were hired by the U.S. entity and whether the individuals were employed part-time or full-time. In addition, the petitioner did not explain why the U.S. entity did not complete a Form 1099 for the independent sales representatives. Furthermore, the petitioner failed to provide a job description for each sales representative employed by the U.S. entity, as requested by the director. 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).

The AAO observes that the petitioner did report paying commissions in the amount of \$21,293 in 2004. However, even if the AAO assumes that these payments were made to independent sales agents, it does not appear that such agents could have accounted for a substantial proportion of the company's \$2.2

million in sales for the same year. Many of the checks submitted as evidence of payments to sales agents are for nominal amounts. The petitioner has not established that the claimed independent sales staff would relieve the beneficiary from performing a substantial proportion of the company's day-to-day sales and marketing activities.

In addition, as noted by the director, the record contains several inconsistencies regarding the staffing of the U.S. entity. The petitioner submitted an organizational chart of the U.S. entity with the original petition and then submitted a new organizational chart in response to the director's request for evidence. The two charts are very different and indicate different job titles and different individuals employed in several of the positions. The first organizational chart indicates that the beneficiary will supervise 29 sales agents while the second organizational chart indicates that the beneficiary will supervise 13 agents. In addition, the Form I-129 states that the U.S. entity has 21 sales agents. Further, the Form I-129 states the U.S. entity has 9 full-time employees, however the first organizational chart indicates 11 employees and the second organizational chart indicates eight employees. Moreover, as discussed above, the petitioner submitted the company's California Form DE-6, Quarterly Wage and Withholding Report, for the quarter ended on June 2005 that indicates five full-time employees at the time the instant petition was filed. According to the petitioner's "master employee list," the U.S. entity employed nine employees as of the date of filing. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

As noted, the director based his decision partially on the size of the enterprise and the number of staff. 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.

At the time of filing, the petitioner was a nineteen-year-old company that claimed to have a gross annual income of \$2.2 million. The U.S. entity employed five individuals, the president, the beneficiary as vice president of sales and marketing, the vice president of production/development, the warehouse manager, and an individual that is not listed on the second organizational chart but listed on the first organizational chart as a driver. As discussed above, the petitioner has not provided evidence regarding the number of outside sales representatives utilized by the company, or the scope and nature of the services they provide. 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 vice president of sales and marketing and four additional 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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's

duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. The record does not demonstrate that the beneficiary has a sufficient number of employees in the United States employed full-time who could perform the non-managerial tasks associated with operating a retail store six days per week. The petitioner's general description of the beneficiary's duties and the lack of sufficient personnel to perform these tasks make it impossible to conclude that the beneficiary would plausibly perform primarily managerial or executive duties.

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the warehouse functions of the warehouse manager, who is the beneficiary's only confirmed subordinate employee. Although the beneficiary's subordinate has a managerial position title, the petitioner has not submitted sufficient evidence to substantiate the claim that this employee is in fact employed in a managerial or supervisory role.

Furthermore, on appeal, counsel for the petitioner indicates that the beneficiary manages an essential function for 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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 not provided evidence that the beneficiary manages an essential function.

As discussed above, the totality of the record supports a conclusion that the beneficiary would be required to perform primarily non-qualifying duties associated with the day-to-day functions of the petitioner's sales and marketing department, as the petitioner has not identified sufficient staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to the sales and marketing function. The fact that the beneficiary has been given a managerial job title and general oversight authority over a department within the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

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.* As discussed above, the beneficiary supervises one warehouse manager and does not direct or supervise a subordinate staff in the sales and marketing department. Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity.

Based upon the lack of a comprehensive job description, and the lack of evidence of the company's staffing levels, it cannot be concluded that the beneficiary will be employed by the U.S. company in a managerial or executive capacity. Based on the foregoing discussion, the appeal will be dismissed.

The prior approval of two nonimmigrant petitions filed by the petitioner on behalf of this beneficiary does not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. 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).

In addition, 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). Based upon the lack of required evidence in the current record, and due to the petitioner's failure to submit requested evidence, the AAO finds that the director was justified in departing from the previous petition approvals and denying the instant request for an extension of the beneficiary's status.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.