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FILE: SRC 06 010 51136 Office: TEXAS SERVICE CENTER Date: FEB 21 2007

IN RE: Petitioner:
Beneficiary:



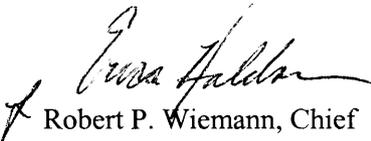
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 nonimmigrant visa petition was initially approved by the Director, Texas Service Center. The director subsequently served the petitioner with a notice of her intention to revoke the approval of the nonimmigrant visa petition, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The U.S. 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 is a Tennessee corporation that claims to be engaged in the import, export and marketing of agricultural products. The petitioner states that it is a subsidiary of Radix S.R.L., located in Argentina. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently approved for an extension of the L-1A status. The petitioner now seeks to extend the beneficiary's stay for three years in order to continue to fill the position of chief executive officer.

The petitioner filed the nonimmigrant petition on October 14, 2005. The director initially approved the petition on November 14, 2005. On December 9, 2005, the director issued a notice of intent to revoke the approval, noting that the approval of the nonimmigrant visa was granted in error. In the notice of intent to revoke, the director noted that the record lacked: (1) credible evidence of the qualifying relationship between the U.S. entity and foreign company; and, (2) evidence that the beneficiary will be employed in a managerial or executive capacity with the U.S. entity. The director properly advised the petitioner that it had thirty days in which to respond to the notice of intent to revoke, and that failure to submit such evidence could result in the revocation of the approval previously granted. Counsel for the petitioner filed a timely response on January 6, 2006.

The director revoked the approval of the petition on February 10, 2006 concluding that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity. The director stated that the petitioner did not submit the job titles or job duties of the employees and subcontractors supervised by the beneficiary. The director also 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 running a business.

The petitioner subsequently filed an appeal on March 10, 2006. 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 again states that the petitioner was previously granted two approvals for L-1A classification based on the same information and circumstances as outlined in the instant petition. Counsel cites from an Interoffice Memorandum from William R. Yates, Associate Director for Operations, USCIS, dated April 23, 2004, stating that "if the petitioner involved the same parties (both petitioner and beneficiary) and the same underlying facts, a proper determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference." See Memorandum of William R. Yates, Assoc. Director for Operations, USCIS, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQPRD 72/11.3 (April 23, 2004)("Yates Memorandum"). Counsel contends that the instant petition should not be revoked since there was no finding of material error or fraud. In addition, counsel states that the beneficiary is in fact employed in a primarily managerial or executive capacity with the

U.S. company. Counsel also asserts that the beneficiary supervises two employees and several subcontractors who perform the day-to-day activities of running a business. Counsel further states that the beneficiary also qualifies as a function manager. Counsel contends that the Service cannot look at the company's size alone but must also take into account the reasonable needs of the organization. In support of the appeal, counsel submits a brief and additional documentation.

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.

Under CIS regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

In the present matter, the director provided a detailed statement of the grounds for the revocation but did not cite to the specific provision of the regulations as a basis for the revocation. Referring to the eligibility criteria at 8 C.F.R. § 214.2(l)(3)(i) and (ii), the director reviewed the rebuttal evidence and concluded that the petitioner had not established the qualifying relationship between the U.S. entity and foreign company; and, that the beneficiary will be employed in a managerial or executive capacity with the U.S. entity. Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(5): "Approval of the petition involved gross error."

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. See *Black's Law Dictionary* 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001).

As the term "gross error" was created by regulation, it is most instructive to examine the comments that accompanied the publication of the rule in the Federal Register. The term "gross error" was first used in the regulations relating to the revocation of a nonimmigrant L-1 petition. In the 1986 proposed rule, an L-1 revocation would be permitted if the approval had been "improvidently granted." 51 Fed. Reg. 18591, 18598 (May 21, 1986)(Proposed Rule). After receiving comments that expressed concern that the phrase "improvidently granted" might be given a broader interpretation than intended, the agency changed the final rule to use the phrase "gross error." 52 Fed. Reg. 5738, 5749 (Feb. 26, 1987)(Final Rule). As an example of gross error in the L-1 context, the drafter of the regulation stated:

This provision was intended to correct situations where there was gross error in approval of the petition. For example, after a petition has been approved, it may later be determined that a qualifying relationship did not exist between the United States and the foreign entity which employed the beneficiary abroad.

Accordingly, upon review of the regulatory history and the common usage of the term, the AAO interprets the term "gross error" to be an unmitigated or absolute error, such as an approval that was granted contrary to the requirements stated in the statute or regulations. Regardless of whether there can be debate as to the legal determination of eligibility, any approval that CIS determines to have been approved contrary to law must be considered an unmitigated error, and therefore a "gross error." This view of "gross error" is consistent with the example provided in the Federal Register. *See* 52 Fed. Reg. at 5749.

Upon review, the present petition was properly revoked as the director clearly approved the petition in gross error, contrary to the eligibility requirements provided for in the regulations.

Upon review, the AAO concurs with the director's decision to revoke approval of the petition. In the present case, the director did raise sufficient factual issues to support the revocation. The notice of intent to revoke and the subsequent revocation were based on evidence that was in the record at the time the notice was issued.

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 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 October 14, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of chief executive officer for the petitioner, which claimed to have two employees. In a support letter dated October 11, 2005, the beneficiary's proposed duties in the U.S. are described as the following:

[The beneficiary] will be responsible for the day to day management of the company, determine and formulate policies and provide the overall direction of the company; Determine and formulate policies and business strategies; Planning the use of materials and human resources; Assist the President in the development of the US market as well as the worldwide market of the US subsidiary, import and export and accomplishing the most complex transactions.

In addition, the petitioner submitted the following job description for the position of chief executive officer:

- Determine and formulate policies and provide the overall direction of the company
- Plan, direct and coordinate operational activities at the highest level of management with the help of subordinate executives, managers and employees.
- Determine and formulate policies and business strategies; Participate in formulating and administering company policies and developing long range goals and objectives
- Managing daily operations of the company
- Planning the use of materials and human resources
- Management or administration, personnel, purchasing, and administrative services
- Direct and manage all the major divisions of the company
- Review analyses of activities, costs, operations, and forecast data to determine department or division progress toward stated goals and objectives.
- Direct and coordinate activities of the company to obtain optimum efficiency and economy of operations and maximize profits
- Direct and coordinate promotion of products and services to develop new markets, increase share of market, and obtain competitive position in industry
- Analyze division or department budget requests to identify areas in which reductions can be made, and allocate operating budget
- Promote the company in industry, manufacturing and trade associations
- Reports to the President of the company

In addition, the petitioner submitted the U.S. company's employer quarterly report for the quarter ended September 30, 2005 which indicated that the beneficiary was the only employee hired by the U.S. company. The petitioner also submitted the U.S. company's 2003 IRS, Form 1120, U.S. Corporation Income Tax Return, for the fiscal year ended on October 31, 2004 which indicated gross sales of \$206,200. The form also stated that the U.S. company paid the amount of \$49,999 for compensation of officers to the petitioner's president, and did not pay any amount for salaries and wages.

The director initially approved the petition on November 14, 2005. On December 9, 2005, the director issued a notice of intent to revoke the approval, noting that the approval of the nonimmigrant visa was granted in error. In the notice of intent to revoke, the director noted in part, that the record lacked evidence that the beneficiary will perform in a managerial or executive capacity with the U.S. entity. The director properly advised the petitioner that it had thirty days in which to respond to the notice of intent to revoke, and that failure to submit such evidence could result in the revocation of the approval previously granted.

In a response dated January 6, 2006, counsel for the petitioner stated that the petitioner was previously granted two approvals for L-1A classification based on the same information and circumstances as outlined in the instant petition. Counsel cites from above-referenced Yates memorandum, stating that "if the petitioner involved the same parties (both petitioner and beneficiary) and the same underlying facts, a proper determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference." Counsel also asserted that the beneficiary is indeed employed by the U.S. company in a primarily managerial or executive capacity, and claimed that the U.S. company has two employees and several subcontractors.

Specifically, counsel stated that the U.S. company employs the following 10 professional subcontractors:

- [REDACTED] web design's [sic] professionals are engaged in catalogues designs, graphic design, writing letters in business language on behalf of client, etc.
- [REDACTED] is responsible for administrative tasks, such as answering phones, packing and mailing supplies, taking them to the post office, etc.
- [REDACTED] is engaged in marketing consulting. They are a company that conducts market research for product marketing purposes.
- [REDACTED] is an independent marketing professional. Her duties include trying to establish strategic marketing goals, aiding in the marketing and sales of new products, consulting market research by phone contacting different buyers in the food industry and in the fishing industry
- [REDACTED] n, who is a practitioner psychologist, is responsible for launching test markets and verifying whether a specific product is suitable for the U.S. market.
- [REDACTED] is engaged in complex translations and business correspondence between the Spanish and English languages
- Accounting: [REDACTED], CPA and [REDACTED] CPA
- Legal: [REDACTED] (anti-dumping); [REDACTED] (immigration)

In addition, the petitioner submitted an organizational chart for the United States company. The chart indicated the president supervises the beneficiary as the chief executive officer. The chart also indicated the beneficiary supervises the subcontractors listed above. The petitioner submitted two invoices issued to the U.S. company by hpdCrafts.com dated May 1, 2005 and May 30, 2005.

Counsel asserted that because the petitioner is a marketing and services company, it mainly performs work through subordinate subcontractors and does not require a large staff. Counsel emphasized that section 101(a)(44)(c) of the Act requires USCIS to take into account the reasonable needs of the company if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. Counsel cited an unpublished AAO decision and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988) in support of her assertion that managerial capacity is not limited to those persons who supervise large enterprises or a large number of employees.

The petitioner also submitted a brochure for the U.S. company specifying the services the petitioner provides. The brochure identifies the beneficiary as "Import/Export Trade Specialist" rather than chief executive officer as stated on the Form I-129.

The director revoked the approval of the petition on February 10, 2006 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

The petitioner filed an appeal on March 10, 2006. On appeal, counsel for the petitioner states that the petitioner was previously granted two approvals for L-1A classification based on the same information and circumstances as outlined in the instant petition. Counsel contends that if the L-1A extension petition involves the same parties and facts, the director must give deference to the decision made on the previous

L-1 petitions. Counsel further states that the approval of the instant petition should not be revoked since there was no finding of material error or fraud. In addition, counsel states that the beneficiary is in fact employed in a primarily managerial or executive capacity with the U.S. company. Counsel states that the beneficiary supervises two employees and several subcontractors who perform the day-to-day activities of running the business. Counsel further states that the beneficiary also qualifies as a function manager. Counsel contends that the Service cannot look at the company's size alone but must also take into account the reasonable needs of the organization. In support of the appeal, counsel submits a brief and additional documentation.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a 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.*

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).

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. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. at 604.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of her proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as the beneficiary will "determine and formulate policies and provide the overall direction of the company"; "determine and formulate policies and business strategies;" "participate in formulating and administering company policies and developing long range goals and objectives"; "managing daily operations of the company"; and "direct and manage all the major divisions of the company." 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 her 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, the record shows that the beneficiary, although she has been given the title "chief executive officer," reports to the company president and is not in fact the top manager or executive

within the U.S. company. The petitioner has not provided a job description for the company president, however, the existence of a higher-level employee raises questions as to whether the beneficiary is actually responsible for providing the "overall direction of the company" or directing activities "at the highest level of management" as claimed by the petitioner.

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will "review analyses of activities, costs, operations, and forecast data to determine department or division progress toward stated goals and objectives"; "direct and coordinate promotion of products and services to develop new markets, increase share of market, and obtain competitive position in industry"; "analyze division or department budget requests to identify areas in which reductions can be made, and allocate operating budget"; and "promote the company in industry, manufacturing and trade associations." Since the petitioner has not explained that the U.S. company has hired any employees in accounting, marketing, sales or financial development, it appears that the beneficiary will be providing the services of accounting, finance, sales and market research and operations 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).

In addition, the petitioner submitted information further casting doubt on the petitioner's claim that the beneficiary performs primarily managerial or executive duties. For example, as discussed above, the petitioner submitted a brochure describing the petitioner's business and identifies the beneficiary as its "import/export trade specialist." This title and the beneficiary's list of activities set out in the brochure support the conclusion that the beneficiary is primarily performing operational tasks. 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).

According to the petitioner's statement on Form I-129, the U.S. company has two employees. However, the petitioner's Form 941, Employer's Quarterly Federal Tax Report for the quarters ended in October 2005, indicates that the U.S. company only employed the beneficiary. On appeal, counsel states that the U.S. company has two employees in addition to the beneficiary, a Marketing Development and Research Analyst and a Project Manager. According to the Forms I-9 and W-4 for these two individuals, it appears that the U.S. company did not hire these employees until January 2006, nearly three months after the instant petition was filed. 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).

On appeal, counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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.

Furthermore, 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.*

At the time of filing, the petitioner was a three-year-old marketing services company that claimed to have a gross annual income of \$206,200. According to the submitted documentation, the only individual that is confirmed to be employed by the U.S. company is the beneficiary as the chief executive officer, and perhaps a company president. As the only employee of the U.S. company, it appears that the beneficiary will be performing all of the various operational tasks inherent in operating the business on a daily basis, such as negotiating contracts, arrange for international shipment of different types of cargo, issuing bill of lading and airwaybills, working with custom brokers, locating potential new global business associates and performing international market research, preparing budgets and financial statements, bookkeeping, paying bills, and customer service. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude her from functioning in a primarily managerial or executive role. 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 the chief executive officer and perhaps a company president. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Furthermore, on appeal, counsel submits an organizational chart for the U.S. company which indicates that the beneficiary supervises 10 subcontractors. Although counsel states on appeal that the petitioner has contractual employees in the areas of accounting, legal services, graphic design, and market research, the petitioner has neither presented sufficient evidence to document the existence of these employees nor specifically identified the nature and scope of the services these individuals provide. Additionally, the petitioner has not explained how 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. 158, 165 (Comm. 1998). The AAO acknowledges that in certain situations a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner's obligation to establish

however, through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary.

On appeal, counsel asserts that the position offered to the beneficiary is executive in 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-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the beneficiary is the only confirmed employee of the U.S. company, the petitioner has not established a complex organizational structure which would elevate the beneficiary to a position wherein she would primarily focus on the broad policies of the organization. Thus, the petitioner has not established that the position is in an executive capacity.

In addition, the AAO acknowledges counsel's contention that the service further erred in not identifying the position as an essential function within the petitioner's 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.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations 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. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Other than stating that the proposed position is an essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. 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).

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 petitioner's day-to-day functions, 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 operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate her position to that of a "function manager" as contemplated by the governing statute and regulations.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. As noted above, it is the petitioner's obligation to establish however, through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although, as correctly noted by counsel, these employees need not be professionals, or direct employees of the company. Here, the petitioner has not met this burden.

Furthermore, counsel for the petitioner discusses prior cases approved by the AAO where the AAO held that a small staff does not justify a denial where the beneficiary holds wide decision-making discretion. Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Additionally, counsel observes that Congress omitted the language that discussed individuals who produce a product or provide a service from the Immigration Act of 1990 and asserts that this is a clear indicator that such individuals are not precluded from qualifying as multinational managers or executives. However, the AAO will not draw this conclusion based solely on an omission.

Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or

executive employee under 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 "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel's unsupported assertions are not persuasive on this point.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp 1570 (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. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc. v. INS*. Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. For this reason, 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). It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 § C.F.R. 103.2(b)(16)(ii).

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). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

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 revoking the approval of the instant petition for an extension of the beneficiary's status.

On appeal, counsel for the petitioner cites the above referenced Yates memorandum. CIS memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

The petition will be denied 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.