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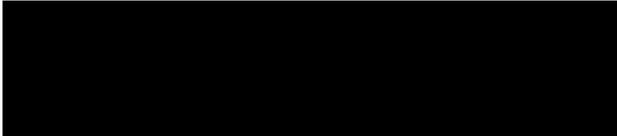
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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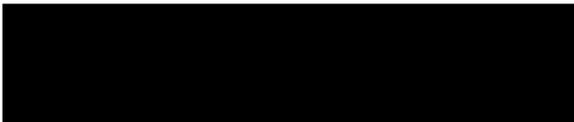
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FILE: WAC 06 079 50868 Office: CALIFORNIA SERVICE CENTER Date: MAR 27 2007

IN RE: Petitioner:
Beneficiary:



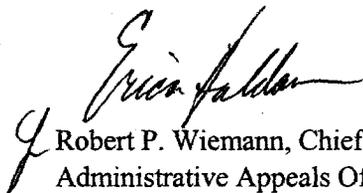
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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, a California limited liability company, claims to be engaged in the information technology and media services business. The petitioner states that it is a subsidiary of Jonathan Hatchery System, 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 was initially granted a one-year period of stay to open a new office and the petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of CEO and president for a two-year period.

The director denied the petition on June 20, 2006, concluding that the record contains insufficient evidence to demonstrate: (1) that a qualifying relationship exists between the foreign company and the United States entity; and, (2) that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that since the beneficiary is the only employee of the U.S. entity and does not supervise a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, the beneficiary will be primarily involved in performing the day-to-day services essential to running a business. In addition, the director stated that it appeared that the U.S. entity was a sole proprietorship and is not a qualifying organization.

On appeal, counsel asserts that the U.S. company is a limited liability company in the United States and is not a sole proprietorship. Counsel states that the U.S. entity is not required to file Schedule K tax returns and instead the beneficiary, as the sole member and owner of the company, may file the business tax returns on his Form 1040. In addition, counsel states that the beneficiary is employed in a primarily managerial and executive capacity since he is responsible for managing and developing the operations of the entire U.S. company. In addition, counsel states that although the beneficiary is the sole employee of the U.S. entity, he is primarily engaged in the managerial and executive duties. Counsel cites several decisions to support his claims. Finally, counsel for the petitioner asserts that the beneficiary is a function manager. 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.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether a qualifying relationship exists between the foreign company and the United States entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer is the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner claims to be a subsidiary of the foreign employer, ██████████ System. In support of this claim, the petitioner submitted: (1) a membership certificate, number 1, indicating that the beneficiary is the holder of 10,000 membership units of the U.S. entity; (2) Articles of Organization of the U.S. entity identifying the beneficiary as the sole member; and, (3) Certificate of Registration Corporation for the foreign company, authorizing the beneficiary to do business as ██████████ System" in the Philippines.

On February 21, 2006, the director requested that the petitioner submit copies of the foreign company's most recent filing of tax documents, and copies of the U.S. company's most recently filed federal income taxes.

In response, the petitioner submitted the beneficiary's annual income tax return, and a copy of the foreign company's financial statement for the year ended December 31, 2005. In addition, the petitioner submitted a letter from ██████████ CPA, stating the U.S. entity is a single member limited liability company, and thus is not required to file the Schedule K tax return, and instead the U.S. entity reports its income and expenses on a Schedule C.

The director denied the petition on June 20, 2006 on the ground that the petitioner submitted insufficient evidence to establish an existing qualifying relationship between the foreign company and the United States company. The director stated that according to the submitted evidence, the U.S. entity is a sole proprietorship and is not a qualifying organization. The director stated, "if the petitioner is actually the individual beneficiary doing business as a sole proprietorship, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization."

On appeal, counsel for the petitioner asserts that the U.S. entity was organized in the State of California as a limited liability company with the beneficiary as the sole member. Counsel asserts that the petitioner submitted a letter by [REDACTED], as discussed above, indicating that a single member limited liability company is not required to file a Schedule K tax form, and instead may file the company's tax returns on the single member's individual tax returns.

In review of the record, the AAO withdraws the director's conclusion that the U.S. entity is a sole proprietorship and confirms that the documentation evidences that the U.S. entity is a limited liability company. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Thus, the U.S. entity may sponsor the beneficiary for L-1A classification.

In addition, in reviewing the record, the AAO withdraws the director's conclusion that the evidence is insufficient to establish that a qualifying relationship exists between the foreign company and the United States entity. As discussed above, the petitioner submitted: a membership certificate, number 1, indicating that the beneficiary is the holder of 10,000 membership units of the U.S. entity; the Articles of Organization of the U.S. entity identifying the beneficiary as the sole member; and, a Certificate of Registration Corporation for the foreign company, authorizing the beneficiary to do business as "Jonathan Hatchery System" in the Philippines. In addition, the petitioner submitted balance sheets of the foreign company in the beneficiary's name, and the beneficiary's tax return indicating he is the owner of a business. If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the regulations. In the instant matter, the petitioner provided sufficient evidence to establish that the beneficiary is the owner of both the foreign company and the U.S. company, and thus the entities are affiliates and qualifying organizations.

The second 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 January 11, 2006. The Form I-129 indicates that the beneficiary will be employed in the position of CEO and president for the U.S. entity, which claimed to have one employee. The petitioner submitted an annual report for 2005, which described the beneficiary's duties in the past year, and the future goals of the U.S. entity as the following:

[The beneficiary] has provided the technological needs of some companies, from web-development, network and server maintenance to computer controlled surveillance system; so far we were able to maintain a solid business relationship for number companies.

We've installed services for two companies and are currently negotiating to develop application which integrates their in-house operation with their web site for sales orders and inventory control.

We've developed a web database application for a fertility broker to lessen the staff's workload; egg donors and surrogate applicants can apply on line with all their pertinent information. Clients can view this information online on a secured connection. We are negotiating in installing an in-house server for better security.

* * *

We are starting to venture to a new area: e-retailing. The sector's sales volume increased 30% from last year to \$30 billion. Los Angeles being a wholesale hub is a perfect place to start e-retailing, this region supplies most parts of the country. We plan to develop e-stores for various products that are available from our clients and come reputable wholesalers.

Looking ahead, we will broaden our operation into four distinct areas: Network and server Maintenance, Web-software Development, E-retailing and Computer base Surveillance System

In addition, the petitioner submitted a document entitled "Planned Organizational Chart for Year 2006." The chart indicated the beneficiary as president. The chart also indicated six positions that are supervised by the beneficiary but are currently vacant. The positions are: marketing person, computer technician, e-store administrator, Philippine backend support, application programmer, and graphic designer. The chart indicated that the proposed hiring schedule for these positions would start in February 2006 and end in June 2006.

On February 21, 21006, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director, in part, requested that the petitioner submit: (1) the organizational chart of the U.S. company, including the names, job titles and a detailed job description for each employee; (2) a more detailed description of the beneficiary's duties in the U.S., including the percentage of time spent on each duty; and, (3) copies of the petitioner's California employer's quarterly wage reports, Form DE-6, for the last four quarters for all employees.

In a response to the director's request, dated May 16, 2006, the petitioner submitted the current organizational chart of the U.S. entity. The chart indicates that the beneficiary holds five positions within the company. The chart indicates that the beneficiary is the president/CEO, the sales representative, the administrative personnel, the computer technician, and the systems analyst website/database programmer.

In addition, the petitioner submitted a description of the beneficiary's duties in the United States as the following:

The beneficiary is the CEO/President but is current [sic] serving several roles in the company:

1. His main role is the CEO/President of the company,
 - a. currently building the groundwork and foundation of the Company, by studying and documenting every aspect of the Company's operation with his hands on approach, and
 - b. Also by developing procedure and application for the company's operation.
 - c. He is developing a time standard computer repairs and cost analysis for common computer and network problems.
 - d. Reviews market trends and customer needs and want and set the direction for the company's products and services.
 - e. He manages the financial resources of the company to keep it in good credit standing at all times.
 - f. He is building the image of quality, professionalism, dependability and reliability for the company.
2. He is temporarily the Sales Representative for the Company, which solicits and follow-ups [sic] customers and potential customers. As a Sales rep he is able to see a first hand

view of the market trends and direction and also helps him understand the specific needs and wants of the customers.

3. He is developing a Customer Management Support application based on actual needs and wants of customers. This will be used by the sales department in the near future with a goal of 99.9% Customer satisfaction.
4. He is temporarily the Computer Technician and network administrator, goes on site to client's offices to repair setup and configure workstations, servers, and networks, and also provides training procedures. As a Tech, he can determine the common problem encountered in a small business environment and their future IT needs.
5. He is the senior System Analyst, Website/Database Programmer, design system workflows and develops programming scripts. He develops application for the company and the clients and studying [sic] emerging technology that can be useful.
6. He temporarily [sic] the Administrative manager for the company whose main job is to record expenses, create checks and track bank records for the company pays [sic].

The petitioner also submitted a letter from [REDACTED] stating that the U.S entity did not file Form DE-6, Quarterly Wage Report, since the company did not hire any employees. The letter states that the beneficiary, as the sole owner, filed his annual self-employment taxes as part of his 1040 filing. The letter also states that the U.S. entity is a single member limited liability company and it is not required to file the Schedule K tax return but instead the U.S. entity reports its income and expenses on a Schedule C.

The director denied the petition on June 20, 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 director noted that the beneficiary, as the sole employee of the U.S. entity, will be performing all aspects of the day-to-day operations of the business. The director also noted that the petitioner did not submit sufficient evidence to demonstrate that the beneficiary will be a function manager, or will primarily perform executive duties for the U.S. entity.

The petitioner filed an appeal on July 19, 2006. On appeal, counsel for the petitioner asserts that the beneficiary is employed in a primarily managerial and executive capacity since he is responsible for managing and developing the operations of the entire U.S. company. In addition, counsel states that although the beneficiary is the sole employee of the U.S. entity, he is primarily engaged in the managerial and executive duties. Counsel also cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga 1988), *National Hand Tool Corp. v. Pasquarell*, 889 F.2d. 1472 n. 5 (9th Cir. 1989), and an unpublished decision in support of the assertion that the number of staff is not a basis for denial where the beneficiary does not supervise a large number of employees or large enterprises. Finally, counsel states that the beneficiary is a function manager.

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 and executive 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

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

The beneficiary's proposed job description includes vague duties such as the beneficiary is "currently building the groundwork and foundation of the Company, by studying and documenting every aspect of the Company's operation with his hands on approach, and also by developing procedure and application for the company's operation"; and "building the image of quality, professionalism, dependability and reliability for 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 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).

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will be responsible for "developing a time standard computer repairs and cost analysis for common computer and network problems"; "reviews market trends and customer needs and want and set the direction for the company's products and services"; "manages the financial resources of the company to keep it in good credit standing at all times"; "solicits and follow-ups [sic] customers and potential customers"; "goes on site to client's offices to repair setup and configure workstations, servers, and networks, and also provides training procedures"; "develops application for the company and the clients and studying emerging technology that can be useful; and "record expenses, create checks and track bank records for the company pays." As the only employee of the company, the beneficiary is responsible for performing all of the non-qualifying tasks involving finance and development operations, technical functions, administrative and operational tasks and clerical work. Although the petitioner failed to provide the percentage of time spent on each duty as requested by the director, since the beneficiary is the only employee of the U.S. entity it appears that he

would need to spend the majority of his time performing non-managerial technical, administrative or operational duties in order to provide the services of the business. Again, 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 Int'l.*, 19 I&N Dec. at 604.

As noted above, the petitioner failed to submit the percentage of time the beneficiary will spend on each duty, 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). On appeal, counsel for the petitioner asserts that the beneficiary primarily performs executive and managerial duties, however, the petitioner did not submit any documentation to confirm this assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As noted above, according to the petitioner's statement on Form I-129, the U.S. company has only hired the beneficiary in order to fill the positions of CEO/president, sales representative, administrative manager, computer technician, and systems analyst website/database programmer. 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. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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, it appears that the U.S. company was providing information technology and media services to companies. As discussed, the submitted job description indicates that the beneficiary is responsible for performing primarily non-managerial and executive duties. Thus, if the beneficiary is the only employee providing the services offered by the U.S. entity by providing the technical and consulting

services to its clients, it is reasonable to assume that the beneficiary will be performing the day-to-day operations and directly providing the services of the business rather than directing such activities through subordinate employees. Again, an employee who "primarily" performs the tasks necessary to produce a product or 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 Soffici*, 22 I & N Dec. at 165.

Based on the evidence submitted, it appears that the beneficiary will be performing all or many of the various operational tasks inherent in operating the business on a daily basis, such as acquiring clients, negotiating contracts, budgeting, and providing the consulting services to its clients. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary alone. 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.

Furthermore, on appeal, counsel asserts that the position offered to the beneficiary is in an 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.* 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. at 604. As the beneficiary is the only employee of the U.S. entity, the U.S. company has not established a complex organizational structure which would elevate the beneficiary to an executive-level position. In the instant matter, the petitioner has not established evidence that the beneficiary is employed in an executive capacity with the U.S. entity.

Finally, 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. at 604. 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 supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner has not identified any employees 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 his position to that of a "function manager" as contemplated by the governing statute and regulations. As discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial in nature, and thus he cannot be considered a "function manager."

Other than stating that the proposed position will be responsible for managing an unidentified 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).

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. It is the petitioner's obligation to establish 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. Here, the petitioner has not met this burden.

Furthermore, counsel for the petitioner discusses an unpublished decision 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.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga 1988), and *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 n. 5 (9th Cir. 1989), 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* or *National Hand Tool Corp. v. Pasquarell*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(14)(ii). As counsel has not discussed the facts of the cited matters, they will not be considered in this proceeding.

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.

Although counsel for the petitioner argues on appeal that the petitioner's rights to procedural due process were violated, they have not shown that any violation of the regulations resulted in "substantial prejudice" to them. See *De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The respondents have fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard,

the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. Based on the foregoing discussion, the submitted evidence is not relevant, probative, and credible.

Counsel for the petitioner noted that CIS approved a petition that had been previously filed on behalf of the beneficiary for the same position. The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(L)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as prima facie evidence that eligibility has been established in the present proceeding.

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).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.