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U.S. Citizenship
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Services

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File: EAC 06 102 53180 Office: VERMONT SERVICE CENTER Date: **SEP 06 2007**

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa and affirmed his decision on a subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Virginia corporation, states that it is engaged in the import, wholesale and retail sale of musical instruments, and claims that it is an affiliate of Scottish Musical Instruments Makers, located in Sialkat, Pakistan. The beneficiary was previously granted L-1A classification from June 23, 2003 until March 21, 2006. The petitioner now seeks to extend the beneficiary's stay for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity under the extended petition. The director subsequently granted the petitioner's motion to reopen and affirmed the denial of the petition in a decision dated October 10, 2006.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity. Counsel emphasizes that the beneficiary was previously granted L-1A status for employment with the petitioner in the offered position and references an April 23, 2004 U.S. Citizenship and Immigration Services (USCIS) interoffice memorandum which provides guidance to adjudicators reviewing requests for an extension of status. Counsel contends that the director should have given deference to the decision of the adjudicator who approved the petitioner's previous extension request absent a finding of a material error, a substantial change in circumstances, or new material information that adversely impacts the petitioner's or beneficiary's eligibility. Counsel submits a brief and documentary evidence in support of the appeal.

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

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue address by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on February 23, 2006. The petitioner indicated on Form I-129 that the U.S. company was established in 1999 and has four employees. In a letter dated February 20, 2006, counsel for the petitioner asserted that although the initial petition granting the beneficiary L-1A classification was approved in June 23, 2003, due to delays in obtaining his visa, the beneficiary arrived in the United States on May 29, 2004. Counsel stated that the petitioning company commenced operations "in earnest" in June 2004.

With respect to the beneficiary's duties, counsel provided the following description: "[The beneficiary] has served as the company's Chief Executive Officer, expanded and solidified retail sales, hired staff, overseen the work of various professional consultants, and launched a retail sales operation." Counsel noted that the petitioner had recently established a subsidiary corporation, Fredericksburg Music, Inc., to launch the company's retail sales in the United States, and hired a manager for the first retail store. The petitioner submitted its 2004 and 2005 corporate tax returns, and evidence of its ongoing business operations, including invoices, customs documents, bank statements, lease agreements for its storage and retail space, and a certificate of incorporation for its claimed subsidiary.

The petitioner did not provide a current letter describing the beneficiary's duties and the petitioner's staffing levels, but instead submitted copies of documents submitted in support of the initial L-1A petition in June 2003 (EAC 03 192 52850). The documentation included an exhibit identified as "Proposed staffing pattern for the new office of [the petitioner], along with job descriptions and identification of potential employees."

The job description for the beneficiary's position of chief executive officer, as of April 2003, was as follows:

Permanent Duties:

1. Supervises the managers and contract professionals providing services to the company
2. Determines the need for independent contractors to provide professional services, such as legal and accounting not provided by staff, and retains professional services
3. Directs resource development activities on behalf of the company
4. Serves as the liaison to [the foreign entity] and is the public representative of that company in the United States
5. Manages the strategic relationships of the company with appropriate US and Pakistani government regulatory an [sic] other agencies
6. Serves as the company's chief liaison to all government agencies
7. Formulates and implements administrative and operational policies and procedures
8. Responsible for long term planning

Interim Responsibilities:

1. Analyzes United States market, setting strategic planning goals, sales quotas, expense

2. Develops an advertising campaign and promoting products in the United States
3. Conducts or reviews market research and identifies business opportunities in the US market
4. Establishes guidelines for contract negotiation and payment terms for purchases of manufactured goods.
5. Analyzes market trends to forecast potential sales and ensure sufficient supplies of goods.

The petitioner indicated that the "Vice President-National Call Center Director," would likely take over the beneficiary's "interim responsibilities" within the course of twelve months.

The petitioner further provided detailed position descriptions for four proposed positions subordinate to the beneficiary, including Vice President – National Call Center Director, office manager, accounts (financial) manager, and shipping/warehouse manager, as well as a proposed organizational chart identifying each proposed employee by name.

The petitioner also submitted a copy of a letter from the foreign entity, dated May 21, 2003, which explained that the foreign business operated in the United States in "unincorporated form" as MAS Imports from 1999 until March 2003, with no full-time employees. The petitioner was incorporated in Virginia on March 11, 2003 and filed its initial corporate tax return in 2004.

The director issued a request for additional evidence on March 6, 2006, in part, instructing the petitioner to submit: (1) a complete position description for all employees in the United States, including one for the beneficiary's position, along with a breakdown detailing the number of hours devoted to each employee's job duties on a weekly basis; (2) copies of IRS Forms W-2 issued to employees in 2005; (3) copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Returns, for the last two quarters of 2005; (4) a copy of the petitioner's payroll records for January 2006; (4) an organizational chart for the U.S. office; and (5) documentary evidence of payments made to contract employees, if applicable.

In a response dated April 26, 2006, counsel for the petitioner emphasized that "extensive evidence regarding [the beneficiary's] leadership of the US company, and that company's growth were submitted with the above-referenced petition." The petitioner submitted its current organizational chart, which depicts the beneficiary as chairman and chief executive officer, an account manager, a vice president/national call center director, and a warehouse and shipping employee. The petitioner re-submitted the 2003 position descriptions for these positions.

The petitioner provided a payroll summary for the month of January 2006, which shows that the beneficiary, the vice president, and the account manager each received gross wages of \$1,500. The petitioner also submitted copies of IRS Forms 1099-MISC, Miscellaneous Income, issued to these three employees in 2005 in the amounts of \$21,900 to the vice president, \$20,900 to the beneficiary and \$18,750 to the accounts manager. The petitioner did not provide evidence of wages paid to the warehouse and shipping employee in 2005 or 2006.

The director denied the petition on June 6, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the petitioner had not established that the beneficiary's subordinates are employed as managers, notwithstanding their job titles, because they directly perform the services of the company. The director also noted that the evidence submitted shows that the company has three employees, not six as suggested by the initial organizational chart. The director further observed that the beneficiary and his subordinates earn essentially the same wages, causing the director to question the claimed hierarchical structure of the company and the beneficiary's claimed \$55,000 salary. The director concluded that the beneficiary would not be managing a staff of subordinate managers, supervisors or professionals, or managing an essential function of the company.

The petitioner filed a motion to reopen on July 6, 2006, counsel for the petitioner noted that the beneficiary was previously granted L-1A status and refers to a 2004 USCIS memorandum to support his assertion that it is USCIS policy that prior approvals should be given deference in matters relating to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts. *See* Memorandum of William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity*, HQOPRD 71/11.3 (April 23, 2004)("Yates memorandum"). The memorandum provides that exceptions to this policy should be made where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *Id.* Counsel asserted that the instant petition involves the same parties and underlying facts as the initial petition, and that none of the above-referenced exceptions to USCIS policy apply. Counsel further asserted that the approval of the initial petition was "completely appropriate" and that the beneficiary has undertaken the tasks and responsibilities set out in that petition upon his arrival in the United States.

Counsel asserted that the beneficiary's two subordinates perform both professional and managerial functions, including duties related to marketing, distribution and finance/administration. Counsel emphasized that the beneficiary is at the top of the petitioner's hierarchical structure, as he supervises the other employees and is responsible for "overall strategic planning." Counsel noted that the beneficiary's salary is low because he has a substantial ownership interest in both the U.S. and Pakistani companies, he enjoys income from the foreign entity, and he has decided to defer or forego income from the U.S. company. Counsel further argued that the beneficiary supervises essential functions of the U.S. company including "import strategy, strategic planning, human resources, and business development."

The director granted the petitioner's motion and affirmed his previous decision on October 10, 2006. The director noted that notwithstanding counsel's arguments, the record did not establish that the beneficiary's subordinates are professionals, managers or supervisors. The director found insufficient evidence to overcome the grounds for denial of the petition.

On appeal, counsel once again emphasizes that the beneficiary was previously granted L-1A status and that no substantial change in circumstances has occurred since the approval of the initial petition. Counsel states that since the approval of the initial petition, the beneficiary has increased the petitioner's wholesale market share

and established retail sales operations. Counsel asserts that the beneficiary's managerial functions have not decreased since his arrival in the United States, and notes that an import and export wholesale business such as the petitioner "generally runs with few staff." Counsel argues that the beneficiary does in fact manage managerial and professional employees, and supervises several essential functions. Counsel states that the fact that the beneficiary occasionally engages in "hands on" operation of the company does not prohibit a finding that he is a manager.

Upon review, counsel's assertions are not persuasive and the decision of the director will be upheld. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the only position description submitted for the beneficiary was the description prepared in support of his initial petition in 2003, one that clearly stated that many of the duties were only "interim responsibilities," that would likely be taken over by a subordinate within 12 months. The petitioner has had multiple opportunities to provide a current position description of the beneficiary's role and has opted not to update his job duties in any way, even though the petitioner states that it has recently established a subsidiary company and suggested that the beneficiary is involved in its management and operation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, as counsel has repeatedly stated that the beneficiary's duties have not changed since the initial filing and has re-submitted the 2003 job description, it must be assumed that he is continuing to perform all duties listed, including the "permanent" and "interim" duties.

The beneficiary's "permanent duties" have been described in vague and nonspecific terms, and offer little insight into what the beneficiary actually does on a day-to-day basis. For example, the petitioner indicates that the beneficiary "directs resource development activities," "formulates and implements administrative and operational policies and procedures," and is "responsible for long term planning." The petitioner did not, however, describe the beneficiary's "resource development activities," or clarify what specific duties he performs in connection with policy development and long-term planning. 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).

Many of the beneficiary's "permanent duties," while suggestive of his managerial or executive authority, would not plausibly require a significant portion of his time, considering the nature of the petitioner's

business. For example, it is unclear that serving as a public representative of the foreign entity, managing relationships with government and regulatory agencies, serving as "chief liaison" to government agencies, and retaining legal and accounting services, would require the beneficiary's attention on a day-to-day basis as the chief executive officer of a three-person import and wholesale company.

Furthermore, the beneficiary's job description includes a number of non-qualifying duties such as "analyzes United States market," "develops an advertising campaign and promoting products," "conducts or reviews market research," and "analyzes market trends." The petitioner has not established how these market research and promotion duties fall under the definition of managerial or executive capacity.

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 or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although the director specifically requested a breakdown as to how the beneficiary allocates his time on a weekly basis, the petitioner declined to provide this information. As a result, 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). Any 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).

Overall, the position description provided falls significantly short of articulating the beneficiary's day-to-day responsibilities, such that they could be classified as primarily managerial or executive in nature. The petitioner cannot rely on vague characterizations and conclusory assertions to establish the beneficiary's employment in a managerial or executive capacity. Furthermore, as noted above, the position description appears to be outdated and incomplete, and it does not indicate what, if any role, the beneficiary has in the petitioner's newly-opened retail operations.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The organizational chart submitted with the initial petition indicated that the beneficiary manages an account manager, a vice president, an office manager, and a warehouse/shipping manager. However, as noted by the director, the petitioner's actual staff at the time of filing, based on the petitioner's 2005 Forms 1099 and payroll records for January 2006, consisted only of the beneficiary, the vice president and an account manager. Counsel has not contended that the director's determination regarding the staffing levels was incorrect or otherwise attempted to explain the discrepancy between the initial organizational chart and the petitioner's actual staffing levels. 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). Moreover, a 40 percent reduction in staff does represent a significant change in circumstances for a company with only five employees, and it has not been explained who is performing the duties claimed to be assigned to the office manager and warehouse/shipping manager.

Although the beneficiary's subordinates both have managerial job titles, the record does not support a finding that they are supervising subordinates or performing management-level duties, notwithstanding counsel's claim that they should be deemed function managers. Rather, based on the evidence presented, it is clear that the beneficiary's subordinates are performing various aspects of the day-to-day operations of the petitioner's import and wholesale business.

Nor does the evidence submitted establish that the beneficiary's subordinates are employed in a professional capacity. 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 claims that the positions of vice president and account manager are professional positions. However, the petitioner has also indicated that its vice president is a high school graduate and its account manager has an associate degree, thus the petitioner does not require a bachelor's degree for either position. Further, the petitioner has not established that the duties performed by either employee would reasonably require a person with a baccalaureate degree in a particular field. As discussed above, the petitioner has also failed to establish that the beneficiary's subordinates are managers or supervisors, other than in position title.

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 three-year-old import and wholesale company that claimed to have a gross annual income of \$350,000. The firm employed the beneficiary as chief executive officer, a vice president/national call center director, and an account manager. As noted above, the petitioner, while emphasizing its growth under the beneficiary's leadership, appears to have eliminated two full-time positions since the initial petition was filed. Further, the petitioner also claims to have commenced retail operations, but has failed to document the existence of the manager hired by the business, or otherwise provide evidence that a single employee is able to operate the retail business without assistance from the petitioner's employees. Based on the petitioner's representations, it does not appear the petitioner would have a reasonable need for the beneficiary to perform primarily managerial or executive duties. The record does not establish that the beneficiary's two subordinate employees could relieve him from participating in the day-to-day operations of the company on a regular basis. 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.

Counsel claims on appeal that the beneficiary qualifies as a manager based on his supervision of "supervising essential functions of the organization including import strategy, strategic planning, human resources and business development." 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 "primarily" 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 petitioner has not clearly described the beneficiary's job duties. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. The argument that the beneficiary is a function manager was introduced only after the petition was denied and counsel has made no attempt to identify with specificity the essential functions the beneficiary is now claimed to manage. 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).

Counsel asserts that it was improper for the director to deny the petition after previously approving the beneficiary's request for an extension of status with the same petitioner for the same position. Referring to the Yates memorandum, counsel claims that the director was required by current USCIS policy to give deference to the subjective determination of prior adjudicators who concluded that the beneficiary is serving in a qualifying managerial or executive capacity. Counsel states that only a finding that there had been a material error with respect to the initial approval, or a determination that there had been a substantial change in circumstances, would warrant the denial of the extension request. Counsel asserts that these factors were not present in the instant matter.

Counsel's assertion is not persuasive. It must be emphasized that each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). 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.

Furthermore, there is some ambiguity in the record as to whether the initial grant of a 33-month period in L-1A status to the beneficiary was appropriate. The petitioning company was incorporated approximately three months prior to the filing of the previous petition in June 2003. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year." Although the petitioner claims that the foreign entity sold its products in the United States under the name [REDACTED] as early as 1999, there was no formal branch, affiliate or subsidiary in the United States until the petitioning company was incorporated in March 2003. There were also several references in the initial documentation to the petitioner's goals for its "first year of operation." Based on the evidence submitted with the instant petition, the petitioner should have been treated as a new office and the previous petition limited to a one-year period of approval pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3). The guidance provided in the Yates memorandum does not apply to petitions involving the extension of a petition involving a new office. Furthermore, the evidence submitted showed a decrease in staff and a significant difference between projected and actual revenues for 2004 and 2005. The director's close analysis and detailed request for evidence were appropriate in light of the referenced memorandum and the petitioner's evidentiary burden.

While USCIS previously approved a petition for L-1A status filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approvals by denying the present request to amend and extend the beneficiary's status. As discussed above, the evidence submitted fails to describe the beneficiary's actual job

duties in detail as required by 8 C.F.R. § 214.2(l)(3)(ii) and is insufficient to establish that the beneficiary would be employed in a managerial or executive capacity.

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). CIS memoranda merely articulate internal guidelines for CIS 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)).

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 petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

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.