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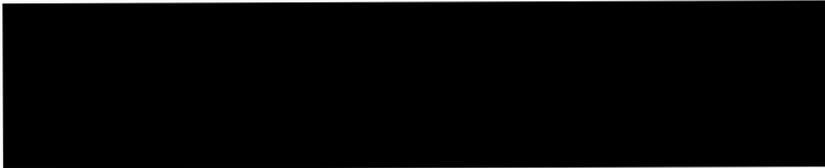
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: WAC 05 007 51597 Office: CALIFORNIA SERVICE CENTER Date: **MAY 20 2008**

IN RE: Petitioner:
Beneficiary:



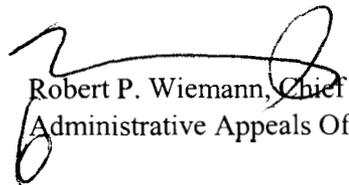
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The original petition (WAC 02 282 52414) was approved to allow the beneficiary to open a new office in the United States. The petitioner is a corporation organized under the laws of the State of California and is allegedly in the furniture business.

The director denied the petition concluding that the petitioner did not establish: (1) that it and the foreign employer are qualifying organizations; or (2) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred, that it and the foreign employer are "affiliates" controlled by the same group of individuals, and that the beneficiary's duties will primarily be those of an executive. Counsel also argues that the director failed to follow Citizenship and Immigration Services (CIS) policy pertaining to petition extensions.

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 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 the present matter is whether the petitioner has established that it still has a qualifying relationship with the foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." "Affiliate" is defined in pertinent part as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In this matter, the petitioner asserts that it is an "affiliate" of the foreign employer. In support, the petitioner describes the ownership and control of each entity in a letter dated October 3, 2004 as follows:

[T]he majority owners or shareholders of the foreign corporation are members of the [REDACTED] family, namely:

Stockholder	Shares Subscribed	Amount
[REDACTED]	500	100,000
[REDACTED]	950	190,000

[REDACTED]	100	20,000
	600	120,000
	150	30,000
	200	20,000

The same is true with the U.S. corporation as shown by the stock certificates of the U.S. corporation [citation omitted], to wit:

Stockholder	Shares Subscribed
[REDACTED]	1,000
[REDACTED]	500

On March 17, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

On appeal, counsel asserts that the record establishes that the two entities are "affiliates" as defined in the regulations. Specifically, counsel argues that both entities are owned and controlled by the same group of individuals, namely [REDACTED] and [REDACTED]. Counsel also claims that the petitioner will submit a "voting shares agreement" as additional evidence.

Upon review, counsel's assertions are not persuasive.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner and the foreign employer do not share common ownership and control and, therefore, are not "qualifying organizations." First, while the beneficiary appears to own a 66.7% interest in the petitioner, he only appears to own either a 4% interest, or a 24% interest, in the foreign employer.¹

¹It is noted that the director stated in his decision that the beneficiary owns 100 shares of the foreign employer, or a 4% interest. On appeal, counsel asserts that the beneficiary actually owns 600 shares and that the director failed to consider other evidence in the record, such as the foreign employer's amended articles of incorporation and its "general information sheet," which purportedly indicate that the beneficiary's interest has increased from 100 shares to 600 shares. Upon review, it is noted that the record does not contain enough information for CIS to deduce with any certainty the exact size of the beneficiary's ownership interest. The record is devoid of evidence clearly establishing when and how the beneficiary was issued his alleged 600

Accordingly, the beneficiary appears to control the petitioner but does not have similar control over the foreign employer. Therefore, the petition may not be approved for this reason.²

Second, it appears that counsel is asserting that the organizations are qualifying because the beneficiary and his family collectively own and control both entities. However, this familial relationship does not constitute a qualifying relationship under the regulations. If counsel is claiming that the beneficiary essentially controls the foreign employer through his family, and that his family owns and controls the petitioner through the beneficiary, it must be established that the parties have gained *de facto* control. In order to establish *de facto* control, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *Matter of Hughes*, 18 I&N Dec. at 293. A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999). As the record in this matter is devoid of evidence establishing that the minority shareholders "control" either entity, the petitioner, which appears to be 66.7% owned by the beneficiary, has not established that it has a qualifying relationship with the foreign employer.³

Third, the petitioner and the foreign employer do not share ownership and control because each individual does not own and control "approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). For example, the beneficiary appears to own 66.7% of the petitioner and either 4%, or 24%, of the foreign employer. [REDACTED] appears to own 33.3% of the petitioner and 25% of the foreign employer. [REDACTED] appears to own no stock in the petitioner but owns 38% of the foreign employer. According to the record, a total of 56% of the foreign employer's stock is owned by persons who do not have an ownership interest in the petitioner. Therefore, as each individual does not own and control approximately the same share or proportion of each entity, the entities are not qualifying organizations. The beneficiary appears to own and control the petitioner as the 66.7% owner but does not exert similar control over the foreign employer.

shares. However, given that neither 100 shares nor 600 shares constitute a controlling interest in the foreign employer, the AAO need not further consider this matter.

²Also, as the record contains unresolved inconsistencies pertaining to the beneficiary's claimed ownership and control of the petitioner, the record fails to persuasively establish the petitioner's ownership and control. For example, the petitioner claims in its California tax returns that no single interest owns 50% or more of the petitioner. However, the petitioner claims in the petition to be 66.7% owned by the beneficiary. The record is devoid of evidence addressing this inconsistency pertaining to the petitioner's true ownership and control. 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).

³It is noted that counsel claims in her brief that a "voting shares agreement" would be submitted for the record. However, as the record is devoid of this claimed evidence, it does not appear as if the petitioner has ever submitted a "voting shares agreement." Accordingly, the appeal will be adjudicated based on the evidence submitted to the director.

Furthermore, the petitioner has failed to establish that the foreign employer is a qualifying organization because the petition is not persuasive in establishing that the foreign employer is currently "doing business" as defined by the regulations. The record is devoid of objective evidence from 2004 establishing that the foreign employer is engaged in the regular, systematic, and continuous provision of a good or service. All invoices and other objective evidence are from previous years. 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)).

Accordingly, as the petitioner has failed to establish that it and the foreign employer are qualifying organization, the petition may not be approved.

The second issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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 petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, although counsel on appeal appears to limit the beneficiary to the executive classification. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed in either an executive *or* a managerial capacity and will consider both classifications.

The petitioner describes the beneficiary's proposed duties in a letter dated October 3, 2004 as follows:

This position requires [the beneficiary] to: (1) develop organizational management plans; (2) develop marketing strategies; (3) develop business and market entry plans; (4) directing the preparation of necessary feasibility studies, including site analysis, competition analysis, pricing and market acceptance; (5) identifying and coordinating materials and equipment suppliers to meet with high quality manufacturing and service standards of the company; (6) coordinating with designers and clients to come up [with] updated and contemporary designs; (7) managing and overseeing manufacturing, designing, refurbishing, servicing of furniture and accessories; (8) [f]ormulate policies and objectives pursuant to the business purposes of the company.

Although the petitioner claims to employ two people in the Form I-129, the petitioner submitted an organizational chart describing the operation as a multi-tiered organization involving 12 existing or prospective staff workers.

On November 26, 2004, the director requested additional evidence. The director requested, *inter alia*, a more detailed organizational chart for the United States operation, a more detailed description of the beneficiary's proposed duties, descriptions of the duties of the beneficiary's subordinate employees, and quarterly wage reports.

In response, the petitioner submitted a letter dated February 14, 2005 in which it further describes the beneficiary's proposed duties as follows:

[D]evelop organizational management plans. Develop marketing strategies. Develop business and market entry plans. Set up organizational structure. Set up work flow for the company to ensure smooth operations and ensure high quality of work. Lay the basis for the groundwork for setting up the institutional structures of the company. Direct the preparation of necessary feasibility studies, including site analysis, competition analysis, pricing and market acceptance. Formulate policies and objectives pursuant to the business purposes of the company. (40%)[.]

[I]dentify and coordinate materials and equipment suppliers to meet with high quality

manufacturing and service standards of the company. (20%)[.]

[C]oordinate with designers and clients to come up with updated and contemporary designs. Market designs performed by the parent company for eventual production in the US. (20%)[.]

[C]oordinate with the Vice president for production in the management and overseeing of the manufacturing, designing, refurbishing, servicing of furniture and accessories of the company. (20%)[.]

The petitioner also describes its current and prospective staffing as follows:

The company presently has a total of four (4) employees. Out of the four (4) employees, two (2) presently works [sic] for the company on a regular basis while the two other employees are independent contractors. The company plans to hire a projected total number of ten (10) employees.

The regular employees we presently have are as follows:

1. [The beneficiary] who acts as the President of the US company. He is currently under L1A status.
2. [REDACTED] who presently acts as the company's Vice President for Production. [REDACTED] is a legal permanent resident and is a holder of a bachelor[']s degree in mechanical engineering. [REDACTED] performs the following duties for the company: "Plans, directs, and coordinates the work activities necessary for manufacturing products in accordance with cost, quality and quantity specifications of the company. Coordinates with the independent contractors to ensure that deadlines of job orders are met. In charge of purchase and inventory supplies and raw materials."
3. [REDACTED] is one of the company's independent contractor[s]. He is not a degree holder and is in charge of all our upholstery works. He is a permanent resident.
4. [REDACTED] is one of the company's independent contractor[s]. She is not a degree holder and is in charge of our window coverings. She is a permanent resident.

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary at the top of a complex, multi-tiered organization directly or indirectly supervising nine positions. However, six of the positions appear to be vacant. Consequently, the chart indicates that the beneficiary currently supervises the vice president for production who, in turn, supervises the two independent contractors.

Finally, the petitioner submitted its California quarterly wage report for the fourth quarter of 2004. This report indicates that the petitioner employed one person, the beneficiary, in October, November, and December 2004. The instant petition was filed on October 7, 2004. The petitioner offers no explanation for why it claimed to employ [REDACTED] in both the initial petition and in its response to the Request for Evidence when it appears that [REDACTED] was not employed at the time the petition was filed. Furthermore,

while the petitioner claims to employ two independent contractors, the record is devoid of evidence addressing the number of hours worked by these individuals, how much compensation, if any, was paid to the contractors, the degree of control exerted by the petitioner over their work performance, or the likelihood that these contractors will perform services in the future and, if so, to what degree.

On March 17, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of an executive.

Upon review, counsel's assertions are not persuasive.

Title 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. The petitioner's plans to expand its business or to hire additional staff members may not be used to establish that the beneficiary will be employed in a managerial or executive duty at the time 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 based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, the petitioner's employment, or planned employment, of additional staff members is not relevant to the AAO's consideration of the instant petition. Based on the payroll records pertaining to the time period in which the instant petition was filed, it appears that the beneficiary was the only employee of the United States operation. Therefore, as further explained below, the petitioner's business has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will develop plans, marketing strategies, structures, policies, and objectives. However, the petitioner does not specifically define any of these plans, marketing strategies, structures, policies, and objectives. Furthermore, general managerial-sounding duties and an inflated job title are not probative of the beneficiary actually performing qualifying duties. Specifics are clearly an important indication of whether a beneficiary's duties will be primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of

meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Consequently, the petitioner has not established that the beneficiary will primarily perform managerial or executive duties as its "president" and principal owner. To the contrary, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks inherent to the operation of a one-employee furniture upholstery business. First, in addition to being vague, the job duties ascribed to beneficiary appear to concern primarily non-qualifying tasks and not managerial or executive duties. For example, the petitioner claims that the beneficiary will devote most of his time to working with suppliers, designers, and clients, performing marketing tasks, and "coordinating" the company's services with the vice president of production. However, not only is the record not persuasive in establishing that the beneficiary's "coordination" of the company's services constitutes a qualifying duty, the remaining tasks, e.g., *marketing and customer relations, appear to be tasks necessary to the petitioner's provision of a service or the production of a product.* An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Second, and as discussed by the director, the record is not persuasive in establishing that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to the petitioner's business by a subordinate staff. As discussed above, the record indicates that the beneficiary is the petitioner's sole employee. While the petitioner claims that the beneficiary is relieved of the need to perform non-qualifying tasks by "independent contractors," the record fails to persuasively establish that these contractors will truly relieve the beneficiary of the need to perform non-qualifying tasks. The record is devoid of evidence addressing the number of hours worked by these contractors, how much compensation, if any, will be paid to them, the degree of control exerted by the petitioner over the contractors' work performance, or the likelihood that the contractors will perform services in the future and, if so, to what degree. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Moreover, even if the contractors were established to perform certain operational tasks such as upholstering furniture, the record does not address who, other than the beneficiary, will perform those other administrative tasks inherent to the operation of any small business, e.g., processing accounts receivable and accounts payable, performing advertising tasks, and answering the telephone. Accordingly, it has not been established that the beneficiary will be "primarily" employed as a manager or an executive.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As indicated in the record, the beneficiary is the petitioner's sole employee. Furthermore, even if it were established that the vice president for production was employed at the time the petition was filed, this worker's vague job description fails to establish that he is truly a managerial, supervisory, or professional employee. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and

assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates.

Given the size and nature of the petitioner's business, it is more likely than not that the beneficiary and his proposed subordinates will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of a non-professional employee or independent contractor. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Finally, as the petitioner failed to establish the skills required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.⁴ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.⁵

⁴In evaluating whether the beneficiary will manage 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 subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is actually necessary to perform the duties of the vice president for production.

⁵While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. 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. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine

Similarly, the petitioner has failed to establish that the beneficiary will act 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. 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 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam)); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). 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.*

Finally, and in addition to those issues addressed above, counsel argues on appeal that the director failed to follow CIS policy pertaining to petition extensions. This guidance appears in a 1994 memorandum, which outlines the process by which an adjudicator, during the adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of a nonimmigrant petition where there has been no material change in the underlying facts. Specifically, this Memorandum states that adjudicators should give deference to prior approvals involving the same underlying facts except 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. Memo. From William R. Yates, Associate Director for Operations, to Service Center Directors, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a*

what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Subsequent Determination Regarding Eligibility for Extension of Petition Validity (April 23, 2004). The Memorandum also states that the adjudicator should clearly articulate the material error, changed circumstances, or new material information in his or her decision. *Id.*

However, counsel's assertion is not persuasive for three reasons. First, the Memorandum specifically excludes L-1A new office extension petitions from the restrictions placed on adjudicators in denying an extension petition. *Id.* at 2, Note 1. Second, this Memorandum limits its authority on page 4 and does not vest petitioner with any substantive rights. The Memorandum states as follows:

This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or matter.

Id. at 4.

Courts have consistently supported this position. *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that 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"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing an INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"); *Ponce-Gonzalez v. INS*, 775 F.2d 1342, 1346-47 (5th Cir. 1985) (finding that OIs are "only internal guidelines" for INS personnel, and that an apparent INS violation of an OI requiring investigation of an alien's eligibility for statutory relief from deportation was at worst "inaction not misconduct").

Therefore, the Memorandum does not create any substantive rights in the petitioner, and a director's failure to follow the guidance in the Memorandum would not be grounds for a withdrawal of the decision.

Third, it is clear from the director's reasoning in this matter that a material error was made with regard to the previous petition approval. As explained above, the petitioner failed to establish that it has a qualifying relationship with the foreign employer primarily because an affiliate relationship does not exist. The petitioner also failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. It must be noted that the previous approval of an L-1A petition does not preclude CIS from denying an extension based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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, 8 U.S.C. § 1361.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be 66.7% owned and controlled by the beneficiary. As a purported owner of the petitioner, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.