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U.S. Citizenship and Immigration Services

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[redacted]

File: EAC 08 013 52907 Office: VERMONT SERVICE CENTER Date: OCT 3 1 2008

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 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 petitioner, a New York corporation, states that it is engaged in international transportation services. The petitioner claims to be a subsidiary of China Shipping Development Co., Ltd., located in China. The petitioner has employed the beneficiary in L-1A status since January 2005 and now seeks to extend his status for three additional years.

The director denied the petition concluding that the petitioner did not establish 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 for the petitioner emphasizes that the beneficiary was previously granted L-1A status to work in the same capacity for the petitioner, and asserts that the petitioner has provided ample evidence to establish that the beneficiary will continue to be employed as a manager or executive. Counsel contends that the director disregarded the beneficiary's duties and the documentary evidence submitted, but instead erroneously based his decision on the size of the petitioning company. Counsel submits a brief and additional 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. Finally, counsel contends that the beneficiary's organizational structure is sufficiently complex to support the beneficiary in a position that is primarily managerial.

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 addressed by the director is whether the petitioner established that 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 filed the nonimmigrant visa petition on October 11, 2007. The petitioner stated on Form I-129 that it is an international transportation company established in 2003, with 15 employees and gross annual income in excess of $10 million. In a letter dated October 9, 2007, counsel for the petitioner stated that the beneficiary will perform the following duties as general manager:[1]

> [The beneficiary] maintains the authority to make any decisions with respect to the organizational, financial, and marketing activities of the company.
>
> In his day-to-day business operations, [the beneficiary] formulates plans and programs. He directs financial and commercial policies and practices of the company to ensure that financial objectives, goals, and corporate growth are sound and in accordance with government regulations.
>
> He confers with department managers to plan and initiate programs concerning organizational and operational functions of the company and oversees their execution. [The beneficiary] directs major fiscal and physical planning activities such as development of budget and building expansion programs, and recommends them to the shareholders for adoption. He coordinates communication and reporting activities between departments and branch offices to ensure availability of data required for efficient daily operations.
>
> [The beneficiary] approves operational procedures, rules, and standards relating to staff classification standards, financial disbursements, and accounting requirements. He delegates to subordinate corporate officers authority for administering activities and operations under their control. [The beneficiary] reviews reports and financial statements to determine policy changes due to changes in economic conditions and market demands. He confers with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives.
>
> [The beneficiary] reviews reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. He directs formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.
>
> Furthermore, [the beneficiary] directs development of a strategic plan for the quality program and establishment and maintenance of all systems to support external certification of quality construction systems. He also represents the company to the financial community, major customers, government agencies, and the public.
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> In summary, [the beneficiary's] duties are as follow[s]:

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[1] The petitioner stated on Form I-129 that the beneficiary will serve as the petitioner's president, but he is referred to as "general manager" in the majority of the documentation submitted.

- Direct development of the structure, policies, and objectives of the company in accordance with the Business Plan
- Direct market research and analysis to fulfill parent company's initial objectives
- Develop financial plans and strategies, including attracting continued investment from the parent company to assure sufficient capital to implement the Business Plan, as well as direct overall financial and accounting policies and controls
- Negotiate and ratify contracts on behalf of the company, including final determination of products quantity, price and payment terms and
- Continue directing the business cooperation between the parent company and its US subsidiary; confer with the Board of Directors of the parent company to establish joint financial strategies; oversee the development of joint projects between the US subsidiary and its parent company.

The petitioner submitted an organizational chart for the U.S. company which identifies the beneficiary as general manager, a vice general manager (April Shen), and five departments: Ocean, Air, Customs/Import/Export, Trucking/Warehouse, and Accounting/Freight Cashier.

The organizational chart identifies a total of 14 subordinate employees as follows:

Ocean Import/Ocean Export

Air Import/Air Export

Customs/Bond

Inland Trucking/Warehouse

Accounting/Freight Cashier

The petitioner also provided payroll records from its payroll service provider for the pay period ended on September 1, 2007. During that two-week period, the petitioner paid the following employees, in addition to the beneficiary:

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The payroll report also included a master list of employees who worked for the company in 2007 along with their hire dates and status. This list shows that more than one-third of the employees depicted on the petitioner's organizational chart, specifically, [redacted] and [redacted] were terminated during 2007, prior to the filing of the instant petition. Another employee, [redacted] appears on the master list, and while it does not appear that she was terminated, there were no 2007 earnings reported for her, and her status at the time the petition filed is unclear. With respect to the other employees on the organizational chart, there is no one by the name of "[redacted]" "[redacted]" or "[redacted]" listed on the master list of employees or listed on the petitioner's 2006 Forms W-2. There was an employee named [redacted] who received a Form W-2 from the petitioner in 2006, but he does not appear on the employee list for 2007. The AAO assumes that this individual is the "[redacted]" referenced on the organizational chart.

The director found the initial evidence insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the director issued a request for additional evidence (RFE) on December 7, 2007. The director instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's duties; (2) a list of U.S. employees by name and job title; (3) complete position descriptions for all U.S. employees, including a breakdown of the number of hours devoted to their job duties on a weekly basis; (4) copies of educational credentials for the beneficiary's subordinates; (5) copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2006 and the first three quarters of 2007; and (6) copies of all IRS Forms W-2 and 1099 issued in 2006.

In a response dated January 17, 2008, counsel for the petitioner provided the following description of the beneficiary's duties:

- Performing essential executive functions of president of the company in all aspects of business decision making, policy making and personnel management particularly;
- Establishing the company management structure, office rules, operation guidelines, and communication protocol between offices abroad and within the U.S.;
- Formulating immediate goals for expansion and long term business policies in accordance with the parent company's direction;
- Ensuring our company's compliance with regulations, guidelines, business direction and profit goals established and mandated by the parent company;
- Directing the preparation of financial plans and annual budget reports for the parent company's review;
- Researching and familiarizing himself with the American and Chinese markets as well as the relationship between the two markets;
- Amending and/or modifying company's directions in response to the changing markets;
- Meeting and/or discussing with the parent company to form an [sic] cooperative effort in response to the changing market;
- Exercising personnel management authority concerning hiring, recruiting and discharging of subordinates;

- Exercising wide latitude in discretionary decision-making power and receiving only general direction from parent company;
- To recruit and supervise one vice general manager and other department head;
- To set up all management systems, including the business, budget, accounting, clientele, compliance, banking, and texts;
  To set up sales, marketing, advertisement and commission systems in order to develop a wider customer's base in the U.S.;
- To recruit proper public relationship firm or marketing firms as consultant to increase the image and expose [sc] of parent Company's services.

The petitioner did not submit copies of the requested Forms 941, but did submit comparable information provided by its payroll services provider. The documentation provided shows that, as of September 2007, the month preceding the filing of the petition, the petitioner employed two employees in California and six employees in New York. Notwithstanding the fact that the petitioner was only able to document a total of eight employees, it submitted an employee list with names, job titles and job duties for 15 individuals.

The petitioner indicated that the vice president, Apple Shen, performs "executive functions . . . in decision making, policy making and personnel management, particularly in the Air, Ocean, Customs Service/Import/Export and Trucking/Warehouse Department" and spends 100 percent of her time on management. The petitioner stated that the ocean import/export manager, [redacted] is in charge of managing the operation of her department, monitoring its performance, liaising with terminal/agent/steam line, dealing with customer complaints, training new employees, controlling shipping costs, and preparing a sea transportation report, statistics and analysis. The petitioner stated that she spends 60 percent of her time on operational tasks and 40 percent of her time on management tasks.

The other Ocean department employees listed were [redacted] whose role is identified as "Ocean documentation," and [redacted] and [redacted] who were all identified as "Ocean operation" employees. As discussed above, the evidence of record does not establish that these employees worked for the petitioner as of the date the petition was filed; therefore, their claimed duties will not be discussed.

The petitioner indicated that its air import/export manager is [redacted] who was actually terminated on April 9, 2007, according to the payroll documentation provided. The petitioner indicated that [redacted] and [redacted] are the air operation employees; however, as discussed above, [redacted] was terminated in July 2007, and the petitioner has not established [redacted] while listed on the payroll employee list, actually received any wages in 2007. The petitioner paid her $320 in 2006.

The petitioner indicated that its customs department includes a "customs superior," [redacted], who was terminated on April 9, 2007, and a customer operation employee, [redacted] (also known as [redacted]), who received no wages from the petitioner in 2007 through September 1 of that year.

The petitioner stated that its trucking department includes a trucking supervisor, _____ and a trucking operations employee, [redacted]. Mr. [redacted] is responsible for liaising with trucking companies, arranging trucking

services for importer/exporter, negotiating and quoting rates, and solving complaints from customers. The petitioner has not provided evidence that it employed [redacted] at the time of filing, and his name does not appear on any wage or payroll documentation provided for 2006 or 2007.

The petitioner indicated that its accounting employees include [redacted], the supervisor, and [redacted], an "accounting operation" employee. The petitioner stated that [redacted] is responsible for reviewing customers' credit lines, accounts receivable and payable, maintaining company cash flow, reporting to "manager," and liasing with banks and steamlines/airlines. The record shows that [redacted] was employed at the time of filing, but terminated in February 2008. As noted above, [redacted] was on the petitioner's payroll employee list as of September 2007, but did not receive any payments from the petitioner in 2007.

The director denied the petition on April 12, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director observed that position descriptions provided for the beneficiary identified general managerial functions, but failed to specify exactly what the beneficiary would be doing within the context of the company's staffing arrangement. The director acknowledged the petitioner's claim that it employs 15 workers, but found that the petitioner had not adequately documented who was employed at the time the petition was filed, noting that two employees who were paid, [redacted] and [redacted], were not included on any employee list.

The director also raised questions as to whether the beneficiary's subordinates are employed in a full-time status, noting that many of them apparently received compensation commensurate with part-time employment in 2006.[2] The director further determined that the petitioner failed to establish that the beneficiary manages any professional employees, or that the petitioner has sufficient staff to relieve the beneficiary from providing the goods and services of the business.

On appeal, counsel for the petitioner asserts that the petitioner provided ample evidence to establish that the beneficiary will continue to be employed in a managerial or executive capacity. Counsel contends that the director disregarded evidence submitted in response to the RFE and erroneously based his decision on the petitioner's small staff size without giving due consideration to the beneficiary's duties. In an accompanying brief, counsel emphasizes that the instant petition is a request for an extension of the beneficiary's previously granted L-1A status. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F. 2d 1472, n.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988) to stand for the proposition that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or a large enterprise.

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[2] It appears that the director relied on the petitioner's 2006 Forms W-2 in determining the company's staffing structure, and emphasized that the petitioner failed to submit the requested IRS Forms 941 for 2007. As discussed above, the petitioner did provide documentation pertaining to its 2007 payroll in response to the RFE. It does not appear that the director reviewed this information. The evidence shows that all or most of the petitioner's eight employees were in fact employed on a full-time basis.

Counsel further contends that a beneficiary need not supervise subordinates in order to qualify as a manager, but rather may qualify as a "functional manager." Counsel discusses the facts of several unpublished decisions in which the AAO found that a beneficiary who supervised few employees met the criteria for a functional manager.

In support of the appeal, the petitioner provides a copy of its 2007 Form 1120, U.S. Corporation Income Tax Return, which shows that the petitioner had gross sales of $10.8 million, and paid salaries and wages of $257,225. The petitioner also submits a copy of its California Form DE-6, Quarterly Wage and Withholding Report and New York Form NYS-45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return, for the first quarter of 2008. The quarterly reports show that the petitioner **employed** [redacted] and [redacted] in California, and six employees in New York, including the beneficiary, [redacted] and [redacted] who was terminated in February 2008. One additional employee was hired during the quarter.

Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will serve 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.*

The definitions of executive and managerial capacity each have two basic parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, while it appears that the beneficiary possesses the requisite level of authority as the senior employee in the U.S. company, the petitioner has failed to describe the beneficiary's actual duties in any detail, and thus has failed to demonstrate that the beneficiary performs primarily qualifying duties.

The petitioner's initial description of the beneficiary's duties is general and nonspecific, offering little insight as to what the beneficiary actually does on a day-to-day basis as the general manager within the context of the petitioner's business. For example, the petitioner indicates that the beneficiary "formulates plans and programs," "directs financial and commercial policies and practices," "initiates programs concerning organizational and operational functions of the company," "directs major fiscal and physical planning activities such as development of budget and building expansion programs," "reviews activity reports and financial statements," "develops organizational policies to coordinate functions and operations between divisions and departments," "directs development of a strategic plan for the quality program and establishment and maintenance of all systems to support external certification of quality construction systems." While the petitioner has broadly utilized terms with managerial connotations such as "directs," "formulates," and "initiates" to convey the beneficiary's level of authority, the petitioner failed to identify the petitioner's plans, programs or policies, and it did not list the beneficiary's specific managerial or executive

tasks. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Furthermore, the position description included in counsel's letter dated October 9, 2007 refers to "building expansion" activities and implies that the petitioner develops "construction systems." Given that the petitioner is a freight forwarding company, it is reasonable to question whether the position description provides an accurate representation of the beneficiary's duties.

The position description provided in response to the director's request for a "comprehensive" description of the beneficiary's duties did little to clarify the nature of the beneficiary's position. Portions of the position description simply paraphrased the statutory definitions of managerial and executive capacity, while other parts merely rephrased the initial position description. For example, the petitioner stated that the beneficiary would "perform essential executive functions . . . in business decision making, policy making and personnel management," formulate goals and policies, ensure compliance with regulations, and exercise wide latitude in discretionary decision making. 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. at 1108. The AAO will not accept an ambiguous position description couched in broad managerial or executive terms and speculate as to the actual tasks the beneficiary performs. It is the petitioner's burden to clearly articulate the actual duties performed by the beneficiary within the context of the business and to establish that his duties are primarily managerial or executive in nature.

Although the director specifically addressed the deficiencies in the record with respect to the beneficiary's position description, neither counsel nor the petitioner has attempted to clarify the beneficiary's duties on appeal. The lack of a detailed position description alone is sufficient to warrant the denial of this petition.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner claims that the beneficiary will supervise and control a total staff of 15 employees, including a vice general manager, who, in turn, allegedly supervises five department managers or supervisors. The evidence of record does not corroborate the petitioner's claims that it employs 15 employees. The petitioner has documented the employment of only the beneficiary, the vice general manager, the ocean

import/export manager, a trucking supervisor, an accounting supervisor, and three other employees (and) whose job titles and duties have not been provided. More importantly, the petitioner has intentionally and consistently misrepresented that it continues to employ persons who were in fact terminated months prior to the filing of the petition, and others who were not, for whatever reason, receiving wages at the time of filing. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine 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). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the petitioner's staffing levels is not credible. Although the director referred to some discrepancies in the evidence pertaining to the petitioner's employees, counsel does not address this issue on appeal.

The petitioner also failed to provide any explanation regarding its California-based activities, and has not documented that it actually maintains an office in California. Given that the beneficiary's only direct subordinate, the vice general manager, appears to be based in California with only one other employee, the petitioner's claim that she directly supervises employees in the New York office on a day-to-day basis is not persuasive. Given the actual staffing levels of the office in which the beneficiary is located, it is reasonable to conclude that the beneficiary is, at most, directly supervising five employees who are engaged in the day-to-day operations of the petitioner's ocean import/export activities, air import/export activities, customs and bond activities, trucking activities, and accounting duties, rather than serving as managers or supervisors themselves. Furthermore, since the petitioner, based on the submitted organizational chart, claims that it actually requires 14 employees to carry out the day-to-day functions of its five departments, it is reasonable to question whether a staff of only five employees could plausibly relieve the beneficiary from primarily performing the day-to-day, non-managerial functions of the petitioner's business.

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 actual size and nature of the petitioner's business, it is more likely than not that the beneficiary and his proposed subordinate employees 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 non-professional employees. 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.

On appeal, counsel discusses at length a number of unpublished AAO decisions involving function managers. Counsel does not, however, attempt to establish how the beneficiary in this matter qualifies as a function manager. 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 detailed job description that discusses 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. Here, the petitioner has failed to identify any essential function to be managed by the beneficiary, has failed to articulate his specific daily duties, and has failed to establish that the beneficiary will perform primarily managerial duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, it should be noted that counsel's reliance on unpublished decisions is not persuasive. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, and more importantly, 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.

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 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.* Here, the petitioner's claim that the beneficiary will serve in an executive capacity is based on a job description that merely paraphrases the statutory definition at section 101(a)(44)(B) of the Act, and the beneficiary's placement at the top of an organizational chart that significantly misrepresents the company's actual staffing levels. Such evidence is of little or no probative value and is insufficient to establish that the beneficiary will be employed in an executive capacity. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or

executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from primarily performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in approving a visa for a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (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 1313, 1316 (9th Cir. 2006) (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.* As discussed, the petitioner represents itself as a 15 or 16-person company with a hierarchy of departments and middle managers operating at a single location in New York, when in fact, it appears to employ six employees in New York and two employees in California. Under these circumstances, the actual size of the company is especially relevant.

In sum, while the beneficiary may exercise discretion over the day-to-day functions of the U.S. company, the petitioner has not established that managerial or executive duties will constitute his primary tasks, or that he will supervise a staff sufficient to relieve him from performing the day-to-day functions of the petitioner's

business. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

The AAO acknowledges counsel's assertion on appeal that the director failed to consider that this matter involved the extension of a previously approved petition. 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).

It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous petition approval by denying the instant petition.

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).

Beyond the decision of the director, the AAO notes a discrepancy in the record with respect to the petitioner's claimed qualifying relationship with the beneficiary's foreign employer. The petitioner claims to be a wholly-owned subsidiary of the foreign entity. However, the petitioner's 2006 and 2007 IRS Forms 1120, U.S. Corporate Income Tax Return, indicate at Schedule K that no one foreign person or corporation owns at least 25% of the company's stock, and there is no documentary evidence of the petitioner's ownership in the record, such as copies of its stock certificates or stock transfer ledger. The record also contains the foreign entity's detailed 2006 consolidated financial statements, which includes a list of its subsidiaries. The petitioner is not listed among the subsidiaries. Consequently, it cannot be concluded that the petitioner maintains a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i). For this additional reason, the petition cannot be approved.

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). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S.*

Dept. of Transp., NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.