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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship
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Services

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[Redacted]

File: EAC 08 002 52426 Office: VERMONT SERVICE CENTER Date: JUN 16 2009

IN RE: Petitioner:
 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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant petition on March 18, 2008. The director granted the petitioner's subsequent motion to reopen and reconsider and affirmed the denial of the petition on August 18, 2008. 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 beneficiary's employment 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 Florida corporation established in 2000, is engaged in the sale and installation of flooring products. It claims to be a subsidiary of Bogan Internacional, C.A., located in Caracas, Venezuela. The petitioner has employed the beneficiary as its president in L-1A status since December 2000 and now seeks to extend his status from October 2, 2007 until December 28, 2007.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner subsequently filed a motion, in which petitioner's former counsel objected to the director's reliance on the petitioner's small staff size, lack of professional employees, and the beneficiary's low salary as factors in determining whether the beneficiary would be employed in a managerial or executive capacity. The director granted the motion and affirmed the denial of the petition, finding counsel's arguments and the petitioner's additional evidence insufficient to overcome the grounds for denial.

On appeal, counsel for the petitioner asserts that the beneficiary "does in fact hold a managerial position in that he is the person making personnel decisions, all decisions regarding strategy, and economic risks." Counsel cites to an April 23, 2004 agency memorandum from William R. Yates, which states that in matters related to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts, deference should be given to an adjudicator's prior determination of eligibility.¹ Counsel asserts that the fact that the petitioner operates a small business should not prohibit a finding that the beneficiary is employed as a manager or executive.

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(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

¹ 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*, (April 23, 2004).

- (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 beneficiary will 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 petitioner filed the nonimmigrant petition on September 28, 2007. The petitioner indicated on Form I-129 that it is engaged in the sales and installation of flooring products and has three employees. In a letter dated September 26, 2007, the petitioner described the beneficiary's duties as president as follows:

[H]e has planned and developed organizational policies and goals and implemented these goals in order to eventually delegate them to subordinate administrative personnel. He will continue to coordinate activities between the different departments of our company such as operations, estimation, sales, scheduling and administration to effect operational efficiency and economy. He coordinates activities with local General Contractors and Flooring Suppliers that hire our company for various projects. He also coordinates activities with various sub-contractors that our company may hire from time to time. He will direct and coordinate the promotion of our Company in the United States in order to develop new markets and obtain a competitive position in our industry. He will analyze budget requests to identify areas where reduction can be made and will allocate operating budgets. He will confer with administrative personnel and review activities, operations and sales reports to determine if change in programs or operations are required. He will direct preparation of directives to each department outlining policy, program or operational changes to be implemented. He will promote the company in our industry and various associations.

. . . [The beneficiary] will devote his time to the management of the business. He will also use the time to complete ongoing projects and to establish vendor contacts in order to export U.S.-manufactured flooring products to Venezuela. [The beneficiary is responsible for hiring of trained and skilled workmen [to] complete the aforementioned products.

The petitioner mentioned that it has exclusive contractual relationships with local retailers, including Boca Kitchens, Inc. a business with three locations.

In support of the petition, the petitioner submitted evidence of wages paid to employees in 2006 and 2007. According to the petitioner's Forms W-2, Wage and Tax Statement, for 2006, the petitioner paid \$16,500 to the beneficiary, \$5,000 to [REDACTED] and \$4,000 to [REDACTED]. The petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, and Florida Forms UCT-6, Employer's Quarterly Report, for the first three quarters of 2007. The records show that the beneficiary was the sole employee of the company during the first two quarters of 2007 and earned \$2,000 during each quarter. During the third quarter of 2007, the petitioner also paid \$2,000 to [REDACTED] and \$1,500 to [REDACTED].

The petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return, for 2006, which indicates that the company achieved gross sales of \$116,435. The petitioner did not pay any rent in 2006 nor does the tax return reflect any payments to contractors or other outside labor.

The petitioner submitted a letter from Boca Kitchens, Inc.'s president, [REDACTED], who confirmed his company's use of the petitioner's services for all of its wood flooring installations. The petitioner also submitted evidence that the petitioner collected approximately \$42,000 in installation fees from Boca Kitchens in both 2006 and 2007. In addition, the petitioner submitted an Export Agent Agreement between the U.S. company and Bogan-Tec, C.A., located in Venezuela, dated September 6, 2007. The agreement, which has a two-year term, indicates that he petitioner will "coordinate export department activities: will negotiate with manufacturers and dealers, place purchase orders, coordinate shipping and transportation details in accordance with carriers schedules."

The director issued a request for additional evidence on December 7, 2007, in which he requested, *inter alia*, a comprehensive description of the beneficiary's duties; a list of all U.S. employees by name and position title; and a complete position description for all U.S. employees including a breakdown of the number of hours devoted to each employees' job duties on a weekly basis.

In response, the petitioner submitted an organizational chart for the U.S. company which briefly describes the positions of each employee as follows:

President

- Overseeing technical operations of company
- Supervision of staff
- Approval of contracts
- Coordinate and direct the formulation of sales & marketing strategies
- Review and report on business goals
- Establish financial policies
- Review of business report
- Develop new markets in the United States

Foreman

- Supervision of the installation of floor covering
- Lays floor coverings (wood or laminate) on cement following guidelines
- Must be familiar with all types of flooring

[REDACTED], Flooring Installer

- Lays floor coverings (wood or laminate) on cement following guidelines
- Must be familiar with all types of flooring

The organizational chart indicates that the petitioner utilizes the services of an accountant to prepare tax returns and quarterly wage reports, and hires subcontracted installers as needed. The chart also shows a vacancy for "administrative services."

The director denied the petition on March 18, 2008, concluding that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director noted that the petitioner failed to provide the requested comprehensive description of the beneficiary's duties and did not provide the detailed position descriptions provided for the beneficiary's subordinates. The director also observed the low salaries paid to the employees, noting that the beneficiary 2006 earnings of \$16,500 do not appear to be "commensurate with a bona fide manager or executive position in a major metropolitan business market." The director further stated that "the beneficiary's lack of a college degree is telling of the importance of the position he holds."

The director concluded that the beneficiary possesses an executive job title "in name only" as the petitioner does not have any full-time employees to provide the sales and services of the organization or any professional subordinate staff.

On motion, former counsel emphasized that neither the statute nor the regulations set forth salary requirements for an L-1 beneficiary, nor do they require that a manager or executive supervise professionals or hold a college degree, although the beneficiary in this matter possesses a bachelor's degree in marketing. Counsel stated that the beneficiary performs the following duties as general manager of the company:

- Manage the U.S. entity and has the discretion over operations decisions for the company.
- Manages the organization and/or essential function of the organization and is the organization's top manager.
- Negotiates contracts on behalf of the corporation and deal with the U.S. supplier of goods.
- Responsible for all of the administrative decisions of the company, for all marketing and sales activities of the U.S. entity and for the overall performance of the company.
- Oversees the day-to-day operations of the company.
- Manage and supervise the employees for the U.S. company, as well as managing and supervising the Sales Manager.

Counsel further stated that the beneficiary allocates his time as follows:

- 10% Networking with business industries in community to identify and cultivate new information sources.
- 10% Communication with various suppliers, distributors, clients and potential clients, and suppliers for the convenience store.
- 10% Preparation of budget for the operations and monitor finances.
- 10% Determination of the needs of the US company, including purchasing the equipment and inventory that is used.
- 5% Evaluate and review the services being provided by the company.
- 55% Monitor the activities of all employees, including lower level employees.

Counsel stated that [REDACTED] serves as both Foreperson and Sales Manager of the company, works 40 hours per week, and is responsible for the following duties:

- Resolve customer complaints regarding sales and service.

- Monitor customer preferences to determine focus of sales efforts.
- Direct, coordinate and supervise the services provided by the company. He also supervises flooring installers.
- Determine and check on inventory.
- Confer or consult with department heads to plan advertising services and to secure information on equipment and customer specifications.
- Advise dealers and distributors on policies and operating procedures to ensure functional effectiveness of business.

Finally, counsel stated that _____ serves as flooring installer and his hours are "contingent upon necessity."

Citing to an unpublished AAO decision, counsel asserted that the beneficiary will be employed as a functional manager because he "is the person making the managerial choices such as, who is to be hired for a specific job, where to get supplies and negotiate with other companies to get better prices and better quality materials." Counsel emphasized that the beneficiary is not in charge of sales, as such duties are performed by _____ Finally, counsel referred to the Yates memorandum, noting that USCIS policy states that deference should be given to prior determinations of eligibility in cases involving the extension of a petition involving the same parties and same underlying facts.

In a decision dated August 18, 2008, the director affirmed his previous decision, again noting that the petitioner did not establish that the beneficiary supervises professional workers.

On appeal, new counsel for the petitioner asserts that the beneficiary is the person making personnel and strategic decisions and taking economic risks on behalf of the company. Counsel emphasizes that the fact the petitioner is operating a small business with a small staff does not prohibit a finding that he is employed in a qualifying managerial or executive capacity. Counsel requests that deference be given to the prior petition approvals pursuant to the policy guidance provided in the Yates memorandum.

In support of the appeal, the petitioner submits a new breakdown of the beneficiary's job duties, as follows:

1. Direct and supervise and coordinate the activities involved with production, sale and distribution of products – 20 hours per week
2. Analyze sales and distribution projections to assist in product marketing and promotions. – 5 hours per week.
3. Review market analysis to determine customer needs, volume potential. – 4 hours per week
4. Train and supervise employees on product development promotion of the products and services offered – 3 hours per week.
5. Review corporate, financial and operating reports of the U.S. corporation – 3 hours per week.
6. Review, coordinate, assign, and supervise the work and procedures of the U.S. corporation – 5 hours per week.
Direct and manage all miscellaneous aspects of company administration – 3 hours per week.

The petitioner submits a copy of its Form UCT-6 for the second quarter of 2008, which indicates that the company paid \$2,000 to the beneficiary, \$1,200 to [REDACTED] and \$900 to [REDACTED] over the three month period. The petitioner also submits a copy of its Form 940 for 2007, which indicates that the total wages paid to all employees was \$15,000.

Finally, the petitioner submits a notarized statement from the beneficiary who asserts:

I . . . am the manager that is responsible for networking in order to maintain the relationship with sub contractors, and assuring that all the companies' needs, administratively as well as functionally, are met. I supervise and have complete discretion to manage the company in what I believe to be the most efficient productive way to manage it.

The beneficiary highlights his responsibility for price negotiations and maintaining long-term relationships with suppliers, and his negotiation of a contract with Bogan-Tec for the export of materials to Venezuela as evidence that he is employed in a primarily managerial or executive capacity.

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. While the AAO finds that the director's adverse determinations were warranted based on the evidence of record, it is noted that the director's underlying analysis, in part, was flawed.

First, the director originally issued an adverse finding on the basis of the beneficiary's proffered salary. The AAO notes, however, that a beneficiary's salary is not a criterion to be used in determining his or her prospective employment capacity. The director's finding with regard to the beneficiary's salary is not supported by any statute, regulations or precedent decision.

Second, the director based the decision, in part, on the petitioner's failure to establish that the beneficiary's subordinate staff is comprised of professionals. 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. 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 petitioner in this matter never claimed that the beneficiary supervises professionals. The director erred by failing to consider whether the beneficiary supervises and controls subordinates who are supervisors or managers, or, alternatively, whether he manages an essential function of the organization, or acts in an executive capacity.

Notwithstanding the director's reasoning the director properly found insufficient evidence to establish that the beneficiary would be relieved from having to devote the majority of his time to the performing of non-qualifying tasks. 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).

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. See 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* The AAO will then consider this information in light of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Here, the petitioner initially described the beneficiary's responsibilities in broad and general terms, noting that his responsibilities will be: to establish "organizational policies and goals"; coordinate activities between the different departments such as "operations, estimation, sales, scheduling and administration"; coordinate activities with general contractors and flooring suppliers; "confer with administrative personnel"; and "direct preparation of directives to each department." This description offered little insight into what specific tasks the beneficiary will perform on a day-to-day basis. Moreover, the evidence of record demonstrates that the petitioner has no "departments" and no "administrative personnel," a fact which raises questions regarding to what extent this description accurately reflects the beneficiary's actual responsibilities. Specifics are clearly an important indication of whether a beneficiary's duties are 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). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

While former counsel submitted additional position descriptions on motion, they suffered from similar shortcomings. For example, counsel stated that the beneficiary devotes 40 hours per week to managing the company, exercising discretion over operations decisions, managing the organization and/or its essential function, negotiating contracts, making administrative decisions, and overseeing the day-to-day operations and employees. Counsel, in large part, simply paraphrased the statutory definition of managerial capacity. 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. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

At the same time counsel stated that the beneficiary devotes 100 percent of his time to "networking with business industries," "communicating . . . with suppliers for the convenience store," preparing budgets and monitoring finances, purchasing equipment and inventory, and monitoring the activities of all employees, including lower level employees. First, as the petitioner operates a flooring installation business and not a convenience store, the credibility of these duties is questionable. 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).

Second, this description suggests that the beneficiary is in fact directly involved in the day-to-day purchasing, marketing/promotion, and finance functions of the business rather than managing such activities, as well as directly supervising the petitioner's flooring installer(s). While the petitioner does not have to manage

professional employees in order to be employed in a managerial capacity, the portion of time the beneficiary spends personally monitoring the work of non-professional employees will not be considered time spent performing qualifying duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

Finally, current counsel has provided yet another iteration of the beneficiary's duties on appeal, now indicating that he devotes the largest portion of his time to "supervise and coordinate the activities involved with production, sale and distribution of products," as well as analyzing sales and distribution projections and reviewing marketing analysis. However, the petitioner does not have employees to perform market research or analysis, or staff to prepare sales and distribution projections, nor does the company produce and distribute a product. Based on the petitioner's representations, the company primarily acts as a subcontracted installer for other companies which sell the flooring products to their own customers. Counsel also states on appeal that the beneficiary devotes only 3 hours per week to supervising employees, as opposed to 55 percent of his time, as indicated by former counsel. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, despite the abundance of position descriptions provided, the petitioner has failed to provide a detailed, consistent account of what the beneficiary primarily does on a day-to-day basis as the president/general manager of the petitioner's flooring installation business. 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 definitions of executive and managerial capacity each 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 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). 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, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations and has the appropriate level of decision-making authority, the petitioner has failed to demonstrate that his actual duties will be primarily in a managerial or executive capacity.

As noted above, when examining the managerial or executive capacity of a beneficiary, USCIS 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, 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.

At the time of filing, and in response to the RFE, the petitioner claimed to employ one foreman and one flooring installer. The foreman's duties were limited to installing floors and supervising the installer. On motion, former counsel for the petitioner stated that the foreman is actually employed as a foreman/full-time sales manager who is responsible for resolving customer complaints, managing all sales activities, planning the company's advertising, and determining inventory levels. Counsel provided no explanation for the change in this employee's job title and job description. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Moreover, the evidence shows that the claimed sales manager, [REDACTED], did not receive wages commensurate with full-time employment at any time from 2006 through the second quarter of 2008. His wages have ranged from \$0 to \$2,000 per quarter. In addition, the record includes invoices identifying [REDACTED] as a flooring installer.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors or managers, and the petitioner concedes that they are not professionals. Instead, the record indicates that the beneficiary's subordinates, when employed, perform the actual day-to-day tasks of installing floors and that their duties do not extend beyond providing this service. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, and he cannot qualify as a "personnel manager" pursuant to section 101(a)(44)(A)(ii) of the Act.

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) of the Act, 8 U.S.C. § 1101(a)(44)(A). In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary.

The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish managerial capacity. Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service or other non-managerial, non-executive duties, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

Moreover, federal courts continue to give deference to USCIS's interpretation of the Immigration Act of 1990 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. *See Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL

576839 at *5 (9th Cir. 1995 (unpublished)(citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); *see also*, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991).

Here, relying on an unpublished AAO decision, former counsel for the petitioner asserted that the beneficiary qualifies as a function manager because he is "the person making the managerial choices," and "has control and authority over all functions and operations." Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. While the AAO does not doubt that the beneficiary makes major decisions for the company, the petitioner has not submitted evidence that the petitioner's subordinate staff, which appears to fluctuate from zero to two part-time employees, relieves the beneficiary from performing non-qualifying duties. Performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties. However, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to 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 USCIS "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 USCIS 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).

At the time of filing, the petitioner was an eight-year-old company engaged in the operation of a flooring sales and installation business. The petitioner has also recently signed a contract to serve as export agent for a Venezuelan company, a role which will require the petitioner to negotiate with flooring manufacturers and dealers, place purchase orders, coordinate shipping and transport details with carriers, coordinate documentation with customs brokers, and coordinate payments to manufacturers, among other duties. The petitioner has not established how two part-time flooring installers are able to perform all non-managerial tasks associated with this multi-faceted business such that the beneficiary will not be engaged in the day-to-day operations of sales, marketing, purchasing, inventory, bookkeeping or other administrative and operational functions, as well as all functions associated with the new export operations.

In fact, the petitioner has not established that the beneficiary has consistently been relieved from participating in floor installations. According to the petitioner's wage records, the beneficiary was the only employee in the first quarter of 2006 and during the first six months of 2007. During these periods, the petitioner performed more than 25 jobs for Boca Kitchens, Inc. alone. As the petitioner has not documented payments to any sub-contractors, it appears that the beneficiary himself may have provided the installation services. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and two intermittent, part-time employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, 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.

On motion and on appeal, counsel for the petitioner noted that the beneficiary was previously granted L-1A status and referred to the 2004 Yates 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. 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. Counsel asserts that the instant petition involves the same parties and underlying facts and suggests that none of the above-referenced exceptions to USCIS policy apply.

The record does show that the beneficiary has held L-1A status for almost seven years, and that his most recent approval was granted in October 2005. However, as noted above, the evidence submitted in support of the instant petition also shows that: (1) the petitioner paid no rent in 2006; (2) the beneficiary has sometimes been this service-oriented company's sole employee for months at a time since the beginning of 2006; and (3) the petitioner's payment of salaries and wages continued to drop between 2006 and 2007 (from \$25,500 to \$15,000). All of these factors reasonably suggest that there has been a substantial change in circumstances, or alternatively, raise questions regarding the approvability of prior petitions that may have been based on similar facts. 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, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Accordingly, the AAO finds that 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 multiple petitions for L-1A status filed on behalf of the beneficiary, the prior approvals does not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 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). USCIS memoranda merely articulate internal guidelines for USCIS 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.