

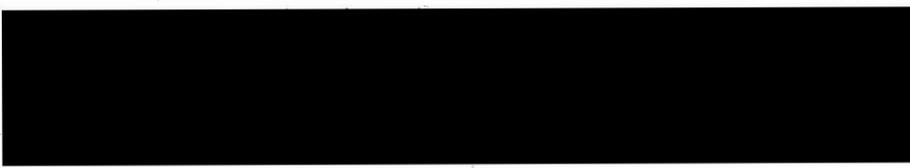


U.S. Citizenship
and Immigration
Services

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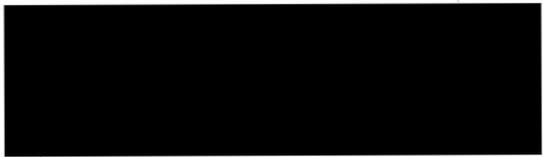
FILE: SRC 05 132 51834 Office: TEXAS SERVICE CENTER Date: JUL 26 2006

IN RE: Petitioner:
Beneficiary



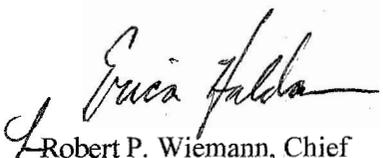
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DECISION: The Director, Texas 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, for the second time, to employ its president in a "new office" 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 was incorporated on February 10, 2003 under the laws of the State of Florida and claims to be operating a dry cleaning business.

Under the governing regulations at 8 C.F.R. § 214.2(l)(3)(v), a U.S. petitioner that has been doing business for less than one year may petition for a manager or executive if it can be expected that the new office will, within one year, support a managerial or executive position. After one year, the regulations require the petitioner to file for an extension with supporting documentation evidencing that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

The director approved the first petition (SRC 03 212 52663) for an approximately one-year period on August 1, 2003. Counsel for the petitioner notes on appeal that after the expiration of this one-year period, the beneficiary returned to Venezuela, the country in which he was employed prior to his entrance into the United States, as the petitioning entity had not reached the point where it was able to begin doing business. The petitioner now seeks approval of a second "new office" petition (SRC 05 132 51834) to permit the beneficiary to reenter the United States in L-1A status for one additional year.

The petitioner stated in the March 31, 2005 letter submitted with the instant nonimmigrant petition that the beneficiary would be transferred to the United States "to direct the start-up phase of the company." Upon initial review of this second new office petition, the director sent the petitioner a request for additional evidence on May 11, 2005. The director noted that the beneficiary had already been granted a one-year period of stay under a new office petition, and requested evidence pertaining to the beneficiary's position in the United States organization. In its response, the petitioner did not address Citizenship and Immigration Services' (CIS) prior approval of the L-1A nonimmigrant visa petition filed on behalf of the beneficiary.

The director treated the petition as if it had been filed by an established organization and denied the petitioner. The director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that the director did not properly consider the record prior to her denial of the petition. Counsel claims that the petitioning entity should be considered a "new office" for purposes of determining the beneficiary's proposed employment in a managerial or executive capacity, and asserts that the beneficiary would be primarily managing the petitioning organization. Counsel submits a brief and documentary evidence in support of the appeal.

The AAO will first address the issue of whether the petitioner should be considered a "new office" for purposes of employing the beneficiary in a primarily managerial or executive capacity.

Upon review and for the reasons discussed herein, counsel's assertions are not persuasive. The petitioner may not be granted a second "new office" L-1A visa approval with an additional one-year validity period.

In general, the statute allows nonimmigrant L-1A classification for an alien that is being transferred from an overseas employer temporarily to the United States to work for a related company in a managerial or executive capacity. Section 101(a)(15)(L) of the Act. By statute, eligibility for the classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. See section 101(a)(44)(A)(iv) of the Act; see also 52 Fed. Reg. 5738, 5740 (February 26, 1987) (available at 1987 WL 127799).

Recognizing that a manager or executive may not immediately engage in the full scope of their duties, the regulations provide for a lower standard when a petitioner is a new office. According to 8 C.F.R. § 214.2(l)(1)(ii)(F), a "new office" is defined as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." The term "doing business" is defined as "the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

The regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the beneficiary is coming to the United States as a manager or executive to open or to be employed in a "new office," the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that, after one year, 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.

On appeal, counsel asserts that the petitioner should be granted a second one-year period to open the new office. Counsel concedes that the petitioning entity did not develop in the first year to a point that it would support a managerial or executive employee. In support of the request for a second new office period, counsel explains that the beneficiary was unable to get the United States company operational during its one-year "new office" validity period, due to the petitioner's failure to secure acceptable working premises, obtain working permits and complete city inspections. Counsel states that the petitioner's final inspections were completed on January 27, 2005, and that the beneficiary responded by opening a corporate bank account, attaining liability insurance, and initiating a marketing campaign.

Despite counsel assertions, the petitioner may not be granted a second "new office" L-1A visa approval. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, CIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, which allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the start up of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, CIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B).

Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its new office petition. Documentary evidence offered in connection with the current petition reflects that the petitioner did not submit its occupational license application to the state of Florida until February 4, 2004, approximately six months after it filed the first petition. Counsel also concedes on appeal that the petitioner did not complete its state inspections until January 27, 2005 or obtain all permits necessary to begin doing business in the United States until February 2005. While the petitioner secured its business premises prior to the filing of the first "new office" petition, there is no additional evidence in the record that the petitioner was actually ready to commence doing business. During the first year of operations, the beneficiary appears to have primarily acted as an agent of the foreign entity, in which he "entered in L-1A classification for brief periods to being setting up the company business." *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (noting that the "mere presence of an agent" is not sufficient to show that a company is doing business).

As previously discussed, the regulations allow a newly established petitioner to demonstrate that within one year of filing the nonimmigrant petition it will develop to a point that it can support the employment of an alien in a primarily managerial or executive position. In the present matter, it is not clear whether the petitioner did not comply with this requirement when it filed its first petition, misrepresented that they had complied, or whether the director committed gross error in approving the initial petition without evidence that the petitioner would employ the beneficiary as a manager or executive within one year of the initial filing. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

The AAO notes that the petitioner may still seek the beneficiary's entry into the United States under a different employment-based immigrant or nonimmigrant classification. In reviewing Congressional intent as part of the rulemaking process, the legacy INS noted that the L-1 category was created by Congress "to help eliminate problems faced by international companies having offices abroad in transferring key personnel freely within the organization." 52 Fed. Reg. at 5739. However, the INS also noted that many aliens that do not fit under the L-1 category, such as self-employed investors, may be classified under a different visa: "Congress has provided several other nonimmigrant classifications which permit such persons (who often characterize themselves as "investors") to come to the United States to oversee their investments, including the B-1 (temporary visitor for business), E (treaty trader or investor), and the H (temporary worker) classifications." *Id.*

If any one foreign employee is critical to launching a new company in the United States, the immigration laws of the United States already provide a number of other means for an employee to enter the country for this purpose. Specifically, for certain trade and commerce treaty countries, including the United Kingdom, the E nonimmigrant visa classification is designed to permit foreign investors and those engaged in the international trade of goods and services to enter the country. *See* section 101(a)(15)(E) of the Act, 8 U.S.C. § 1101(a)(15)(E). Moreover, if a petitioner is not immediately ready to begin doing business in the United States, it may seek to send foreign employees to the United States under the B-1 classification. *See* section 101(a)(15)(B)(i) of the Act, 8 U.S.C. § 1101(a)(15)(B); *see also* INS Insp. Field Manual § 15.4(b)(1)(B); 9 FAM § 41.31 Notes.

Finally, if a petitioner is unable to meet the requirements to extend an L-1A new office petition, this does not mean that the beneficiary can never be approved again for L-1A classification. While the petitioner may be ineligible for a second new office petition or a new office petition extension under 8 C.F.R. § 214.2(l)(3)(v)(C) and 8 C.F.R. § 214.2(l)(14), the petitioner may wait until it has been doing business in the United States for more than one year and then file a standard L-1A petition for new employment on behalf of the beneficiary. Under such a petition, however, the petitioner must show that it will employ the beneficiary in a managerial or executive capacity as required under sections 101(a)(44)(A) and (B) of the Act.

In this matter, the petitioner was not prepared to begin doing business in the United States until February 2005, at the earliest, eighteen months after the initial new office petition was approved. This failure on the petitioner's part, while unfortunate, is not a result of some impediment created by the law or regulations. The one-year period was not included in the regulations as a hindrance to new offices. On the contrary, the new office provisions were added to the regulations in 1987 specifically in recognition that it would be impossible for some new offices to immediately employ someone in an executive or managerial capacity as defined in the regulations. *See* 52 Fed. Reg. at 5739-5740. At the same time, the legacy INS stated that it "must concern itself with abuse or the potential for abuse of any visa category" and further noted that "one year is sufficient for any legitimate business to reach the 'doing business' standard." *Id.* Thus, it appears that the petitioner's present exigency is not the result of a restrictive regulation but rather a lack of legal and business planning together with the normal and expected business delays in the petitioner's given industry.

In conclusion, the petitioner may not be granted a second petition under the more lenient "new office" provision. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of a new office petition to support an executive or managerial position. There is no provision in CIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently

operational after one year, the petitioner is ineligible by regulation for an extension of the previously approved L-1 petition. The director properly determined that the petition could only be processed as an established business and not as a new office, and she properly reviewed whether the beneficiary would be primarily employed in a qualifying managerial or executive capacity.

The AAO will next address the issue of whether the petitioner demonstrated that the beneficiary would 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), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an addendum to the Form I-129, filed on April 8, 2005, the petitioner provided the following job description for the beneficiary's proposed position:

[The beneficiary] will be responsible for directing, supervising, and coordinating all matters, including administrative, production, financial and personnel matters. He will have ultimate authority with respect to negotiations with suppliers and clients. He will set guidelines in accordance with the general policies of the company. He will direct and coordinate the company's activities while continuing to be consistent with the policies and procedures implemented. He will be responsible for making plans to improve operations, while striving to attain predetermined goals of efficiency. He will train subordinates [sic] managers in all phases of company activities. He will be responsible in formulating and implementing personnel policies, such as hiring and firing. He will oversee lower level managers and personnel.

In an attached letter, dated March 31, 2005, the petitioner restated the above job description, noting also that the beneficiary would devote 100 percent of his time to managing the United States company. In the appended documentary evidence, the petitioner provided its organizational chart identifying the beneficiary as one of eight employees, including two shift managers, two stain cleaners and three iron clerks. A payroll journal for the period ending March 12, 2005 identified the seven workers as employees of the petitioning entity. The AAO notes that a May 20, 2005 payroll journal subsequently submitted by the petitioner in response to the director's request for evidence also identified seven workers employed in these same positions, however, two had been hired during March and May 2005, and consequently replaced two of the workers originally named by the petitioner.

As previously noted, the director issued a request for evidence on May 11, 2005, asking that the petitioner submit a "more specific description" of the day-to-day job duties to be performed by the beneficiary and the percentage of time that the beneficiary would spend on each task. The director also requested that the petitioner provide an organizational chart of the United States company, which would reflect the names and job titles of each employee and their job duties.

The petitioner responded in a letter dated June 3, 2005 and provided the following job description, which, the AAO notes, closely resembled the job description initially submitted by the petitioner:

As President, [the beneficiary's] duties will include: He will be responsible for directing, supervising, and coordinating all matters, including administrative, operational, production, financial and personnel matters. He will set guidelines in accordance with the general policies of the company. **This will take approximately 50% of his time.** He will be responsible in formulating and implementing personnel policies, such as hiring and firing employees. He will oversee lower level managers and personnel which will take approximately 20% of his time. He will direct and coordinate the company's activities while continuing to be consistent with the policies and procedures implemented. He will be responsible for making plans to improve operations, while striving to attain predetermined goals of efficiency. This will take 10% of his time. He will have ultimate authority with respect to negotiations with suppliers and clients. Negotiating and meeting with suppliers and major customers will take approximately 10% of his time. He will review and negotiate new and existing contracts for the U.S. company. He will authorize the quantity of supplies

needed. He will confer with management to plan production schedule. This will take approximately 5% of his time. He will train subordinate managers in all phases of company activities. This will take approximately 5% of his time.

The petitioner provided a list of the job responsibilities held by its employees, and noted the hiring of an individual to replace one of its iron clerks. As the description of the employees' job duties is already part of the record, it will not be entirely repeated herein. The petitioner submitted copies of its payroll journal for the periods ending May 20, 2005 and May 27, 2005 and a copy of its organizational chart.

In a July 25, 2005 decision, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the beneficiary would not be managing other professionals or managers, and that he would be engaged in the day-to-day business activities of the petitioning entity, including the functions associated with the petitioner's "human resources, accounting, legal department, payroll, marketing, [and] recruiting." The director also concluded that the beneficiary would not be managing or directing an essential function of the organization. The director stated that instead, the beneficiary "would be involved in performing the function." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on August 26, 2005, claiming that the beneficiary's eligibility for the requested classification was demonstrated in the evidence submitted with the initial filing and in response to the director's request for evidence. In a subsequently submitted appellate brief, dated September 21, 2005, counsel outlines the statutory definition of "managerial capacity," and contends that CIS erred in concluding that the beneficiary would not be employed in a primarily managerial capacity. Counsel states that the beneficiary would qualify as a manager, as he would: (1) be responsible for directing and supervising the administrative, operational, production, financial and personnel matters of the petitioning entity; (2) "oversee lower level managers and personnel"; (3) hire and fire employees and determine promotions; and (4) "set guidelines in accordance with the general policies of the company." Counsel also notes that the beneficiary would direct two managers and five lower-level employees, who would perform the day-to-day functions of the petitioner's business. Counsel asserts that CIS incorrectly focused on the beneficiary's responsibilities of negotiating and reviewing contracts with suppliers and training subordinates, which would consume approximately 15-20 percent of the beneficiary's time, without also considering that 85 percent of the beneficiary's time would be spent managing and directing the United States company. Counsel states that CIS' reliance on only a portion of the beneficiary's job duties as a basis for its denial "ignores the nature of the business, the totality of the duties to be performed by the [b]eneficiary, and the organization of the company."

Counsel further maintains that the beneficiary's employment capacity has already been determined by CIS, as it approved the previous L-1A visa petition filed by the petitioner on the beneficiary's behalf. Counsel cites a December 20, 2002 legacy INS memorandum, which instructs that CIS should reference all criteria of the statutory definition of "managerial capacity" when determining whether a beneficiary would be employed in a primarily managerial capacity. Memorandum from Fujie O. Ohata, Associate Commissioner, Immigration and Naturalization Service, *Definition of Manager*, HQSCOPS 20/7.1.8 (December 20, 2002).

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Contrary to counsel's objection on appeal, the job descriptions offered by the petitioner are not sufficient to demonstrate that the beneficiary would occupy a primarily managerial or executive position within the United States company. The petitioner noted such vague job responsibilities as directing and supervising "administrative, operational, production, financial, and personnel matters," setting guidelines, formulating policies, "direct[ing] and coordinat[ing] the company's activities," "making plans to improve operations," negotiating contracts, meeting with customers, planning the production schedule, and training subordinates. The limited job description provided by the petitioner does not address the specific day-to-day managerial or executive job duties to be performed by the beneficiary as president of a dry cleaning business. It appears that the named job duties could relate to a position in any organization, as the petitioner has not defined the "guidelines," "policies," "activities," or "plans" specific to its business. Nor does the petitioner explain the beneficiary's responsibility of "[n]egotiating and meeting with suppliers and major customers," a task which would seem to be uncommon in the dry cleaning industry where the petitioner would be providing a service to individuals rather than engaging in procuring and supplying goods. Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). In addition, the beneficiary's job responsibility of "directing, supervising and coordinating . . . administrative, operational, production, financial and personnel matters" is questionable, as the petitioner has not represented that any of its lower-level employees would perform the actual tasks related to it administrative, financial and personnel functions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The AAO also notes that despite having several opportunities to submit a comprehensive description of the beneficiary's proposed job duties, the petitioner repeatedly offered essentially the same job description and merely included percentage allocations. In her May 11, 2005 request for evidence, the director specifically asked that the petitioner provide "a more specific description of the day[-]to[-]day duties of the position," thereby implying a more detailed account of the beneficiary's position in the United States company than that already offered for review and consideration. The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

It is further questionable whether the petitioner maintains a staff sufficient to employ the beneficiary in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner employed the beneficiary, as well as two customer service managers for the first and second shifts, three iron clerks and two stain cleaners. The AAO notes that the petitioner did not submit its payroll journal for the period corresponding to the date of this filing. Based on the petitioner's March 12, 2005 payroll journal, its second shift manager worked approximately twenty-three hours per week, while two of its iron clerks worked approximately five hours a week and a stain cleaner worked part-time at

approximately twenty hours per week.¹ The petitioner's May 20, 2005 payroll journal, the next consecutive payroll journal submitted by the petitioner for review, reflects that the hours worked per week by the second shift manager and iron clerks increased, but that they did not maintain a forty-hour workweek.² Based on the petitioner's business receipts, it began doing business as early as March 5, 2005 and, on that day, processed at least twenty-one transactions to be completed by the next business day. Given the part-time status of the majority of its workers, it is questionable whether the reasonable needs of the petitioning entity might plausibly be met the services of the beneficiary as president and its lower-level staff. Moreover, as previously noted, the petitioner had not accounted for the performance of the non-qualifying tasks related to its recordkeeping, billing, financial, personnel, and marketing functions. The AAO notes that 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel stresses on appeal that the beneficiary qualifies as a manager as he would be directing the work of two managerial employees. While the petitioner's organizational hierarchy may consist of two "managerial" employees subordinate to the beneficiary, this factor alone is not sufficient to demonstrate the beneficiary's qualification as a manager or executive. The statutory definitions of "managerial capacity" and "executive capacity" require that the beneficiary perform each of the enumerated high-level responsibilities. The mere fact that the beneficiary may direct two workers holding managerial titles is not sufficient to demonstrate that he would be employed in a primarily managerial or executive capacity. The December 20, 2002 INS memorandum, which counsel references on appeal, further reinforces this evidentiary requirement, noting that CIS should consider "all elements" of the statutory definition of "managerial capacity" in its analysis of a beneficiary's employment capacity.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner represented in its March 31, 2005 letter that the beneficiary was employed as the president and general manager of the foreign entity, during which he directed the company's "administrative, operational, production, financial, and personnel matters," possessed "ultimate authority" in negotiations, "set guidelines in accordance with the general

¹ The petitioner did not identify its hours of operation, however, its business receipts suggest that it was open for business six days a week, Monday through Saturday.

² The AAO notes that the petitioner did not state whether the employees worked each business day, however, the title of "first" and "second" shift manager suggests that each manager would work Monday through Saturday.

policies of the company," ensured consistency in "the company's activities" with its implemented policies, "[made] plans to improve operations," and possessed the authority to hire and fire personnel. Following a request from the director for a "definitive statement" of the beneficiary's foreign job duties, the petitioner submitted essentially the same job description, which incidentally, closely resembles the description offered for the beneficiary's position as president in the United States organization. Again, 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Despite the claim that the beneficiary directed the work of five managers and forty-two lower-level employees, the limited description of the beneficiary's specific managerial or executive job duties prevents a finding that the beneficiary was employed by the foreign entity in a primarily qualifying capacity. For this additional reason, the petition will be denied.

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).

Counsel emphasized on appeal that CIS approved an L-1A nonimmigrant visa petition that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petitions. As previously noted, if the earlier 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 a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.