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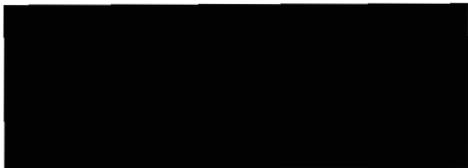
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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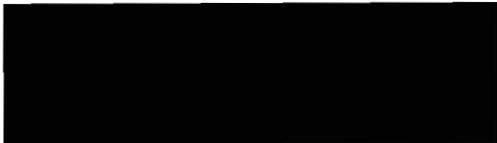


File: WAC 08 240 51189 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 2010**

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.

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).



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and 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/chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it is engaged in the import, export and wholesale of ceramic tile and other building materials. It claims to be a subsidiary of [REDACTED], located in China. The petitioner has employed the beneficiary since December 2004 and now seeks to extend her L-1A classification for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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 asserts that "the petitioner's description of [the beneficiary's] job duties proved the executive capacity of the beneficiary's position." Counsel contends that the director erroneously interpreted the proposed job duties and failed to consider the "current declining economic environment and business downturn," in making her determination. Counsel submits a brief, but no 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.

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 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 Form I-129, Petition for a Nonimmigrant Worker, on September 8, 2008. The petitioner stated on Form I-129 that the U.S. company two employees. In a letter dated August 27, 2008, counsel for the petitioner stated that the beneficiary is employed in an executive capacity as the chief executive officer of the U.S. company with "full responsibility for the petitioning company." Counsel further stated:

It is her duty to exercise discretion over every aspect of operations of the business, and she has the authority to hire, fire and take other personnel actions over all directly supervised employees.

For the past few years since the initial establishment of the U.S. petitioning company, [the beneficiary] has organized the office and implemented strategic business systems to assure the success of the petitioning company. This required detailed coordination with executives in the home offices so that the integration would include the objectives of the foreign parent. [The beneficiary] has also conducted extensive research to determine which suppliers and contractors to use. Upon deciding on a list of rightful bona-fide suppliers and contractors, [the beneficiary] conducted extensive interviews in order to select the best possible affiliates. [The beneficiary] also acted as a liaison at a high level between client executives and her contractors to resolve problems. In addition, as the president of the company, she has implemented her business plan and set out to establish a solid public relations and advertising campaign to assure future growth.

As a company in pursuit of growing business in North America market, [the beneficiary's] work as the CEO & President is particularly important. The beneficiary will spend a tremendous amount of time making important executive decisions that will ensure the well-being and efficient operation of the company.

The petitioner submitted an organizational chart for the U.S. company which depicts the beneficiary in the positions of president and marketing manager. The chart depicts a finance department staffed by a cashier/warehouse manager (██████████) and a contracted accounting firm. Finally, the chart depicts an "office center" with an office manager, receptionist and clerk. The beneficiary and ██████████ are the only employees identified by name on the organizational chart.

The petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, and California Forms DE-6, Quarterly Wage and Withholding Report, for the last two quarters of 2007 and first two quarters of 2008. The wage reports confirm that the beneficiary and ██████████ were the only employees paid between July 2007 and June 2008.

On December 1, 2008, the director issued a request for additional evidence (RFE) in which she requested: (1) a more detailed description of the beneficiary's duties, including the percentage of time spent in each specific duty listed; (2) a more detailed organizational chart clearly identified the beneficiary's position and all subordinates by name and job title; (3) a brief description of job duties, educational level, salaries/wages and source of remuneration for the beneficiary's subordinates; (4) copies of the petitioner's state quarterly wage reports for the last three quarters; and (5) if the beneficiary will be employed in an executive capacity, a list of the specific goals and policies the beneficiary has established, the specific discretionary decisions she has made, and a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a response dated December 12, 2008, counsel for the petitioner further described the beneficiary's position as follows:

1) Beneficiary Made Personnel Decisions Based on Economic Downturn

The beneficiary has made the decision to cut payroll expenses and eliminate some positions, based on reasoned analysis of the macro-economic conditions, as well as business activities of the petitioner. These decisions were made in conjunction with detailed discussions . . . with the parent company's Board of Directors in China. . . . The beneficiary has embarked on expanding client base for new businesses in this difficult environment

2) Beneficiary has Consulted with Foreign Parent in Shaping New Company Strategy

The beneficiary has been in constant consultation with her superiors at the Chinese parent company, and the Chinese parent has great confidence in the petitioner's ability to steer the US subsidiary through these turbulent times. . . . The unwavering support from the parent company is the result of the beneficiary's ability to fashion a succinct and coherent strategy for company growth. The beneficiary's executive leadership is therefore apparent in her dealings with the Chinese parent.

3) Beneficiary is Forging New Strategic Vision and Business Opportunities for the Petitioner

The beneficiary has established a plan of generating new business clients and increased in this difficult environment by broaden the company's market focus. The beneficiary is instituting plans to conduct sales and marketing activities in the regions of the US with less severe housing problems. The beneficiary is exploring the possibility of venturing into other business opportunities beside the sale and distribution of decorative stones.

Due to the fact that the Chinese market for building materials is still growing, the beneficiary is making the paradigm shift of exporting US made, high quality building materials to China

Counsel noted that the petitioner has three employees, including the beneficiary, and noted that, given the downturn in the economy and the decrease in homebuilding and renovation spending by Southern California residents, the petitioning company "is facing the brunt of the economic crisis."

The petitioner submitted a revised organizational chart in response to the RFE which depicts the beneficiary as president. The chart indicates that [REDACTED] holds the positions of marketing manager and finance department, while [REDACTED] is the head of the "office center." The positions of cashier/warehouse, office manager and receptionist are listed, but apparently vacant. Finally, the petitioner submitted a copy of its California Form DE-6 for the third quarter of 2003, which shows that [REDACTED] was hired in August 2008.

The director denied the petition on December 31, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In

denying the petition, the director emphasized that the beneficiary's claimed duties are too broad and nonspecific to convey any understanding of what she does on a day-to-day basis as the petitioner's president, and merely paraphrased the statutory definitions of managerial and executive capacity.

The director also based her decision, in part, on the petitioner's staffing levels, noting that, with a staff of only one or two subordinates, it had not been established that the beneficiary would be relieved from performing many aspects of the day-to-day operation of the business. While the director acknowledged counsel's claim that the beneficiary made the executive decision to eliminate some positions for economic reasons, the director noted that the petitioner's evidence indicates that the company has been staffed by only two employees since the beginning of 2007.

The director concluded that, while the beneficiary may have the requisite authority and discretion over the petitioning company, the petitioner had failed to establish that her actual duties would be primarily managerial or executive in nature, or that she would supervise a staff of subordinate staff comprised of managerial, professional or supervisory employees.

On appeal, counsel for the petitioner asserts that the director "failed to incorporate the whole record of the evidence" and "failed to give due consideration to petitioner's special needs in personnel management in order to survive the recent declining in real estate market." Counsel alleges that the director inappropriately decided the executive capacity of the proposed position solely based on the number of petitioner's current employees."

Further, counsel asserts that the organizational chart submitted in response to the director's request for evidence "demonstrated that the beneficiary sits at the top of the petitioner's company hierarchy and directly supervises two managerial positions – Marketing/Finance Manager and General Office Manager." Counsel acknowledges that the petitioner failed to provide the requested position descriptions for the beneficiary's subordinates but states: "the job titles of the subordinates, in combination of the nature of the petitioner's business, are clear enough to indicate the duties to be performed by the subordinate personnel to relieve the beneficiary from non-qualifying duties." Specifically, counsel states that the employees' job titles "made it clear that these positions . . . would cover general marketing, finance and customer service in a sales company such as negotiating contracts, planning marketing strategies and advertising, building business, working with sales people, monitoring sales and marketing performance, working with independent auditors and accountants and etc., and therefore relieve the beneficiary from perform [*sic*] such duties to provide a service."

In addition, counsel asserts that the director considered the petitioner's staffing levels without considering the reasonable needs of the organization in light of its overall purpose and stage of development, as required by section 101(a)(44)(C) of the Act. Counsel asserts that, as a company deeply involved in real estate during an economic downturn, the petitioner has a reasonable need to control costs, and "the fact that it only has three fulltime employees on its payroll at present does not take away the executive nature of the beneficiary's position." Counsel asserts that the beneficiary's level of authority in the company "far exceeds the level normally given to a first-line supervisor and qualifies the position as an executive appointment."

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

When examining the 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(l)(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.

As noted by the director, the petitioner has failed to provide a sufficiently detailed description of the beneficiary's day-to-day duties. The initial position description failed to specify any specific tasks the beneficiary performs on a daily basis as the chief executive officer of a ceramic tile wholesale business. For example, the petitioner stated that the beneficiary "has full responsibility for the petitioning U.S. company," "exercise[s] discretion over every aspect of operations of the business," "has the authority to hire and fire and take personnel actions," and "will spend a tremendous amount of time making important executive decisions." Such duties provide little insight into the nature of the beneficiary's position, and largely paraphrase the statutory definitions of managerial and executive capacity. *See* section 101(a)(44)(A) and (B) of the Act. 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.).

The director therefore requested a more detailed description of the beneficiary's duties, accompanied by a breakdown of the percentage of time the beneficiary allocates to specific tasks. The director's request also included a request for a list of specific decisions the beneficiary has made, specific goals and policies she has implemented, and a specific, day-to-day description of the duties the beneficiary performed over a six month period. Counsel's response to this clear request provided offered little more information regarding the nature of the beneficiary's daily responsibilities. Counsel noted that the beneficiary made the decision to "cut payroll expenses and eliminate some positions," and is instituting plans to generate new business in other regions of the United States and through export activities, but discussed these decisions and goals in vague terms. The petitioner did not provide the requested specific job description for the beneficiary or the amount of time she devotes to specific tasks. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although the director's adverse decision includes a detailed discussion explaining why the submitted job descriptions are deficient, neither counsel nor the petitioner has supplemented the record on appeal with any further information regarding the beneficiary's actual job duties.

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 prove that the beneficiary *primarily* performs these specified responsibilities and does not

spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to her position merely on the basis of the beneficiary's job title, placement on a general organizational chart or broadly-cast business responsibilities. While the AAO does not doubt that the beneficiary has the requisite level of authority over the U.S. company, the record remains devoid of a description of the beneficiary's actual job duties and is therefore insufficient to establish that the beneficiary would be performing primarily managerial or executive duties. 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 her 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.

As noted above, when examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (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, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

Here, there are unexplained discrepancies regarding the number of employees working for the petitioner, their job titles and their job duties. At the time of filing, the petitioner indicated on Form I-129 that it has two employees. It named only two employees on its organizational chart, indicating that the beneficiary serves as both president and marketing manager, and that [REDACTED] serves as "cashier/warehouse manager." In response to the RFE, the petitioner indicates that [REDACTED] serves as both finance manager and marketing manager, while a third employee, [REDACTED] serves as office center manager. The petitioner has also submitted a Form DE-6, Quarterly Wage and Withholding Report, which suggests that [REDACTED] was working for the company as of August 2008, prior to the filing of the petition. The petitioner has not submitted any explanation for these inconsistencies. 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). It is reasonable to believe that if the petitioner actually employed three employees as of the date the petition was filed, it would have reported this information on the Form I-129 and in the original organizational chart. Therefore, these discrepancies raise questions regarding the reliability of the petitioner's claims regarding its staffing levels and the ability of the subordinate employees to relieve the beneficiary from involvement in the day-to-day operations of the business.

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 originally claimed that the beneficiary's sole subordinate was a "cashier/warehouse manager" and later claimed that the beneficiary supervises both a marketing/finance manager and an office center manager, while the cashier/warehouse position is un-staffed. Regardless of whether the beneficiary supervised one or two employees, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers or professionals. Though requested by the director, the petitioner did not provide job descriptions for the beneficiary's subordinates or the level of education required to perform the duties of the subordinate positions. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel acknowledges that the petitioner failed to provide the requested position descriptions for the beneficiary's subordinates. Rather than supplementing the record on appeal with this pertinent information, counsel suggests that the director should have assumed that such employees "would cover general marketing, finance and customer service" functions. Counsel's unsupported assertions are not a substitute for the specific information directly requested by the director. 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). Absent a description of the actual duties performed by the claimed subordinate managers, the AAO cannot determine whether they are performing managerial duties or whether they are performing the routine duties of the departments they are claimed to manage or supervise.

Thus, the petitioner has not established that the beneficiary's subordinates possess or require a bachelor's degree, such that they could be classified as professionals.¹ Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. 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. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). The petitioner has not shown that the beneficiary's subordinate employees are

¹ Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

supervisory, professional, or managerial, and she 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)(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 position description that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner has not clearly articulated a claim that the beneficiary manages an essential function of the petitioning company, and, as discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that she performs primarily managerial duties. As noted above, absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. Of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the beneficiary's job description borrows liberally from the statutory definition of "executive capacity," the facts of this case do not support a finding that her actual duties are *primarily* focused on the broad policies of the U.S. company. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

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, counsel incorrectly asserts that the director "decided the executive capacity of the proposed position solely based on the number of petitioner's current employees." The AAO notes that the director in fact denied the petition in large part based on the

petitioner's failure to provide the requested detailed description of the beneficiary's duties, and did not base her determination solely on the petitioner's staffing levels.

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).

The petitioning company was established in 2004 and claims to operate a wholesale, import and export company. The evidence shows that the petitioner leases an approximately 8,000 square foot space to be used for the sale and distribution of ceramic tile products, and photographs of the business indicate that it does business as a "ceramic tile factory outlet" with a large showroom and warehouse space. The company achieved gross sales of \$720,492 in 2006 and \$555,543 in 2007. At the time of filing, the petitioner claimed to employ the beneficiary as president, one cashier/warehouse manager and a contracted accountant, but failed to provide detailed position descriptions for its employees. The petitioner has not explained how a single employee relieves the beneficiary from substantial involvement in the day-to-day operations of the company, particularly in light of counsel's assertions that multiple positions were eliminated by the beneficiary due to the economic downturn. While the company's sales decreased between 2006 and 2007, the decrease was not drastic. If positions were in fact eliminated, it is reasonable to believe that the company's remaining employees, including the beneficiary, have been responsible for performing the duties of employees who were laid off in order to ensure the financial health of the company.

Considering these issues along with the vague job description submitted for the beneficiary, and the petitioner's failure to provide position descriptions for the beneficiary's staff, the AAO cannot conclude that the beneficiary is relieved from involvement in the day-to-day operations of the company. The petitioner reasonably requires employees to perform duties associated with sales, marketing, customer service, warehouse, inventory, delivery, purchasing, day-to-day banking, bookkeeping, administrative and clerical matters, and other routine functions. The petitioner has not provided information regarding how such tasks are accomplished within the two to three-person company, or how the beneficiary is relieved from direct participation in these matters.

The petitioner cannot simply explain that its industry has been negatively impacted by an economic downturn and expect to be exempted from the requirement that it employ the beneficiary in a primarily managerial or executive capacity. As noted by the director, the evidence of record does not establish that the petitioner was forced by economic factors to decrease its staffing levels. The petitioner maintained a staff of two employees throughout 2007 and most of 2008. Furthermore, the AAO notes that according to the petitioner's IRS Forms 1120, the petitioner paid its employees \$101,770 in 2006 and \$105,579 in 2007, thus suggesting that no

significant staffing changes occurred from one year to the next. It is unclear based on the evidence in the current record whether the petitioner has ever been fully staffed, with all positions listed on the organizational chart filled.

In sum, the lack of a detailed description of the beneficiary's actual duties, considered in conjunction with the petitioner's failure to respond to the director's request for evidence and the evident lack of employees to perform the non-qualifying operational and administrative functions of the organization, precludes the AAO from determining that the beneficiary is employed in a primarily managerial or executive capacity. While the beneficiary may exercise discretionary authority over the U.S. company, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a *primarily* managerial or executive capacity. The petitioner suggests that its current staffing levels are temporary and that it will expand and hire additional employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In the instant matter, the petitioner has not established that it currently employs the beneficiary in a primarily managerial or executive capacity.

While USCIS previously approved a new office petition and an extension of status filed on behalf of the beneficiary, the prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of beneficiary's or petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). If the previous nonimmigrant petitions were 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), includes unresolved inconsistencies regarding the staffing of the company, 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 USCIS 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 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.

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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.