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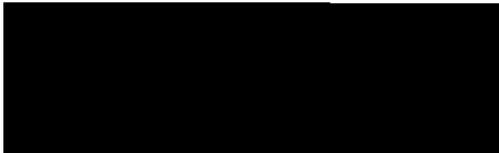
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DATE: **DEC 10 2012** Office: VERMONT SERVICE CENTER 

IN RE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 March 2005, states that is in the business of freight forwarding. The petitioner claims to have a qualifying relationship with S&S Freight Forwarders located in Kingston, Jamaica. The petitioner has employed the beneficiary as its managing director/general manager since December 2005, and now seeks to extend his L-1A status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity. The director also noted that the petitioner provided insufficient evidence that it maintains sufficient physical premises to accommodate its employees and the services that the petitioner would be providing.

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 provided sufficient evidence to establish that the beneficiary will be performing primarily managerial or executive duties, though counsel maintains that the petitioner's previous attorney submitted an inaccurate organization chart and inaccurate position descriptions in response to the director's Request for Evidence ("RFE"). Counsel submits a brief and additional evidence on appeal.

I. The Law

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(i)(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 (i)(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.

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.

II. Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity under the extended petition.

A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, to extend the beneficiary's L-1A status on September 1, 2010. The petitioner indicated on the Form I-129 that it is in the business of freight forwarding with four current employees and an estimated gross annual income of \$217,690. In support of the petition, the petitioner submitted a letter providing the following list of the beneficiary's job duties in the United States:

- (1) Developing and implementing pre-established goals and business strategies, providing strategic support and recommendations in the planning and implementation of administrative and operational systems, and procedures, providing guidance, formulating and implementing administrative and operational functional and executing efforts against pre-established plans to ensure growth and profitability, engaging in long-range planning and identification of business opportunities, (20% of the time);
- (2) Formulating and implementing growth strategies, managing overall plans and company's policies, management sales, marketing, human resources, financial and administrative management functions, directly responsible developing the company's goals and objectives, selecting plans of action, objectives, and managing major components such as business growth and financial objectives (20% of time);
- (3) Ensuring the efficient and profitable operations of the company, evaluating the company's performance and determining areas of improvement, recommending options and courses of action, achieving financial objectives by scheduling expenditures, analyzing variances, initiating corrective actions, and managing budgeted numbers, reviewing and interpreting financial information as required, attending to various administrative aspects of the business, approval of expenditures, budgets, accounting activities, among others, identifying ways to reduce operating costs and increase productivity and efficiency, identifying issues that must be addressed, providing administrative and operational support, monitoring costs associated with business activity to ensure compliance with budget and corporate standards, (15% of time);

- (4) Developing business relationships, pursuing business opportunities and recognizing additional project opportunities, dealing with suppliers, distributors, and key accounts and negotiating deals, liaising with clients and continually developing strategies and pursuing business opportunities, contributing to marketing effectiveness by marketing the company's products and providing support on marketing related issues. (15% of time)
- (5) Management and supervision of personnel including hiring, work allocation, training, development, and problem resolution, motivating employees to achieve peak [sic] productivity and performance, leading, managing, and providing development and direction to personnel, conducting performance evaluations review, selecting and overseeing the work performed by service providers, (20% of time)
- (6) Overseeing domestic and foreign shipments, inventory management, order processing, warehousing and distribution. Ensuring that international regulations, including export of goods, customs regulations, special agreements, licenses, and related issues are adhered to. (10%)

The petitioner submitted an organization chart with the names, titles, and responsibilities of four employees. In addition to the position of managing director/general manager held by the beneficiary, the chart includes: (1) an office manager responsible for budget and expenditures, processing invoices, maintaining records of all commercial transactions, customer service, bookkeeping, HR issues, flow of correspondence, filing, requisition of supplies, and billing; (2) a sales coordinator responsible for day to day sales activities, customer service and support for assigned client base, reviewing proposals and negotiating deals for favorable pricing and terms, and identifying opportunities for improving the cost effectiveness of all procurement activities; and (3) an import/export coordinator responsible for purchase orders, bid requests, import/export transactions, shipping and receiving, customs documentation, providing effective and timely tracking, processing, and clearance and coordination of all shipments. The chart indicates that the office manager, sales coordinator, and import/export coordinator report directly to the beneficiary. None of the positions reporting to the beneficiary have subordinates.

The director found that the evidence was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity and issued a Request for Evidence ("RFE") on October 19, 2010. Specifically, the director requested, *inter alia*, the following: (1) an explanation of why 2009 tax returns showed that the beneficiary had only received \$45,888, though it was indicated on the petition that the beneficiary had been paid \$52,000; (2) an explanation of how the petitioner could afford to pay the beneficiary and all other employees; (3) a detailed description of the staffing of the U.S. office to include: the number of employees and the wage or salary paid to each, job titles, duty descriptions with the percentage of time dedicated to each duty by each employee, and a description of the management and personnel structures of the U.S. office; (4) current pay statements; (5) IRS Forms W-2, Wage and Tax Statement, for all current employees; and (6) photographs of the interior and exterior of all the premises that have been secured for the U.S. entity.

In response to the RFE, the petitioner provided pay statements for four employees from September 18, 2010, through October 15, 2010; a 2009 IRS Form 1120, U.S. Corporation Income Tax Return; Quarterly Employer Reports from the state of Florida for the first three quarters of 2010; an organizational chart; 2009 IRS Forms W-2 and W-3; and photographs of office space. The petitioner's previous attorney also submitted a letter of support describing the wages, duties, and the percentage of time dedicated to each duty for three employees and the duties and percentage of time dedicated to each duty for the beneficiary.

The organization chart submitted in response to the RFE was the same chart as submitted in support of the petition. The petitioner submitted the same description of the duties performed by the office manager, import export coordinator, and sales coordinator, and added the percentages of time dedicated to each duty and wage information for the positions. The new description of the beneficiary's duties no longer included his previously stated responsibility for "[o]verseeing domestic and foreign shipments, inventory management, order processing, warehousing and distribution" or "[e]nsuring that international regulations, including export of goods, customs regulations, special agreements, licenses, and related issues are adhered to," which had been included in the beneficiary's initial position description. The percentage of time previously dedicated to the eliminated duties was redistributed among the remaining duties.

The director denied the petition on January 5, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director based his finding on the descriptions of the employees' positions and, in part, on the size and scope of the business. The director also noted that the photographs of the premises showed a small office space that appeared inadequate to house the office, all employees, and the services provided by the business.

The petitioner retained new counsel on appeal. On appeal, the petitioner submits a Florida Department of Revenue Employer's Quarterly Report from the fourth quarter of 2010 showing the petitioner hired three additional employees between October 2010 and November 2010. The petitioner also provides "an accurate" organizational chart which differs from the previously submitted organization charts; a list of the names, job titles, and job duties for six employees; and a new lease with an effective date of January 19, 2011. Petitioner's current counsel states that the previous attorney did not consult the petitioner before submitting inaccurate position descriptions and an inaccurate organization chart in response to the RFE.

Counsel claims that the petitioner had hired two additional employees between the submission of the petition and the response to the RFE and that the two additional employees should be considered as evidence that the beneficiary is employed in a primarily executive or managerial capacity. Furthermore, counsel contends that even if the new employees are not considered, the newly submitted organization chart and revised position descriptions are the accurate representation of the organization's structure, "but for the removal of the positions of the two 'Sales Representatives' and the position of 'Warehouse Clerk' which would cause the transfer of the duties of those positions to their supervisors, the next position higher on the organizational chart."

The organization chart submitted on appeal depicts a more complex organizational structure than the previously submitted charts by placing the sales coordinator and import/export coordinator positions

subordinate to the office manager. The position descriptions submitted on appeal include additional duties. Most notably, the office manager is given supervisory duties over the import/export coordinator and the sale coordinator. The position description for the beneficiary states that he is "responsible for directing and overseeing the company's entire operations and its various components, including sales, marketing, human resources, financial and administrative management functions, as well as managing overall plans, budgeted numbers, and company's policies."

B. Discussion

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity.

As a preliminary matter, the petitioner submits, for the first time on appeal, additional evidence including quarterly tax reports showing the hire of additional employees, a revised organization chart, and position descriptions for six employees. According to the quarterly tax reports, the petitioner hired two additional employees in October 2010, subsequent to the filing of the nonimmigrant petition. The revised organization chart and the position descriptions include the subsequently hired employees and create additional levels of hierarchy within the organization by placing the sales coordinator and the import/export coordinator subordinate to the office manager. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). For these reasons, the AAO will not consider evidence of new employees hired subsequent to the filing of the petition.

The new organization chart and position descriptions change the duties and authority of the beneficiary, office manager, and other subordinate employees. The organization chart depicts a more complex organization structure with additional levels of authority, even when the employees hired after the filing of the petition are not considered. On appeal, or in response to an RFE, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). 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'r 1998).

The AAO acknowledges the petitioner's claim that former counsel did not submit all available evidence in response to the director's RFE. The AAO notes that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him

and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has satisfied none of these requirements.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* 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 AAO does not doubt that the beneficiary exercises discretion over the petitioning entity and has the appropriate level of authority as general manager and owner of the organization, however, the petitioner has failed to show that his actual day-to-day duties, as of the time of filing, were primarily managerial or executive in nature. The fact that the beneficiary owns and 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 several of the duties generally described by the petitioner could fall under the definitions of managerial or executive capacity, the petitioner's initial description was general and provided little insight into what the beneficiary actually does on a day-to-day basis. For example, the petitioner indicated that the beneficiary's duties include: "developing and implementing pre-established goals and business strategies," "formulating and implementing administrative and operational functional and executing efforts against pre-established plans to ensure growth and profitability," "managing and executing all aspects of product development," "managing major components," "financial and administrative management functions," and "developing goals and objectives." The petitioner did not define any specific tasks associated with these general responsibilities. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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. at 1108.

Additionally some of the described duties suggest the beneficiary's direct involvement in the day-to-day operations of the company. Specifically, the petitioner stated that the beneficiary would be "marketing the company's products," "negotiating deals," "providing administrative and operation support," "attending to various financial aspects of the business," and performing duties associated with "order processing," "warehousing and distribution," and "ensuring that international regulations, including export of goods, customs regulations, special agreements, licenses, and related issues are adhered to." The petitioner has not

explained how the beneficiary's performance of the company's sales, marketing, financial, and administrative functions rises to the level of managerial or executive capacity. The response to the RFE provided a position description that eliminated some of the beneficiary's non-managerial duties, but the lack of specificity and consistency raise questions as to the nature of the beneficiary's actual day-to-day responsibilities. Due to these inconsistencies, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is actually non-managerial. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial sales, marketing, administrative or operational duties. While 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, 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; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1069-70 (9th Cir. 2008).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including 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.

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). Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve the supervision of employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

At the time of filing, the petitioner stated it had four employees including the beneficiary. The job descriptions submitted by the petitioner do not establish that any of the employees working for the beneficiary are professional-level employees.¹ In support of the petition and in response to the RFE, the petitioner

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not

provided the service with an organization chart and a description for each of the following positions: part-time office manager, import/export coordinator, and sales coordinator. The organization chart submitted with the petition and in response to the RFE indicates that the office manager, import/export coordinator, and sales coordinator are subordinate to the beneficiary, and the description of the beneficiary's duties includes "management and supervision of personnel." The chart indicates that the office manager, import/export coordinator, and sales coordinator do not have subordinate employees, and the position descriptions provided for the beneficiary's subordinates do not show that any of the subordinate employees have managerial or supervisory authority over a clearly defined department or function of the petitioner or other employees. Thus, the petitioner has not shown that the beneficiary supervises and controls supervisory, professional, or managerial staff, as required by section 101(a)(44)(A)(ii) of the Act

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)). 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). Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

On appeal, counsel also claims that the beneficiary will be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 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

automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is required for any of the positions subordinate to the beneficiary's.

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.*

As discussed above, the broad and non-specific terms describing the beneficiary's duties suggest the beneficiary's level of authority, but provide little insight into the nature of his day-to-day duties. The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Counsel refers to a 2004 USCIS memorandum to support the assertion that it is USCIS policy to give deference to prior approvals of petitions involving the same parties. *See* Memorandum of William R. Yates, Associate Director for Operations, USCIS: *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)("Yates Memorandum"). 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. *Id.* It is noted that the Yates Memorandum is addressed to service center and regional directors and not to the chief of the AAO. The AAO also notes that prior approvals do 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). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm'r. 1988).

Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. *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). The director reviewed the record of proceeding and concluded that the petitioner was ineligible for an extension of the nonimmigrant visa petition's validity. In both the request for evidence and the notice of decision, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. 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). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition.

The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act. The record indicates that the beneficiary and his subordinates perform the actual day-to-day tasks of operating the freight forwarding business. The petitioner has not established that the staff will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons. 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.