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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

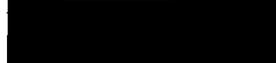
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DATE: **MAR 05 2012**

Office: CALIFORNIA SERVICE CENTER

FILE: 

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:

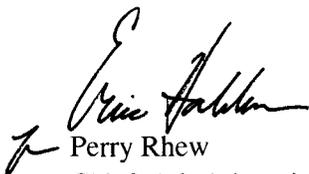


INSTRUCTIONS:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the nonimmigrant visa petition. The director subsequently issued a notice of intent to revoke the approval of the petition, and, after reviewing the petitioner's rebuttal evidence, issued a notice of revocation. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition to employ the beneficiary pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an intracompany transferee employed in a managerial or executive capacity. The petitioner, an Illinois corporation, claims to operate as a publisher and distributor of books. It claims to be a branch of [REDACTED]

[REDACTED] The beneficiary was previously granted L-1A status for a period of two years, from December 2006 to December 2008, and the petitioner now seeks to extend his status so that he may continue to serve in the position of general manager.

The director initially approved the petition for a two-year period commencing on December 28, 2008. The director then revoked the approval of the petition on November 16, 2009, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that "the revocation is legally and factually erroneous." Counsel goes on to state that "supervision by L-1A manager/executives is not limited solely to petitioner's employees, it also includes non-employees, such as independent contractors." Counsel submits a brief and additional evidence in support of the 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.

Under USCIS regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

In the present matter, the director provided a detailed statement of the grounds for the revocation but did not cite to the specific provision of the regulations as a basis for the revocation. The director commented that upon review of the petition, and based on information obtained during the course of the beneficiary's visa interview and a site visit, "it appears that the beneficiary is no longer working in an L-1A manager[ial] or executive capacity." Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(2): "The alien is no longer eligible under section 101(a)(15)(L) of the Act."

II. Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary has been and will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 19, 2008. The petitioner indicated on the Form I-129 that it operates as a publisher and distributor of books with five employees and a gross annual income of \$238,447.

The petitioner submitted a letter in support of the petition detailing the beneficiary's duties as follows:

As the President/General Manager, the highest ranking managerial officer of [the petitioner], a branch office of [redacted] [the beneficiary] will continue to take full managerial responsibility/authority of [the petitioner's] day-to-day business operations. His duties are as follows:

- Manage/supervise/direct/control/oversee the work of all supervisory, professional and managerial employees in relation to the day-to-day business operation of [the petitioner], manage/supervise/control the matters in establishing and maintaining regular and normal working relationships with various business entities and customers, etc. and initiate contacts with the same on behalf of the company, establish and maintain relationships with customers or other business parties, negotiate contracts with other business entities regarding business related matters; make decisions with regard to hiring/retaining/firing contractors working for the company, in the areas of sales, accounting, marketing, etc. (40%)
- Manage/direct all the legal matters and financial affairs relating to business operations, including making decisions regarding hiring/retaining all professionals who handle company's legal matters, making decisions regarding filling or answering complaint(s) on behalf of the company as an official/managerial officer of the company (15%);
- Set up company's policy, stipulate and consummate the operation principles and procedures for the employees to follow; make decisions regarding hiring, firing, promotion and discipline of the employees of the company (5%);
- Supervise/manage/direct the work of all the supervisory, professional and managerial employees in relation to responding and solving problems encountered in business operations and related matters (20%);

- Manage/direct/supervise the work of all the supervisory, professional and managerial employees of various departments in relation to coordination with parent company and overseas offices with regard to business operations (5%);
- Manage/control/direct the work of other supervisory, professional and managerial employees of various departments in relation to coordination with parent company and overseas offices with regard to business operations (10%);
- [Left blank by petitioner.]
- Make strategic planning and decisions to achieve goals set up by the parent company in China; prepare monthly and annual reports to parent company regarding the business operations of [the petitioner] (5%).

As shown in [the petitioner's] company structure, [the petitioner] has hired and plans to hire more managerial/supervisory/professional employees and other U.S. employees who will be under [the beneficiary's] management and supervision.

The AAO notes that the fifth and sixth bullets are identical but indicate different percentages. The AAO also notes that the petitioner had an additional bullet in the letter that was left blank.

The petitioner's 2008 Employer's Quarterly Federal Tax Return, Form 941, for the third quarter indicates zero employees and wages, tips, and other compensation paid as \$20,754. However, the petitioner's 2008 State of Illinois Employer's Contribution and Wage Report, Form IL-941, for the same quarter lists three employees, [REDACTED] and total compensation in the amount of \$20,754. The petitioner's Form 941 for the second quarter of 2008 indicates three employees and wages, tips, and other compensation paid as \$20,752. The Form IL-941 for the same quarter lists the same three employees. The petitioner's Form 941 for the first quarter of 2008 indicates four employees and wages, tips, and other compensation paid as \$23,148. The Form IL-941 for the same quarter lists the same three employees plus [REDACTED]. The petitioner's 2007 Employer's Annual Federal Tax Returns, Form 944, indicates total wages, tips, and other compensation paid as \$50,005. The petitioner's 2007 U.S. Corporation Income Tax Return, Form 1120, shows total salaries and wages paid in the amount of \$50,005 and an additional cost of labor in the amount of \$60,332. The beneficiary's 2007 U.S. Individual Income Tax Return, Form 1040, indicates that he received \$31,002 in wages, salaries, tips, etc.

The director initially approved the petition on November 25, 2008 and forwarded the beneficiary's information for visa processing to Beijing, China. The U.S. Consulate in Beijing conducted an interview of the beneficiary and notified USCIS of several discrepancies in the record and the beneficiary's testimony. USCIS conducted a site visit based on the U.S. Consulate's information and provided their findings to the

director. The director then issued a Notice of Intent to Revoke on March 19, 2009 addressing the issue of the petitioner's failure to establish that the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director addressed the number of personnel currently employed by the petitioner and in what capacity they are employed, and a site visit conducted by USCIS that revealed that the petitioner's office had moved to Chicago, IL and that [REDACTED] employee of the petitioner, was not performing duties that qualify as an H-1B, instead he was working part-time maintaining the printing machines.

In response to the Notice of Intent to Revoke (the Notice), the petitioner submitted a letter explaining the discrepancies outlined in the Notice. The petitioner provided the following information on its current employees:

[T]here are altogether six (6) employees on staff, with one left the employment [sic]. We herewith list all the names of the employees of the company and their visa type for your information:

[REDACTED]

part-time

[The beneficiary] also planned to transfer more employees from China to the U.S. office. If [the beneficiary] is able to re-enter U.S. as L-1A, there will be at least more than ten (10) employees hired by our U.S. company.

The petitioner went on to explain the wages paid to each of the employees for 2007 and 2008 as follows:

Our company has paid the wages to all above listed six (6) employees in 2007 and 2008. We also withheld the necessary taxes including FICA accordingly.

[REDACTED]

The petitioner submitted a Wage and Tax Statement, Form W-2, for each of the employees listed above that show the same total wages for each individual.

The petitioner provided an extensively detailed list of job duties for the beneficiary for the past two years. The petitioner described the beneficiary's job duties as follows:

- 1) [REDACTED]
[REDACTED] He selects and purchases all the Printing Machines, the Staple Machines, Imprinting Machines, Computers able to receive the manuscript from China, and all supplies including papers and inks. He also selects the proper individuals who know how to install the machines and put the machines to work as well as daily maintenance of these machines. He has also secured the proper and safe housing for the employees.
- 2) [REDACTED] for a loan of \$200,000. He negotiated the agreement and executed all necessary legal documents.
- 3) Plan and execute marketing policies for the next two (2) years. Work out the step to step [sic] procedure to develop the publishing business, by placing advertisement of the U.S. company on the website and U.S. media. Directs sales personnel to develop and cultivate the relationship with other Chinese publishers in the U.S.
- 4) Plan and draw the publishing contracts with individuals and other corporations. Conducts negotiations, seeking legal advices [sic] from company attorneys, and formalizes the final contract for the best interest of the company.
- 5) Plan and place advertisement and long term contracts with other Chinese publishers in the U.S. as well as other Chinese websites.
- 6) Plan and perform the publishing contracts already executed between December 28, 2006 to present.
- 7) Supervise the Manager of editorial work of the materials to be published. Approve the design contained in each publication. Supervises and confirms the list of regular shipments of publications and the costs involved. Direct the Accounting Department to follow up auditing procedure.
- 8) Attends all business meetings on behalf of the U.S. company regarding the copyrights of the materials published by the company.
- 9) Select the Directors and Journalists for each and every locations [sic] in the U.S. as the branch officers for the company in the near future.
- 10) [The beneficiary] attended the Writer's Convention for "World Chinese Weekly" with writers, authors and publishers from all over China.
- 11) Report to the parent company in China, and develop new goals for the U.S. company.
- 12) Make decision to hire additional U.S. workers and recommend future transfer employees from the parent company in China to the U.S. company, or transfer the employees from U.S. to the parent company in China.

The petitioner also submitted a letter as a report to the board of directors on the beneficiary's responsibilities and achievements. In the letter, the petitioner breaks down the beneficiary's duties as follows:

- 1) In charge of the production, operation of the company and the management (hire, dismiss, promote) of the whole company's staff for both permanent workers and

- temporary labors; Organize the implementation of resolutions of the Board of Directors; Guide and control the growing of the whole business of the company; Maintain the good relationship between all old clients, and set up new business relationship with potential clients; Participate all kinds of business activities with the staff. (40%)
- 2) In accordance with the American laws and company's regulations, deal with all concerning affairs especially for the personnel management; Make registration and answer all complains [sic] for clients in the name of the General manager. (5%)
 - 3) Draft the basic management system of the Company; Draft proposals regarding the salaries, benefits, bonuses and punishment for staff; Set the principles and methods for financial cost for the purpose of efficient management. (5%)
 - 4) Supervise and direct the business for all departments of the company, such as business promotion, client communication, business negotiation, book selling, etc. so as to fulfill all developing plans. (20%)
 - 5) Direct all difficulties for all department managers and deal with all questions for any problems occurring in publishing business. (5%)
 - 6) Direct all difficulties for all department managers and deal with all questions for any problems on the relationship between all subsidiary branches and the Chinese parent company. (5%)
 - 7) Initiate long-term business plans and make operation decisions for the development goals of the company; Compile annual business reports for board of directors. Exercise other functions and powers authorized by the board of directors. (5%)

The AAO notes that the above percent breakdown only accounts for 85% of the beneficiary's time.

The petitioner also listed other responsibilities, such as "selecting and employing the directors and distribution managers for branch offices of [redacted]" "set up the offices and factories for American company, installed equipments [sic], employed technicians, etc.;" "making advertisements on American medias [sic], discussing publishing works with the global writers, signing business contracts with clients;" "the establishment of [redacted]" "looking for the famous authors and nice works worldwide;" "be present at many kinds of book fairs and publishing annual meetings for the copyright business;" the remote commander of America[n] company's business;" and "organize writing conferences in China so as to attract more authors and advertising companies for further cooperation."

Also in the report to the Board of Directors, the petitioner lists seven additional employees who are identified as the directors and distribution managers of [redacted]. The Chicago office director is [redacted]

[redacted] The petitioner also listed three additional employees that appear to have been hired after the filing of the initial petition: [redacted] in charge of the personnel management and the ad business of [redacted] in America and Canada; [redacted] in charge of the management and ad business of World Chinese Weekly in Chicago; and [redacted] in charge of the "website management and technique management of factory."

The petitioner submitted a new undated organizational chart for the U.S. company listing the beneficiary as the general manager with the following subordinate divisions: [redacted]

[redacted] Directly answering to the sales director are the Directors of the Branch

The director revoked the approval of the petition on November 16, 2009, concluding that the petitioner failed to establish that the position offered to the beneficiary in the United States is primarily managerial or executive. In revoking the approval, the director found that the evidence in the record does not establish the number of employees and their capacity of employment for the petitioner. The director further found that the list of employees provided by the petitioner is insufficient to establish that the L-1A managers are relieved from performing non-qualifying duties.

In support of the appeal, counsel submits a brief in which he asserts that the petitioner employs independent contractors that relieve the beneficiary from performing non-qualifying duties. Counsel explains that in addition to the petitioner's five employees, there are five non-employees/independent contractors that the director failed to consider as working for the petitioner. The AAO notes, however, that this is the first instance of any mention of independent contractors in the record. Neither counsel nor the petitioner made any reference to independent contractors with the initial filing of the petition or in response to the notice of intent to revoke. According to counsel, the record should reflect the existence of non-employees/independent contractors who work for the petitioner as that information was previously provided in response to a request for evidence of a previous petition. However, it is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, U.S. Citizenship and Immigration Services (USCIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the petitioner would like specific evidence that may have been submitted in conjunction with a separate nonimmigrant petition filing considered in this proceeding, the petitioner is obligated to submit the evidence anew as nonimmigrant records are not combined and each is independent from the other.

Counsel provides the following explanation for the independent contractors in his brief:

The record shows, in its response to the RFE, the petitioner also submitted an organization chart with detailed explanation. Regarding the independent contractors, the petitioner states: "In addition to the above [petitioner's] regular employees, [the petitioner] also has contracted personnel who are also under the beneficiary's supervision by name and job title. Among the contracted personnel already working for the petitioner was [REDACTED]

[REDACTED] Both of them are U.S. citizens. The organization chart also shows additional positions that the petitioner intended to hire. Please note employers are required to file W-2 for employees only, but not for independent contractors.

The Consulate made a legal error in counting only "employees" but not the independent contractors. . . . It is unclear what exactly the Consulate meant when it stated the petitioner had "no U.S. employees." It might mean, for example, the petitioner should have some employees who were U.S. citizens or U.S. permanent residents to be qualified as under the supervision of the beneficiary. However, there seems to be no such specific legal requirement in the L-1A regulation. The U.S. citizen contractors should be considered as

good as U.S. citizen employees for the purpose of counting who is under the supervision of [the] L-1A beneficiary.

* * *

At the time of its response to NOIR, petitioner had five employees, five independent contractors, including three who are U.S. citizen or permanent residents, and two in China, working for the petitioner. In fact, as the organization chart shows, three additional persons worked under [redacted] an independent contractor who has been managing the petitioner's sales department since 02/1/2008. The persons listed in the chart under her have been working under special arrangement though not officially hired by the petitioner. The petitioner indicated that it intends to officially hire them eventually.

There were nine persons working under the ultimate supervision of the beneficiary. The question is, even if the two from China were to be excluded, whether the other seven subordinate personnel in the U.S. under the beneficiary's supervision is insufficient to relieve him from performing non-qualifying duties.

On appeal, the petitioner submits a letter clarifying the issue of the independent contractors. In the letter, the petitioner provided the following information:

[redacted] U.S. permanent resident, worked as an independent contractor for our company from 02/1/2008 to 10/1/2009, managing the sales department. Attached please find a copy of her IRS 1099, which shows her employment with our company. We paid her \$20,430.00 in 2009 and \$5602.00 in 2008 for her services provided. She was under the supervision of [the beneficiary], the general manager. . . . The persons listed in the organization chart under her have been working under special arrangement but not official employed by us. As indicated below, we intend to hire some of them in the future. Since November 1, 2009, she was officially hired as part-time employee in charge of our sales department.

[redacted] U.S. permanent resident, worked as printing technician (independent contractor) from 11/01/2008 to 10/31/2009. His name was not listed in the organization chart due to an oversight. However, the attached copy of IRS 1099 shows he was employed by our company as an independent contractor and was paid \$5,500.00 for his service. Since November 1, 2009, he was officially hired as part-time employees [*sic*] of our company.

[redacted] U.S. citizens [*sic*], an independent contractor, has been working as an accountant for the accounting and finance department, in charge of accounting and tax. Her name was listed in the original I-129 L-1 petition filed on or around December 20, 2007, and also in the subsequent response to the USCIS' RFE. She is still working in that capacity.

Two persons in the organization chart, namely [redacted] are located in China. They were working under the supervision of [redacted] who managed our company's Pre-Press Design Department. . . .

Our company intends to hire the remaining personnel whose names were listed on the organization chart in stages, including [REDACTED]. The above names were shown in the organization chart, and were clearly explained in our response to the USCIS' NOIR that we intended to hire Jian DU, among others.

The petitioner submits an organizational chart that appears to have been submitted with a previous petition. The new undated organizational chart for the U.S. company lists the beneficiary as the general manager with the following subordinates: Sales Department Deputy General Manager [REDACTED] (Contracted), Finance Department Deputy General Manager (Intend to hire), Production Department Deputy General Manager [REDACTED] and Design Department Deputy General Manager [REDACTED]. Directly answering to the sales department are the Market Division, [REDACTED] Market Analyst, and the Sales Division, 2 persons (Intend to hire); answering to the finance department are Book Keeping, 1 person (Intend to hire), and the Financial Director, [REDACTED] (Contracted); answering to the production department are the Printing Division, 4 persons (Intend to hire), and the Maintenance Division, [REDACTED] Maintenance Engineer; and answering to the design department are the Design Division, (Intend to hire) [REDACTED] and 2 persons, and the [REDACTED] (Intend to hire) Jian DU and 2 persons.

The petitioner also submits a listing of job duties for the beneficiary as general manager (the duties listed are the same as those submitted with the initial petition), [REDACTED] as deputy general manager, design department, [REDACTED] as deputy general manager, production department, [REDACTED] as market analyst, sales department, [REDACTED] as maintenance engineer, production department, [REDACTED] as deputy general manager (contracted), sales department, and [REDACTED] as financial director (contracted), finance department, that appears to have been submitted with a previous petition.

Finally, the petitioner submits an IRS Miscellaneous Income, Form 1099, for [REDACTED] showing nonemployee compensation of \$20,430 for 2009 and \$5,602 for 2008. The petitioner also submits a Form 1099 for [REDACTED] showing nonemployee compensation of \$5,550 for 2009.

Discussion

Upon review, and for the reasons stated herein, the petitioner has not established that the position offered to the beneficiary in the United States is primarily managerial or executive.

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.* 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 AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its general manager. However, 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 operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or 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").

In the instant matter, the petitioner provided several versions of the beneficiary's duties. In the initial breakdown of the beneficiary's job duties, the petitioner describes the beneficiary's duties in very broad terms, noting that he will "manage/supervise/direct/control/oversee the work of all supervisory, professional and managerial employees in relation to the day-to-day business operation of [the petitioner]"; "manage/direct all the legal matters and financial affairs relating to business operations, including making decisions regarding hiring/retaining all professionals who handle company's legal matters, making decisions regarding filling or answering complaint(s) on behalf of the company as an official/managerial officer of the company"; "set up company's policy, stipulate and consummate the operation principles and procedures for the employees to follow make decisions regarding hiring, firing, promotion and discipline of the employees of the company"; and "make strategic planning and decisions to achieve goals set up by the parent company in China." Some of these duties do not correlate with the other duties detailed by the petitioner in response to the notice of intent to revoke.

The beneficiary's job duties are not consistent throughout the record. For example, additional job duties submitted in response to the notice of intent to revoke include duties that were not previously included, such as "select and purchase all the Printing Machines, the Staple Machines, Imprinting Machines, Computers able to receive the manuscript from China, and all supplied including papers and inks"; "select the proper individuals who know how to install the machines and put the machines to work as well as daily maintenance of these machines"; "secure the proper and safe housing for the employees"; "work out the step to step [*sic*] procedure to develop the publishing business, by placing advertisement of the U.S. company on the website and U.S. media"; "plan and draw the publishing contracts with individuals and other corporations"; "supervise and confirm the list of regular shipments of publications and the costs involved"; and "direct the Accounting Department to follow up auditing procedure." The amount of time the beneficiary spends on these non-qualifying duties was not provided by the petitioner. This failure of documentation is important because several of the beneficiary's daily tasks, such as those mentioned above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a 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 "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).

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 a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

The three organizational charts submitted by the petitioner are contradictory. The initial organizational chart shows only two current subordinates and indicates that the petitioner intends to hire nine employees that have already been selected and an additional three employees that have not. The initial organizational chart also lists different departments/divisions that are not listed on the other two subsequently submitted charts, such as the administrative office. The second organizational chart submitted in response to the notice of intent to revoke shows four current employees as directors of the departments/divisions and several subordinates to those directors. The chart does not indicate that any of those employees are independent contractors or employees the petitioner intends to hire. The chart, taken at face value, clearly shows that these are supposed to be current employees of the petitioner; however, in the evidence presented, not all of the employees listed on the chart were paid wages by the petitioner in 2008 (the time of filing of the initial petition). The third organizational chart submitted on appeal shows three current department/division directors, one of which is marked as a contractor; the fourth department/division director has not been hired. The chart also lists three current subordinates to the directors, one of which is marked as a contractor, two employees that have been selected and the petitioner intends to hire, and eleven employees to be hired that have not been selected. The petitioner failed to submit evidence of wages paid to each of the listed employees and failed to clarify the inconsistencies presented by the organizational charts. 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). 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).

While the AAO recognizes that the beneficiary's supervision of independent contractors is relevant to a determination of his eligibility for classification as an L-1A manager or executive, in this instance, the petitioner has not submitted contracts or other documentation to substantiate its claim that the beneficiary had subordinate employees to relieve him from performing non-qualifying duties at the time of filing the initial petition. Based on the evidence in the record, the petitioner only provided a Form 1099 for 2008 for [REDACTED] who is listed on the first organizational chart as someone the petitioner "intend[s] to hire" and on the second organizational chart as the sales department director. 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). 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 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 written job offer 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. 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 International*, 19 I&N Dec. 593, 604 (Comm'r 1988). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function of the U.S. company. The beneficiary appears to be responsible for most of the operational functions of the U.S. company, rather than performing qualifying managerial duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-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.* The beneficiary in this matter has not been shown to be primarily engaged in establishing goals and policies for the U.S. company. Overall, the beneficiary's duties are focused on administrative and operational tasks.

The AAO further notes 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). In reviewing the relevance of the number of employees a petitioner has, however, 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).

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. Here, some of the beneficiary's described job duties are non-qualifying duties and the petitioner failed to quantify the amount of time the beneficiary spends on those duties. The matter of the contradicting organizational charts also does not allow USCIS to make a determination as to the actual number of employees and the capacity in which they are employed by the petitioner. As a result, the AAO cannot make a determination as to whether the beneficiary has sufficient subordinate employees (or independent contractors) to relieve him from performing non-qualifying duties. The petitioner also indicates that it plans to hire additional staff in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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'r 1978).

On appeal, counsel noted that USCIS approved the initial petition that had been previously filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 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 AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Conclusion

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