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U.S. Citizenship
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Services

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FILE: [REDACTED]
SRC 03 067 50934

Office: TEXAS SERVICE CENTER Date: JUL 21 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of Florida that is engaged in warehousing and cargo distribution. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary had been employed abroad in a primarily managerial or executive capacity; or (2) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel contends that the director's decision was "erroneous both factually and as a matter of law since [the beneficiary] was performing in [a] 'managerial capacity' for the foreign company, and is performing in an 'executive capacity' for the U.S. entity." Counsel submits a brief in support of his claims on appeal.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The AAO will first address the issue of whether the beneficiary had been employed abroad in a primarily managerial or executive capacity.

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

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

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

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

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

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

The petitioner filed the instant petition on January 2, 2003. In an appended letter, dated December 20, 2002, the petitioner stated that prior to the beneficiary's transfer to the United States entity in May 1997, the beneficiary was employed overseas at "Arte en Aluminio y Vidrios, C.A." The petitioner explained that the beneficiary, who began his employment in the company on November 1, 1994 in the capacity of "Commercial Manager," was responsible for evaluating the national and international markets, obtaining new customers, and performing research for new providers and customers.

In a request for evidence, dated January 5, 2003, the director asked that the petitioner provide evidence of the beneficiary's employment with the petitioner's overseas parent, subsidiary, branch or affiliate in an executive or managerial capacity during the three years prior to the beneficiary's transfer to the United States. The director asked that the petitioner explain how the beneficiary's work primarily entailed "goal-setting, policy-

making, executive-level decision-making and managerial/executive oversight of the foreign firm or a major component or function of the foreign firm," and provide in detail all of the beneficiary's duties and functions in his overseas position. The director noted that if the beneficiary functioned primarily as a first-line supervisor, the petitioner should document whether his subordinate employees were managers, supervisors or degreed professionals. The director further noted that if the beneficiary did not supervise subordinate managers, supervisors or professionals, the petitioner should explain "how the primary part of the beneficiary's work consist[ed] of the direction, control and oversight of the firm or of a major component or function of the firm."

Counsel responded in a letter dated March 25, 2004, explaining that prior to the beneficiary's transfer to the United States entity the beneficiary was employed by "Distribuidora de Metales, C.A. (DISMECA)," which counsel stated is an affiliate of the petitioner's foreign parent company "Arte en Aluminio y Vidrios, C.A. (ALUARTECA)."¹ Counsel stated that the beneficiary was employed as a production manager since November 1, 1994, and "was in charge of overseeing the Production Department," "had the authority to recruit permanent employees, promote them[,] as well as dismiss their services," "subcontracted personnel," "reviewed overall production operations to determine the level of efficiency," "had the capacity to effect changes within the department to optimize operations," "designed an improved production program . . . [for] the manufacturing process," "research[ed] national and international markets in order to acquire better materials and equipment used in the manufacturing process," "had the authority to negotiate contracts," and supervised a shop supervisor, two technicians, two blacksmiths, and a sales person. Counsel noted that in this capacity, the beneficiary also worked closely with the Marketing and Sales Department in order to customize production to the needs of the client. Counsel submitted copies of the beneficiary's payroll records pertaining to the year prior to his transfer to the United States,² as well as payroll records for his subordinate employees. In an attached letter from the petitioning organization, the company's chief of operations restated the foreign job duties of the beneficiary as described by counsel.

In a decision dated April 6, 2004, the director determined that the petitioner had not demonstrated that the beneficiary had been employed abroad in a primarily managerial or executive capacity. The director concluded that the beneficiary's job duties in the foreign company "show the beneficiary [was] performing tasks that develop, design, market or sell the product that the foreign company is selling." The director also noted that with regard to the employees whom the beneficiary had supervised, the petitioner had failed to submit evidence demonstrating that the workers were employed in managerial, professional or supervisory positions. The director further concluded that the beneficiary acted as a first-line supervisor in the foreign company rather than in a primarily managerial or executive capacity. Consequently, the director denied the petition.

In an appeal filed on May 6, 2004, counsel contends that the director erred "both factually and as a matter of law" in determining that the beneficiary had not been employed abroad in a primarily managerial capacity. Counsel submits a brief dated May 5, 2004, in which he claims that the beneficiary's employment in a

¹ The petitioner claims that a qualifying parent-subsidiary relationship exists between the United States company and Arte en Aluminio y Vidrios, C.A. (ALUARTECA).

² Although the petitioner provided payroll records for the beneficiary's foreign employer for the period January 1, 1996 through December 31, 1996, CIS records reveal that the beneficiary was admitted to the United States on February 16, 1996 and did not depart until some time after May 1998.

primarily managerial capacity is supported by the following description of the beneficiary's position as Production Manager:

[Since November 1, 1994, the beneficiary] was in charge of overseeing the Production Department engaged in manufacturing and assembling custom made items such as windows, doors and facades for residential and commercial buildings. Furthermore, as Production Manager, he had the authority to recruit permanent employees, promote them[,] as well as dismiss their services. He also subcontracted personnel for specific time sensitive projects. Additionally, as Production Manager, [the beneficiary] reviewed the overall production operations to determine the level of efficiency and productivity. As Production Manager, [the beneficiary] had the *capacity to effect changes within the department to optimize operations*. Also as a Production Manager, [the beneficiary], *designed an improved production program* thereby eliminating previous faults in the manufacturing process. Consequently, as Production Manager, [the beneficiary] diminished the inefficient use of raw materials, increased manufacturing efficiency, and increased the overall efficiency and profits of the company. [The beneficiary] also worked closely with the Marketing and Sales Department, which was incorporated under the supervision of the Production Department in order to improve services by customizing production to the client's specifications and taste. The Marketing/Sales Manager, [redacted] however, managed that department. Other duties [the beneficiary] performed as Production Manager entailed *researching national and international markets in order to acquire better materials and equipment used in the manufacturing process*, and were [sic] authorized to negotiate contracts.

(Emphasis in original).

In addition, counsel outlines the four criteria of "managerial capacity" as defined in the Act at section 101(a)(44)(A), and claims that the beneficiary had been employed in a primarily managerial capacity as he: (1) managed, supervised and controlled the procedures and goals related to the foreign organization's production, manufacturing, marketing and sales; (2) managed the production and manufacturing functions of the company, which counsel claimed are essential functions of the company's growth and success, as well as managed and supervised professional employees; (3) reported solely to the president of the company, and had the authority to hire and fire personnel; and (4) exercised discretion over the company's daily operations "by managing the functions associated with the production/manufacture and marketing/sales departments." Counsel noted:

[A]s Production Manager and supervisor over the production/manufacturing function, [the beneficiary] ensured that the raw materials utilized in the production/manufacture of the foreign company's products and the equipment used to achieve production were in accordance with management's goals and procedures. However, as Production Manager, [the beneficiary] was never involved in the development, design, marketing and sales of the products of the foreign company. The actual duties of developing, designing, marketing, and selling the company's products were performed by the Shop Supervisor, the Manager of the Sales Department, and the Salesperson.

Furthermore, as Production Manager[,] the Beneficiary was in charge [of] 'affecting changes' (i.e., establish goals, objective, and procedures) and 'designed['] (i.e., implemented) and improved production programs in the production/manufacturing function (i.e., made managerial decisions to increase productivity, ensure quality control, and increase efficiency in the processes in implementing in the production/manufacture function) of the foreign company.

Counsel submits a description of the job duties performed by the company's shop supervisor and technicians, as well as documentation confirming bachelor's degrees held by the shop supervisor and salesperson.

Counsel contends that the director's failure to address each element of the definition of managerial capacity in his decision is in violation of the December 20, 2002 memorandum of Immigration and Naturalization Service (now CIS) Associate Commissioner [REDACTED] which instructs the director to reference all elements of the definitions of "managerial capacity" and "executive capacity" in the decision.

Counsel also claims that the director incorrectly relied on *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988), in determining that the beneficiary had not been employed in a primarily managerial capacity. Counsel states that the matter contains issues related to ownership and control rather than the present issue of managerial or executive capacity.

On review, the petitioner has not demonstrated that the beneficiary was employed abroad in a primarily managerial capacity.

The record fails to clarify the true position held by the beneficiary while employed overseas. In its December 20, 2002 letter submitted with the petition, the petitioner indicated that the beneficiary was employed as the foreign company's "commercial manager," not the "production manager." The beneficiary's job description as the "commercial manager" is entirely different from that provided in the petitioner's March 25, 2004 response to the director's request for evidence, in which the petitioner outlines the job duties associated with the beneficiary's position as "production manager." 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).

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Here, although the petitioner provided a lengthy description of the tasks performed by the beneficiary in the overseas company, the record does not indicate that the beneficiary was performing *primarily* managerial job duties.

The definitions of executive and managerial capacity 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 AAO acknowledges the beneficiary's responsibility of

"overseeing the Production Department," which included a supervisor and four lower-level employees.³ According to counsel in his brief on appeal, the beneficiary "manag[ed] all aspects of the company's production/manufacturing and marketing/sales," while the "actual duties of developing, designing, marketing and selling the company's products" were performed by the lower-level employees. The record, however, does not support counsel's claim that the beneficiary *primarily managed* the production, manufacturing, marketing and sales departments. Rather, it appears that at least a portion of the beneficiary's time was spent personally performing functions of these departments.

Specifically, the beneficiary "designed an improved production program" to enhance the company's manufacturing process and "research[ed] national and international markets in order to acquire better materials and equipment used in the manufacturing process." Based on these representations, the beneficiary clearly performed non-qualifying tasks associated with the operation of the production and manufacturing departments. The beneficiary was personally involved in the functions of the production department, including ensuring a more efficient and cost effective operation. 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 the non-managerial operational duties of the production and manufacturing department. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The record does not support counsel's claim on appeal that the beneficiary managed the foreign company's essential production, manufacturing, marketing and sales functions. 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, 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. 8 C.F.R. § 204.5(j)(5). 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. As discussed above, the record indicates that the beneficiary is personally performing operational tasks of the production and manufacturing department. Counsel has failed to reconcile the claim of managing an essential function with the beneficiary's performance of the company's non-managerial and non-executive tasks. Furthermore, counsel cannot expect the AAO to accept the claim that the beneficiary did not develop or design products of the foreign company when he specifically stated in his March 25, 2004 letter that the beneficiary "designed an improved production program." An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

³ The record indicates that the Sales and Marketing Department "was incorporated under the supervision of the Production Department," yet counsel notes in his brief on appeal that the salesperson "reported directly to the manager of the Marketing/Sales Department." Therefore, the salesperson has not been considered to be a direct subordinate of the beneficiary.

Counsel claims on appeal that the director incorrectly relied on *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988), when concluding that the beneficiary was not employed in a primarily managerial or executive capacity. *Matter of Church Scientology International* includes issues of determining both a qualifying relationship as well as managerial and executive capacity. The Commissioner specifically notes that an employee's job duties must be *primarily* managerial or executive, and states "an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity." *Id.* at 604. Therefore, the director's application of *Matter of Church Scientology International* to the present issue was appropriate.

It appears that counsel attempted to amend the beneficiary's job duties on appeal by claiming that the beneficiary's responsibility of *designing* production programs is equivalent to *implementing* these programs. Counsel states "the Beneficiary . . . designed (i.e., implemented) and improved production programs in the production/manufacturing function (i.e., made managerial decisions to increase productivity, ensure quality control, and increase efficiency in the processes in implementing in the production/manufacturing department) of the foreign company." The term "design" is defined as the formation and carrying out of plans, or the "invention and disposition of the forms, parts, or details of something according to a plan," whereas "implement" is defined simply as "to put into effect." *Webster's II New Riverside University Dictionary* (Houghton Mifflin Co. 1998). As noted above, the beneficiary's responsibility of *designing* the production programs demonstrates the beneficiary's performance of non-qualifying tasks related to the production and manufacturing department, and undermines counsel's claim that the beneficiary merely "made managerial decisions" to increase productivity and efficiency. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary was employed by the foreign organization in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next consider whether the beneficiary would be employed by the United States organization in a primarily managerial or executive capacity.

On the immigrant petition and an addendum, the petitioner noted that, as president of the company, the beneficiary would be responsible for performing the following job duties:

Plans, develops, and establishes policies and objectives of the company. Confers with parent company to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity. Plans and develops industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public. Evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives.

In a December 5, 2003 request for evidence, the director noted ambiguity in the beneficiary's employment in the United States entity, and requested that the petitioner describe the job duties and functions performed by both the beneficiary and the beneficiary's subordinates in the petitioning organization. The director noted that if the workers subordinate to the beneficiary are not supervisors, managers or degreed professionals, the petitioner should explain how the beneficiary's position involves overseeing a major component or function of the organization, or how the beneficiary functions at a senior level in the company.

Counsel responded in a letter dated March 25, 2004, providing the following list of "executive duties" to be performed by the beneficiary in his position as president:

- Planning, developing and establishing policies in accordance to the policies established by the board of directors of the foreign company, Arte en Aluminio y Vidrios, CA (ALUARTECA). This entails liaising with the headquarters of [the foreign company] in Venezuela to coordinate overall functions and operations between [the] foreign company and the U.S. company, as well as evaluating the overall performance of the company in order to revise procedures.
- Establishing [the] company's goals, at a short, medium and long range. Specifically, one of the goals [the beneficiary] has set is the expansion of the enterprise, which is being accomplished by acquiring additional licenses, including the Ocean Freight Forwarding License and Ocean Transport Intermediary License by the Federal Maritime Commission, which will enable [the petitioning entity] [to] negotiate directly with its clients and function as an agent between the shipping vessels and the clients, and the certificate by the Federal Aviation Administration to function as an agent between the airlines and the clients. Likewise, [the beneficiary] is currently procuring the Non Vessel Operating Common Carrier License (NVOCC) from the Federal Maritime Commission. (See exhibit 12)
- Devising financial programs and investment plans. In particular, [the beneficiary] has been negotiating with agents in Columbia (i.e. [redacted] Bolivia (i.e. Unitbol, Aeromar Representaciones), Venezuela (i.e. [redacted] and other countries in Central America to expand services to those countries offering a competitive edge and with the purpose of penetrating the international market. See attached lists of foreign agents. (See exhibit 14).
- Negotiating contracts with either clients, suppliers, subcontractors, financial institutions, etc. See exhibit 13 for a list of customers, providers and independent contractors.
- Liaising with the Board of Directors of the foreign company to coordinate functions.
- Approving budgets to fund operations after reviewing activity reports and financial statements.
- Evaluate [the] performance of the Chief of Operations and the Administrator.

- In turn, the Chief of Operations is responsible for the overall upkeep of the warehouse facilities, the delivery of merchandise and the freight forwarding operations. The Chief of Operations is in charge of coordinating with different transport companies (Federal Express, UPS, Yellow Freight, Overnite, etc) and reviewing the shipping labels to ensure accuracy. Moreover, the Chief of Operations is in charge of inventory control, as well as safety, and security issues. The Chief of Operations hires personnel to load and unload the containers being shipped as well as subcontracts companies specialized in packing cargo for export. The Chief of Operations coordinates with the airlines and shipping vessels to ensure timely pick up and delivery of merchandise. The Chief of Operations had approximately 10 years of professional experience in warehouse operations.
- The Administrator is entrusted with accounts payable and receivable, incoming and outgoing correspondence, incoming telephone calls and is in charge of record keeping. The Administrator liaises with [the] accountant to supply financial documentation and information pertaining to taxes. In addition, the Administrator manages the President's schedule. The Administrator has a Bachelor's degree in Industrial Engineering and a Master's degree in Business Administration issued in 1988. He has approximately 8 years of experience in management positions.

Counsel stated that the beneficiary also approves the hiring and dismissing of the company's twelve independent contractors, including an accountant, corporate attorney, vessel and cargo line agents, and packing and international insurance agents.

Counsel submitted a letter from the petitioning entity, dated March 23, 2004, in which the chief of operations restated the above-listed job duties of the beneficiary. Counsel also provided letters and invoices from the petitioner's accountant, attorney and agents confirming its use of independent contractors.

In her April 6, 2004 decision, the director determined that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the beneficiary's responsibility of procuring licenses necessary for the petitioner's business represented the beneficiary's performance of the company's operational tasks. The director concluded that the beneficiary's two subordinate employees would not relieve him from performing non-qualifying tasks associated with the petitioner's business. The director further noted that the job duties of the beneficiary and the chief of operations appear to overlap, as both have the authority to procure independent contractors. As a result, the director questioned the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity. Consequently, the director denied the petition.

Counsel files an appeal dated May 6, 2004 claiming that the director erroneously concluded that the beneficiary would not be employed by the petitioning entity in a primarily executive capacity. Counsel states that new information supportive of the facts at the time of filing the petition demonstrates that the beneficiary would be employed as an executive.

In his brief on appeal, counsel outlines the four statutory requirements of "executive capacity" and asserts that the beneficiary's employment as president satisfies each element as he would be responsible for: (1) establishing the company's investments, contracts, cost controls, personnel needs, and goals and objectives;

(2) determining the sector in which the petitioner would do business; and (3) approving the hiring and dismissal of the company's independent contractors. Counsel claims that these duties demonstrate the beneficiary's responsibilities of directing both the management and an essential function of the organization.

Counsel also restates the above-cited job duties of the beneficiary and his two subordinates, asserting the descriptions "clearly [describe] the executive nature of the Beneficiary's duties as President for the Petitioner." Counsel states:

Please note that [the beneficiary's] duties are not performed by the Chief of Operations since [the beneficiary] as President, *approves* the hiring of the independent contractors. The Chief of Operations, however, is delegated the duty to *hire* the independent contractors with the approval of the President, [the beneficiary]. The Notice of Decision, therefore, incorrectly states that 'the president is describe[d] as also able to subcontract' independent contractors. Finally, the Notice of Decision incorrectly relies of [sic] Beneficiary's involvement in procuring the licenses since he merely establishes procedures and goals of the Petitioner in seeking to procure the appropriate licenses to ensure the company's growth and success. The denial, therefore, incorrectly interprets some of the words in the description of duties by incorrectly focusing on very narrow possible meaning[s] of words and thereby altering their meaning in the context used.

(Emphasis in original).

Counsel notes that if staffing levels are considered, the AAO is required to take into account the reasonable needs of an organization with respect to its purpose, stage of development, component or function. Counsel states:

The reasonable needs of Petitioner, specifically with regards to the function of President, is to manage the executive, [and] finance [sic] functions of the company, including the supervision of the accountant, attorneys, if necessary, and the business model of the organization along with the help of the Chief of Operations and Administrator, and the delegation of non-executive duties to the those [sic] employees, as well as managing the entire finance and business model functions of the company. In light of the overall purpose and stage of development of the company, and the function of the finance and business model (i.e., industry that the company is engaged in), these are extremely important for the Petitioner's growth and success. As previously mentioned, in addition to its current employees, Petitioner also employs the services of several independent contractors for services. Finally, the Beneficiary will be delegating any and all non-executive duties to the subordinate employees and/or independent contractors, and will report only to higher-level executives or stockholders of the foreign company.

Counsel also cites unpublished AAO decisions in support of the beneficiary's employment as an executive. Specifically, counsel notes an unpublished AAO decision in which the AAO concluded a beneficiary could be considered a manager or an executive even if he is the sole employee of the company where he utilizes outside or independent contractors. Counsel states that similarly, the beneficiary in the instant matter "will also be responsible for the supervision of several independent contractors, including, but not limited to, an

accountant, corporate counsel, freight forwarders, etc." Counsel submits additional letters from the petitioner's independent contractors as evidence of the functions performed by each.

On review, the petitioner has not established that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The job descriptions of the beneficiary's position as president do not demonstrate that he would be primarily employed as an executive. Rather, as correctly determined by the director, it appears that the beneficiary would be responsible for performing many of the organization's non-managerial and non-executive functions.

Based on the record, the beneficiary would be responsible for such non-qualifying job duties as procuring business licenses, negotiating contracts with clients and suppliers, devising financial plans and negotiating with overseas agents. Despite counsel's claim on appeal that the beneficiary "merely establishes procedures and goals" in the procurement of business licenses, documentation from the Federal Aviation Administration (FAA) and inconsistencies in letters from the petitioner's accountant indicate that the beneficiary has been and would likely continue to personally obtain and maintain the licenses necessary to do business. Specifically, the record contains correspondence dated March 1, 2002 and February 10, 2004 between the FAA and the beneficiary pertaining to the Indirect Air Carrier Standard Security Program.⁴ The correspondence between the beneficiary, personally, and the FAA casts doubt on the claim made by the petitioner's accountant in an April 20, 2004 letter that his office "recommended and processed . . . the [petitioner's] Certification by the FAA." In fact, in a March 23, 2004 letter submitted prior to the director's denial, the accountant, when addressing the services performed by his office for the petitioning entity, did not indicate that his office was responsible for obtaining any business licenses for the petitioner. 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. at 591. Moreover, the petitioner's years 2002 through 2004 summary of accounting expenses, or "Vendor QuickReport," does not identify payments made to the accountant for services rendered in connection with procuring business licenses. The five payments made by the petitioner to the accountant in 2003 appear to be for the preparation of quarterly tax returns and a federal income tax return, and an additional service that the petitioner referred to as "Aplicacion line." 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).

The beneficiary's additional job duties of negotiating contracts with clients, suppliers and contractors and devising financial and investment plans further demonstrate the beneficiary's employment in a non-managerial and non-executive capacity. It is reasonable to conclude that as the sole employee with client contact, the beneficiary is personally responsible for selling the petitioner's services. Moreover, the petitioner concedes in its March 25, 2004 letter that the beneficiary formulates investment and financial programs in order to sell its services to foreign agents. The petitioner does not document what proportion of the beneficiary's time would be spent on these non-qualifying tasks. As a result, the AAO cannot determine whether the beneficiary would primarily perform high-level responsibilities and would not spend the majority

⁴ According to the related documentation in the record, the Indirect Air Carrier Standard Security Program requires that the petitioning entity, in connection with its Ocean Transportation Intermediary License, maintain a security program approved by the FAA.

of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Counsel correctly 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). However, it is appropriate for CIS 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 size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing the petition, the petitioner employed the beneficiary, plus a chief of operations and an administrator. The petitioner claimed to also utilize independent contractors for freight forwarding, shipping, packaging, and insurance. Counsel submits letters from six companies, as well as from an accountant and corporate attorney, attesting to their working relationship with the petitioning entity. However, the petitioner's Statement of Income and Expenses for January through June 2002 fails to identify any payments made to independent contractors during this period.⁵ The petitioner's "QuickReports" indicate that the petitioner would have paid approximately \$31,500 from January through June 2002 for outside services from independent contractors. The failure to clarify this inconsistency leads the AAO to question the authenticity of the petitioner's claim regarding its use of independent contractors. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Based on the record, it does not seem plausible that the reasonable needs of the petitioning entity are met by the services of the beneficiary and two other employees. Again, despite the reasonable needs, the petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel cites on appeal several unpublished AAO decisions to support the claim of the beneficiary's employment in a qualifying capacity. Counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has not furnished adequate evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Counsel merely states "[l]ike the beneficiary in that case, the Beneficiary in this case will also be responsible for the supervision of several independent contractors, including, but not limited to, an accountant, corporation counsel, freight forwarders, etc." As noted above, the record does not contain sufficient evidence to even establish the use of independent contractors. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm.

⁵ The AAO acknowledges payments during this time in the amount of \$1,218 for casual labor. According to Exhibit L of counsel's appeal, "casual labor" is not considered to include the companies identified as independent contractors, but rather includes individual workers.

1972)). While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated the existence of a qualifying relationship between the petitioning and foreign entities.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The statute and regulations require that the United States employer be the same employer or a subsidiary or an affiliate of the legal entity *by which the beneficiary was employed overseas*. See section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); 8 C.F.R. § 204.5(j)(3)(i)(C).

In the instant matter, the petitioner claims that a qualifying subsidiary relationship exists in that the foreign company, [REDACTED] owns 51 percent of the petitioner's issued stock.⁶ The beneficiary's foreign *employer*, however, was the company Distribuidora de Metales, C.A. (DISMECA). The petitioner has not demonstrated that at the time of filing the petition, a qualifying relationship existed between the United States entity and DISMECA.

The evidence submitted by the petitioner in support of a qualifying relationship pertains solely to a parent-subsidiary relationship between the petitioning organization and ALUARTECA. There is no evidence in the record establishing a qualifying relationship at the time of filing the petition between the petitioner and DISMECA. Nor does the record contain conclusive documentation demonstrating that DISMECA and ALUARTECA are affiliates or subsidiaries, thereby creating an indirect qualifying relationship with the

⁶ The petitioner submitted stock certificates, articles of incorporation, amended articles of incorporation, and its stock transfer ledger as evidence of stock ownership.

petitioning entity. Counsel's December 30, 2002 letter identifies [REDACTED] as the owner of 97 percent of the foreign company, and references the "Mercantile Registry" of ALUARTECA as verification of stock ownership. As counsel failed to submit a translated copy of the mercantile registry, ALUARTECA's stock ownership cannot be confirmed. See 8 C.F.R. § 103.2(b)(3). While it appears that Olga Yochabel Hayek is the majority shareholder of both ALUARTECA and DISMECA⁷, the claimed ownership is not sufficiently documented. Moreover, the record does not demonstrate that DISMECA continues to do business overseas. See 8 C.F.R. § 204.5(j)(2) (requiring that the qualifying entity conduct business in the United States and at least one other country). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The AAO recognizes that in January 1997, DISMECA owned 51 percent of the petitioning entity. DISMECA, however, transferred its ownership interest in the United States company on February 20, 1998 to ALUARTECA. The present petition was filed on January 3, 2003, almost five years after DISMECA relinquished its ownership in the petitioning entity. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Consequently, the petitioner has failed to demonstrate the existence of a qualifying relationship between the United States entity and the beneficiary's foreign employer. Accordingly, the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁷ The petitioner submitted a translated copy of the minutes from a February 12, 1996 meeting, in which the board of directors of DISMECA recognized [REDACTED] as a majority shareholder.