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FILE:

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WAC 04 164 52660

Office: CALIFORNIA SERVICE CENTER

Date: JUL 06 2006

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION:

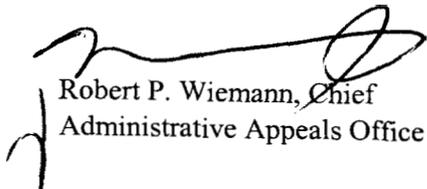
Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in December 1992. It claims to be engaged in import/export activities and property management. It seeks to employ the beneficiary as its "Financial and Real Estate/Trading Division Manager." Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on February 28, 2006, determining that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner; (2) that the beneficiary was employed in a managerial or executive capacity with a qualifying foreign entity for at least one year in the three years preceding the filing of the petition; (3) that a qualifying relationship existed between the United States entity and the beneficiary's foreign employer; or, (4) that the petitioner had the ability to pay the beneficiary the proffered annual wage of \$45,000.

On appeal, counsel for the petitioner asserts that the director misunderstood and overlooked documentary evidence submitted to establish the beneficiary's eligibility for the requested immigrant visa classification. Counsel submits a brief and additional evidence in support of the 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 and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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

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

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

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

The immigrant petition was filed on May 17, 2004. The petitioner stated on Form I-140 that the U.S. company employs approximately ten employees and seeks to employ the beneficiary as its "Finance and Real Estate/Trading Division Manager" with responsibility for "all financial aspects of the holding company including cash flow forecasts, obtaining lines of credit and bond matters and for supervising the management of all real estate properties owned by the holding company."

In an April 19, 2004 letter, the petitioner stated that the beneficiary "is responsible for all financial aspects of our company, including supervision of our subsidiaries, as well as all procurement and trading activities. [The beneficiary] supervises over eight employees and is authorized to enter into binding contracts on behalf of [the petitioner]." The petitioner noted in its letter that the U.S. company is a holding company whose subsidiaries include a trading company, a real estate company, a farm leasing firm, a construction company and a geographic information systems company, all of which maintain headquarters at the petitioner's San Diego office.

The petitioner also submitted a copy of the beneficiary's resume, which includes the following description of the beneficiary's duties with the U.S. company:

- Responsible for all financial aspects of the Holding Company.
- In charge of supervising and compiling financial statements for the Holding Company as well as its subsidiaries.
- Responsible for all procurement and trading activities.
- In charge of the real estate division including management of properties owned by the corporation and its subsidiaries.
- Involved in the decision making process on acquiring and selling real estate property.
- Responsible for managing the human resource division.

On February 3, 2005, the director requested additional evidence to establish that the petitioner would employ the beneficiary in a primarily managerial or executive capacity, including: (1) a more detailed description of the beneficiary's duties and the approximate percentage of time he allocates to each of the listed duties; (2) the U.S. company's organizational chart describing its managerial hierarchy and staffing levels, and including brief job descriptions, educational level, dates of employment and annual salary for each employee under the beneficiary's supervision; and (3) copies of the U.S. company's California Forms DE-6, Quarterly Wage and Withholding Reports, for the last four quarters.

In a response received on April 27, 2005, the petitioner provided the following more detailed description of the offered position:

1. Responsible for all financial aspects of the holding company including cash flow forecasts, obtaining lines of credit and bonding matters. Personally prepares cash flow for the corporation on a monthly basis including details of various aspects such as general overhead expenses, forecasts, project costs, etc. . . .Percentage Time Spent: 25%

2. Responsible for supervising and completing all financial statements for the holding company including balance sheets, profit and loss statements, cash flow statements. Responsible for managing all corporate assets... Percentage Time Spent: 20%
3. Responsible for all procurement and trading activities conducted by the corporation. . . Percentage Time Spent: 10%
4. Personally issues all purchase orders and negotiates with all vendors and suppliers related to the real estate division. . . . Percentage Time Spent: 10%
5. Responsible for supervising the management of all real estate properties owned by the holding company. . . . Percentage Time Spent: 10%
6. Providing cost accounting systems for various projects entered by the holding company. This involve [sic] advanced Excel sheets that are updated on a monthly basis and provide accurate cost breakdowns for all items on a microscopic scale. . . . Percentage Time Spent: 5%
7. Cost control of all company operations. These include approving all purchases from the initial stage of obtaining quotations to the final signature on all checks and payments issued by the corporation. . . . Percentage Time Spent: 5%
8. Coordinating between the company in the United States and the mother company in Egypt. . . This involves preparing the necessary budgets, schedules, five year plans and status reports. . . .Percentage Time Spent: 10%
9. Responsible for managing and supervising human resources and administrative matters for company personnel. Percentage Time Spent: 5%

The petitioner submitted the requested organizational chart for the U.S. company which depicts the beneficiary reporting to the chief financial officer and directly supervising an “administrative and personnel affairs” employee; a “trading division” employee who in turn supervises an assistant; and a “deli manager” who supervises six deli employees. The petitioner’s California Form DE-6 for the second quarter of 2004 confirms the employment of the beneficiary, the trading division assistant, the administrative and personnel affairs employee, and one individual who was not identified on the petitioner’s organizational chart.<sup>1</sup> The petitioner also submitted the Form DE-6 for the second quarter of 2004 for another company, “Osteam Inc.” which shows the employment of six employees, including the “deli manager” identified on the petitioner’s organizational chart. The petitioner did not mention this company among its U.S. subsidiaries.

The petitioner’s organizational chart included brief job descriptions for the beneficiary and his subordinates. The petitioner indicated that the beneficiary’s duties include responsibility for “financial aspects,” supervising/compiling financial statements, procurement/trading, real estate, human resources, and “the deli.” The petitioner stated that the administrative and personnel affairs employee is responsible for medical insurance forms, employment packages, general insurance matters, and payroll processing. The petitioner further noted that the trading division employee responds to inquiries, issues “proformas,” purchase orders and invoices, and is responsible for the shipping and delivery of orders, with the support of the assistant.

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<sup>1</sup> On appeal, counsel states that this unidentified individual formerly served as the petitioner’s trading division supervisor and was replaced by the current job-holder in the third quarter of 2004.

Finally, the petitioner stated that the deli manager runs the day-to-day operations of the deli, hires and fires employees, purchases food and supplies, and modifies the menu.

The director denied the petition on February 28, 2006, concluding that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. The director reviewed the petitioner's organizational chart and quarterly wage reports and determined that the beneficiary supervises only one full-time employee. The director concluded that the petitioner did not establish "that the beneficiary's assignment is primarily that of managing a full-time subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing non-qualifying duties."

On appeal, counsel for the petitioner asserts that the director erroneously determined that the beneficiary is a "front-line" supervisor. Counsel asserts that the beneficiary's duties "clearly fit within the definition of executive capacity" and "also meet the requirements of a function manager" as defined at 8 C.F.R. § 214.5(j)(2). Counsel further argues that the director misread the organizational chart and quarterly wage reports submitted by the petitioner, noting that the trading division supervisor position was staffed by two different full-time employees during 2004. Counsel also emphasizes the beneficiary's supervision of the deli manager employed by [REDACTED], asserting that the director overlooked evidence documenting her employment.

When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Upon review of the record in this matter and as discussed further below, the petitioner has not established that the beneficiary's duties and those of his claimed subordinates elevate the beneficiary's position to a primarily managerial or executive position.

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). On appeal, counsel suggests that the beneficiary qualifies as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. Counsel suggests as well that the beneficiary may be a "function manager." However, a petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. At a minimum, the petitioner must establish that the beneficiary satisfies the criteria of one or the other capacity. In this matter the petitioner has not established that the beneficiary will perform primarily managerial or primarily executive functions.

The petitioner's detailed description of the beneficiary's duties submitted in response to the director's request for evidence fails to demonstrate what managerial or executive duties the beneficiary performs on a day-to-day basis. For example, although the petitioner stated that the beneficiary "is responsible for all financial

aspects” of the company, implying that he performs management aspects of the financial function, the petitioner also indicated that the beneficiary personally prepares cash flow forecasts, obtains lines of credit, prepares financial statements, balance sheets, profit and loss statements and develops spreadsheets, all non-managerial duties more indicative of an accountant or controller than those of a management-level employee. This conclusion is further supported by the lack of subordinate employees who would perform the routine duties related to bookkeeping, accounting and other day-to-day financial matters. Although the petitioner stated that the beneficiary is responsible for supervising subsidiaries and “managing all corporate assets,” the petitioner failed to elaborate with regard to the actual duties the beneficiary performs with respect to these claimed management functions. Conclusory assertions regarding the beneficiary’s employment capacity are not sufficient. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). Overall, the beneficiary’s finance-related duties, which, based on the petitioner’s representations, account for approximately 50 percent of his time, have not been shown to be managerial or executive in nature.

Similarly, although the petitioner claims that the beneficiary will manage the petitioner’s real estate and trading division, the job description provided does not clearly explain what qualifying duties the beneficiary will perform in conjunction with these responsibilities. For example, the petitioner indicates that the beneficiary is responsible for “all procurement and trading activities,” “approving all purchases,” “personally issu[ing] all purchase orders and negotiat[ing] with all vendors and suppliers related to the real estate division,” and “supervising the management of all real estate properties owned by the holding company.” First, the petitioner did not explain the “procurement and trading activities” in which the U.S. holding company is involved, or identify the “real estate properties” owned by the company, nor did it identify a “real estate division” subordinate to the beneficiary. The petitioner further indicated on its organizational chart that the beneficiary is responsible for supervising a “deli manager” who works for a related company, but failed to include any duties related to this function in the beneficiary’s detailed job description. 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. 1972)). Furthermore, the petitioner did not explain how the beneficiary’s operational duties such as issuing purchase orders and negotiating with suppliers qualify as managerial or executive under section 101(a)(44)(A) or (B) of the Act.

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 show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

In the instant matter, the petitioner has failed to show that non-qualifying accounting and purchasing duties will not constitute the majority of the beneficiary’s time. As previously discussed the beneficiary is personally performing these non-qualifying tasks rather than managing or supervising the performance of

these routine duties by other subordinate employees. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. On appeal, counsel claims that the beneficiary will supervise two supervisory employees including the trading division supervisor and the deli manager. As noted above, the petitioner’s detailed job description for the beneficiary makes no reference to his responsibilities related to managing the deli manager, who is employed by an affiliate of the petitioning company, and therefore has not substantiated that the beneficiary actually supervises this employee. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N at 165. The record shows that the trading division supervisor does have an assistant, but his job description also does not include supervisory duties. Regardless, based on the evidence of record, the beneficiary spends the majority of his time performing financial and accounting functions, and does not supervise subordinates performing non-qualifying duties associated with these functions. Even if the beneficiary does manage an employee who can be considered a “supervisor,” the record does not support a finding that supervision of supervisory, professional or managerial employees is the beneficiary’s primary responsibility.

Counsel’s assertion that the beneficiary’s position satisfies the criteria of a functional manager is not persuasive. If a petitioner claims that the beneficiary is managing an essential function or directing the management of a 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 or directing the management of the 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. 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. *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. at 604. In this matter, the petitioner has not provided evidence that establishes that the beneficiary satisfies the criteria of a manager who manages an essential function. Whether the beneficiary is an “activity” or “function” manager turns in part on whether the petitioner has sustained its burden of proving that his duties are “primarily” managerial. As discussed above, the petitioner has not satisfied this essential element of eligibility.

Finally, the record does not support a finding that the beneficiary will be employed in an executive capacity. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of

managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-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 petitioner has not established that the offered position meets any of these criteria.

Based on the foregoing discussion, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will comprise primarily executive or managerial duties. For this reason, the appeal will be dismissed.

The next issue in this proceeding is whether the petitioner established that the beneficiary was employed by the foreign entity in a managerial or executive capacity for at least one year within the three years preceding his entry to the United States as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

In its April 19, 2004 letter submitted in support of the petition, the petitioner provided the following description of the beneficiary's employment with the foreign entity:

[The beneficiary] established and managed the Internal Audit Department for [the foreign entity]. During that time frame, besides his full time workload at the headquarters in the [foreign entity], [the beneficiary] was provided with intensive training at Mostafa Shawki & Co[.] [,]one of the leading audit firms in Egypt[,] in the area of internal auditing. Among other things, he performed audits of financial statements for various size companies as part of that training program. [The beneficiary] received only general supervision from the Chief Financial Officer, a member of [the foreign entity's] Board of Directors. [The beneficiary] had complete control over this important function and his skills and knowledge were invaluable to us.

The beneficiary's resume noted his employment with the foreign entity from March 2000 until May 2001, and included the following description of his role as "Internal Audit Manager" of the foreign entity:

- Training experience at [REDACTED], Cairo, Egypt, March 2000-March 2001
  - Mainly performed [sic] audits of financial statements and completed several company valuations of firms ranging in value from 50 million – 100 million Egyptian pounds.
    - Financial statement audits were conducted on small and medium size companies with employees ranging from as low as 25 to many as 499.
    - Conducted audits of companies from several different industries. . . .
- Returned to [the foreign entity], Cairo, Egypt, March 2001 – May 2001
  - Conducted several audits on company books including assets such as accounts receivable and cash.

- Also conducted several duties on liability accounts such as accounts payable and provisions for losses.
- Improved the over all quality of financial reporting within the group of companies by ensuring that GAAP is being correctly applied.
- Improved the petty cash policy by implementing in tighter control procedures.

In his February 3, 2005 request for evidence, the director instructed the petitioner to provide payroll records to document the beneficiary's employment with the foreign entity for the year preceding his entry to the United States as a nonimmigrant, as well as the following additional evidence to establish that the beneficiary was employed by the foreign entity in a managerial or executive capacity: (1) the foreign entity's organizational chart depicting the managerial hierarchy and staffing levels related directly to the beneficiary, including the names, job titles, job duties, educational level and annual salaries for all employees who worked under the beneficiary's supervision; and (2) a detailed description of the beneficiary's duties, including the approximate percentage of time he devoted to each duty.

In response, the petitioner submitted translated copies of the beneficiary's payroll receipts for the period March 2000 to April 30, 2001, issued by "Specialized Contracting and Industries Company [REDACTED] Group)." The petitioner also submitted a May 2, 2001 letter from a director of the foreign entity confirming the beneficiary's employment as the "junior manager" of the group's internal accounting audit department from March 1, 2000 to May 20, 2001, and stating that during this time "he acquired training in accounting auditing at the prestigious auditing firm [REDACTED]"

The petitioner provided an organizational chart for the foreign entity depicting the beneficiary as the manager of the internal audit department, reporting directly to the executive directors of the organization. The chart indicates that the beneficiary supervised an accounts receivable auditor, an accounts payable auditor and an administrative employee.

The director denied the petition on February 28, 2006 concluding that the petitioner had not established that the beneficiary was employed in a managerial or executive capacity with a qualifying organization "in the three years before the petition was filed." The director quoted the May 2, 2001 letter from the foreign entity, which noted the beneficiary's position as a "junior manager" of the accounting department and subsequent period of training with an external auditing firm prior to his transfer to the United States.

On appeal, counsel for the petitioner asserts that the director erred by finding that the beneficiary did not work for one year as a manager or executive with the foreign entity. Counsel notes that the beneficiary had already been in the United States as an H-1B nonimmigrant for more than three years at the time the petition was filed, and therefore the director was required to examine the one-year period during the three years prior to the beneficiary's entry into the United States to perform services for the petitioning company, pursuant to 8 C.F.R. § 204.5(j)(3)(B). Counsel further states: "even if, *arguendo*, [the director] intended to state that the beneficiary's qualifying employment was not managerial or executive, [the director] ignores the substantial evidence submitted in response to the request for information." Counsel questions the director's reliance on the May 2, 2001 letter from the foreign entity, noting that the letter was submitted for the purpose of confirming the beneficiary's employment dates with the foreign entity, not to provide a description of the

beneficiary's duties. Counsel states that the petitioner's April 19, 2004 letter, considered in conjunction with the foreign entity's organizational chart, is sufficient to establish that the beneficiary managed professional employees and "was responsible for the internal audit department, an essential function affecting all aspects" of the foreign entity. In support of the appeal, the petitioner submits an April 5, 2006 letter from the chairman of the foreign entity, who further describes the beneficiary's duties while employed by the foreign company.

Counsel's assertions are not persuasive. On review, the AAO finds the foreign entity's payroll records for the beneficiary are sufficient to establish that he completed the required one year of employment within the three years preceding his admission to the United States as a nonimmigrant. However, as discussed below, there is insufficient evidence to support the petitioner's or counsel's assertions that the beneficiary was employed in a managerial or executive capacity during this period.

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 evidence submitted with the initial petition and in response to the director's request for evidence indicated that the beneficiary spent the majority of his 14 months of employment with the foreign entity undergoing training in internal auditing with another firm, rather than managing the foreign entity's internal auditing function and supervising professional employees, as claimed by the petitioner on appeal. The petitioner's statement that the beneficiary worked full-time as the foreign entity's internal audit manager while completing this "intensive training" does not seem plausible, particularly in light of the beneficiary's statement in his resume that he spent one year completing his "training experience" with the auditing firm and "returned to" the foreign entity in March 2001, only two months prior to his transfer to the United States.

Further, all of the duties described in the beneficiary's detailed resume were related to directly performing auditing tasks, rather than to supervising a subordinate staff of professionals or managing an essential function of the foreign organization. In addition, the May 2, 2001 letter prepared by the foreign entity prior to his transfer to the United States referred to him as the "junior manager" of the internal audit department. Although counsel clarifies on appeal that this letter was not intended to describe the nature of the beneficiary's duties with the foreign entity, there is no reason to doubt the accuracy of the information contained therein, namely that the beneficiary was a "junior manager" who was assigned to acquire training in accounting/auditing with an outside auditing firm. Overall, the evidence suggests that the beneficiary was hired by the foreign entity as a management trainee rather than as a manager or executive as defined at section 101(a)(44)(A) or (B) of the Act. Accordingly, the organizational chart submitted in response to the director's request for evidence, which indicates that the beneficiary managed two auditors and an administrative employee, while undergoing training in auditing himself, is not credible. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner has not established that duties performed by the beneficiary while undergoing "intensive training" during his employment with the foreign entity were primarily managerial or executive in nature.

The AAO acknowledges the submission of a new letter on appeal in which the foreign entity's chairman seeks to clarify the nature of the beneficiary's duties while employed by the foreign entity. In this case, the director

specifically requested additional evidence to clarify the beneficiary's actual duties while employed by the foreign entity and the percentage of time he devoted to each of those duties. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Even if the AAO did consider the foreign entity's letter submitted on appeal, the letter fails to describe the beneficiary's actual duties or indicate the percentage of time the beneficiary devoted to each duty. In addition, the statements made in the letter are inconsistent with the evidence submitted in support of the petition. Whereas previously the petitioner, the beneficiary and the foreign entity indicated that the beneficiary underwent a prolonged period of training in internal auditing with a prestigious auditing firm outside the corporate group, the foreign entity now states that the beneficiary was hired specifically to develop the foreign entity's internal audit department and completed only a "brief orientation" related specifically to the structure, policies and practices of the foreign entity before assuming authority for developing company-wide policies, procedures and short- and long-term plans. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. 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 not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The third issue in this matter is whether the petitioner established that the U.S. company has a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate, or subsidiary of the foreign entity.

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.

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*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.

In an April 19, 2004 letter submitted in support of the petition, the petitioner referred to the beneficiary's foreign employer, the [REDACTED], as its "mother group." The petitioner provided information from the web site of one of the petitioner's U.S. subsidiaries which lists various [REDACTED] Group companies. The information refers to the petitioner as "affiliated with the [REDACTED] Group of companies in Egypt." The petitioner also submitted its 2003 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates at Schedule K that one shareholder, based in Egypt, owns 100 percent of its stock. In addition, the petitioner provided copies of Forms 5472, Information Return of a 25% Foreign-Owned U.S. Corporation, for the U.S. company and its subsidiaries, all of which identify "[REDACTED]" as a related party and 25% foreign shareholder. The Forms 5472 were accompanied by an "ownership statement" which states the following: "[REDACTED] [a] citizen and resident of Egypt owns directly or indirectly over 25% of: [REDACTED] and [REDACTED] corporations which own 100% of the stock of [the petitioning company]."

On February 3, 2005, the director requested additional evidence to establish that the foreign and U.S. company have a qualifying relationship, including: (1) a copy of the foreign entity's annual report listing all affiliates, subsidiaries and branch offices and percentages of ownership; (2) a copy of the minutes of the meeting for the foreign company that lists the shareholders and the number and percentage of shares owned; (3) a detailed list of owners for the foreign entity indicating the percentage interest owned by each shareholder; (4) the foreign entity's articles of incorporation; (5) evidence to show that the foreign parent company has paid for its interest in the U.S. entity, including copies of original wire transfers, canceled checks, deposit receipts, bank statements, etc.; (6) a copy of the U.S. entity's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts; (7) a copy of the minutes of the meeting for the U.S. company that lists the stock shareholders and the number and percentage of shares owned; (8) copies of all of the U.S. company's stock certificates issued to date; and (9) a copy of the U.S. company's stock ledger showing all stock certificates issued to the present date including total shares of stock sold, names of shareholders and purchase price.

The petitioner's response to the director's request for evidence included a March 12, 2004 letter from [REDACTED] the U.S. attorney for [REDACTED] who explained the ownership of the petitioning company as follows:

Mr. [REDACTED] is the President, sole director, and indirect owner of [the petitioner] a California corporation, by way of the following ownership trail. [The petitioner] was formed in December 1992 for the purpose of holding ownership to several other California corporations, all wholly owned by Mr. [REDACTED] [The petitioner] is a wholly-owned subsidiary of [REDACTED], a Commonwealth of Bahamas company, formed in May 1992 for the primary purpose of holding sole ownership of [the petitioner's] stock and other non-corporate investment interests of Mr. [REDACTED] in the U.S. . . . Ismos is beneficially owned by the Hind Trust, a Cook Islands trust, formed in March 1995 for the purpose of holding title to all of the stock of [REDACTED] through its custodial Trustee, [REDACTED] a Cook Islands company. Mr. [REDACTED] is the sole director of Pacical Assets. Both the Hind Trust and Pacical Assets are represented in the Cook Islands by [REDACTED] their registered agent. The Hind Trust and Pacical Assets were formed by, and are under the exclusive control of, Mr. [REDACTED]. The beneficiaries of the Hind Trust, the ultimate owners of [the petitioning company] are Mr. [REDACTED] and his immediate family members.

The petitioner's response included the following supporting documents: (1) its December 18, 1992 articles of incorporation authorizing the company to issue one million shares of stock; (2) its February 26, 1993 Notice of Transaction Pursuant to Corporations Code Section 25102(f) confirming the sale of common stock in exchange for consideration of \$1,250,000; (3) the U.S. company's stock certificate number 1, issuing 1,250 shares to [REDACTED], dated January 11, 1993; (4) a January 11, 1993 organizational action by the incorporator of the petitioning company, indicating the issuance of 1,250 shares of common stock to [REDACTED] in exchange for \$1,250,000; (5) the petitioner's stock transfer ledger; and (6) a certificate of incorporation and memorandum of association for [REDACTED]. The petitioner also submitted evidence that a [REDACTED] and [REDACTED] each hold a 50 percent interest in Ismos as holders "exclusively vested in [REDACTED] as trustees for the Hind Trust, the ultimate owners. The petitioner provided a certificate of incorporation for [REDACTED] and its memorandum and articles of association identifying [REDACTED] as the owner of all of its issued 1,000 shares.

Finally, the petitioner submitted an expired Certificate of Registration of an International Trust for the Hind Trust, and a partial copy of a March 16, 1995 deed of settlement between [REDACTED] as settler and [REDACTED] (custodian trustee) and [REDACTED] (managing trustee). The deed of settlement did not include an attached schedule identifying the beneficiaries of the trust.

With respect to the ownership of the foreign entity, the petitioner noted that it was submitting evidence of ownership for four of the companies within the [REDACTED] Group of corporations, including Specialized Contracting and Industries Company, Technocrete, United Investment Group, and [REDACTED]. The petitioner noted that the companies are owed by the [REDACTED] family with the largest share being for Mr. [REDACTED], who is also the ultimate owner of the U.S. company. The evidence submitted shows that [REDACTED] owns: 1,020 of 2,000 shares issued by [REDACTED] 900 of 1,500 shares issued by [REDACTED]

Technocrete; and 19,507 of 100,000 shares issued by Specialized Contracting & Industries Group. The list of owners for United Investment Group lists [REDACTED] as one of six individual shareholders and also shows that the company had a public offering, but does not identify the percentage interest owned by Mr. [REDACTED]. The beneficiary's payroll receipts show that he was paid by Specialized Contracting and Industries Company while employed with the [REDACTED] Group overseas.

The director denied the petition concluding that the petitioner had not established a qualifying subsidiary relationship with the beneficiary's foreign employer. The director noted that, based upon the petitioner's 2003 IRS Forms 1120, Schedule L, the petitioner had issued stock subsequent to the initial \$1,250,000 offering that was not accounted for by a stock certificate or on the petitioner's stock transfer ledger. The director further noted that the petitioner had failed to provide proof of stock purchase by the foreign entity in the form of original wire transfers or other documentary evidence to show that the foreign company paid for its interest in the petitioner. The director concluded that the petitioner had not provided unerring and concise evidence to substantiate the claimed qualifying relationship.

On appeal, counsel for the petitioner asserts that the director's decision "completely misstates the evidence" and contends that the petitioner never claimed to be a subsidiary of the beneficiary's foreign employer. Rather, counsel asserts that the petitioner consistently claimed that the companies are affiliates "as they are ultimately owned and/or controlled by the same individual. Proof of stock purchase is not required in this situation, merely proof of ownership and control." Counsel states that the petitioner submitted sufficient evidence to establish the ultimate ownership of the Egyptian and the petitioning company.

In his April 5, 2006 letter, the chairman of the foreign entity states that the "initial investments" by the foreign entity were made in the early 1980s and notes that information regarding the relationship between the two companies at the time was submitted in the files of other individuals." He further notes that the U.S. companies were "completely reconstructed" in 1992 and that, due to documentary retention policies, the foreign entity no longer has copies of the initial financial documentation.

Counsel's assertions are not persuasive. The petitioner has not submitted sufficient evidence to establish that the U.S. and foreign entities have a subsidiary relationship.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant

annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See 8 C.F.R. § 204.5(j)(3)(ii).* As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Contrary to counsel's assertions on appeal, the petitioner has not "amply and voluminously" documented the ownership and control of the United States and foreign entities. With respect to the petitioner's ownership, the evidence indicates that the ultimate ownership of the U.S. company lies with the beneficiaries of The Hind Trust, who have been identified only as "Mr. [REDACTED] and his immediate family members." As noted above, the petitioner provided an incomplete copy of the deed of trust and failed to provide a list of the beneficiaries and their resulting ownership interest in the U.S. company. Without this information, the AAO cannot conclude that Mr. [REDACTED] is ultimately the majority owner of the U.S. entity. 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. 1972)).

In addition, the AAO notes that the statement of ownership submitted as a supplement to the petitioner's federal income tax returns states that [REDACTED] owns "over 25%" of "[REDACTED] and [REDACTED]" which in turn own 100% of the stock of the petitioning company. This statement suggests that the U.S. company has another shareholder, [REDACTED], that is not identified on the petitioner's stock certificates, stock ledger, or otherwise mentioned by the petitioner in the record. Such a conclusion is further supported by the increase in the value of the petitioner's common stock, as reported on Schedule L of the company's 2002 and 2003 income tax returns. As noted by the director, the value of the petitioner's common stock increased from \$1,250,000 in 2001 to \$1,620,000 by 2003, and the petitioner has not accounted for the issuance of any stock following the initial offering to ISMOS Enterprises Limited in 1993. 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).

Finally, as noted by the director, the petitioner failed to provide the requested evidence that the owners of the U.S. company have in fact paid for issued stock. The foreign entity's explanation on appeal that such

documentation is no longer available is not sufficient, nor is the statement that such evidence was submitted with previous petitions. In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the records of nonimmigrant proceedings are not combined with those previously filed by the same petitioner.

With respect to the beneficiary's foreign employer, the AAO notes that the petitioner consistently refers to the foreign employer as the [REDACTED]. The petitioner claims that the group companies are owned by the [REDACTED] family with the "largest share" being owned by [REDACTED]. As evidence of the ownership of the "group," the petitioner provided evidence of the ownership of four separate companies. The evidence submitted does not establish common ownership among the individual [REDACTED] Group" companies. As noted above, the company that issued the beneficiary's paychecks is "Specialized Contracting and Industries Company." The evidence submitted shows that [REDACTED] is one of fifteen shareholders of this company and owns a less than 20 percent interest in it. There was no additional evidence submitted to establish that he in fact controlled this company based on his minority interest. Therefore, while [REDACTED] may be a shareholder of all of the group companies, and a majority shareholder of some of the group companies, the evidence is insufficient to establish that he in fact owned and controlled the company that employed the beneficiary.

Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In order to establish "de facto" control of both the U.S. and foreign entities by an individual, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm. 1982). A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999).

The AAO recognizes a significant amount of common ownership among the group companies by members of the [REDACTED] family. However, this familial relationship does not aid the petitioner in establishing a qualifying relationship for the purposes of this immigrant visa classification. The record is insufficient to establish that the companies share common ownership and control by the same individual or by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity. *See* 8 C.F.R. § 204.2(j)(2). The petitioner has not substantiated its qualifying relationship with the foreign entity. For this additional reason, the petition may not be approved.

The fourth and final issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$45,000.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the

prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The director reviewed the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for the 2004, 2003 and 2001 years, and noted that the petitioner reported a negative taxable income in all three years. The director concluded that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal counsel for the petitioner cites a May 4, 2004 memorandum outlining CIS guidance for determining the issue of a petitioner's ability to pay. Counsel concedes that the petitioner experienced a loss in the referenced tax years, but contends that the director overlooked other evidence in the record that establishes the petitioner's ability to pay the proffered wage, and failed to follow the guidelines set forth in the memorandum.

Upon review, the AAO will withdraw the director's determination with respect to the petitioner's ability to pay the proffered wage.

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did employ the beneficiary as an H-1B temporary worker at the time the petition was filed on May 17, 2004. The petitioner submitted its California Form DE-6, Quarterly Wage and Withholding Reports for all four quarters of the 2004 year, which confirm that the beneficiary received wages of \$46,560. Accordingly, the petitioner has established its ability to pay the proffered salary.

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.