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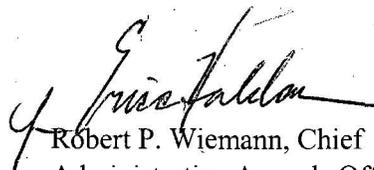
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, Chief
Administrative Appeals Office

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

The petitioner filed the instant immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is doing business as a trader, wholesaler, and retailer of jewelry and diamonds, and claims to be an affiliate of the beneficiary's foreign employer. 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 would be employed by the United States entity in a primarily managerial or executive capacity; (2) the foreign and United States entities enjoyed a qualifying relationship at the time of filing; or (3) at the time of filing the petitioner had the ability to pay the beneficiary's proffered wages of \$3,200 per month.

On appeal, counsel for the petitioner contends that the director incorrectly concluded that the beneficiary was not eligible for the requested visa classification. In a brief submitted in support of the appeal, counsel challenges the director's findings. Counsel also submits additional documentary 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 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.

The AAO will first address the issue of whether the beneficiary would be employed by the United States entity 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 immigrant visa petition on June 24, 2004 noting the beneficiary's employment as president of the six-person company. In an appended letter, dated June 10, 2004, the petitioner noted the beneficiary's additional role as the company's operations manager, and explained that the beneficiary would directly supervise the company's general manager¹ while delegating job duties to its marketing associate. In the same letter, the petitioner provided the following outline of the beneficiary's proposed job duties:

¹ The AAO notes that the individual referenced by the petitioner as its vice-president and general manager is not listed as an employee on the quarterly tax return relating to the period during which this petition was filed. The petitioner noted on an accompanying organizational chart that the employee was removed from its payroll until after the adjudication of the instant petition and the individual's receipt of his work permit extension. A different individual was subsequently identified as the company's general manager on a later organizational chart.

1. Planning, developing, establishing and modifying new policies and objectives of the US office, [and] [a]ct as a [l]iaison between the foreign entity and the US on a[n] [as] need[ed] basis (10%)
2. Supervise and manage [the] store manager who reviews inventory levels in conjunction with sales and purchase orders to ensure proper inventory levels [are] available at all times. Facilitates the supply and demand factor of products affecting the operations of the company. Discusses needs with managers and authorizes orders of more stones and settings. (20%)
3. To visit trade shows and research about newer types of jewelry, contact new diamond and colored stone vendors and pursue higher end customers to ensure company awareness. Deal with all Filipino publicity and advertising and enter the company into contracts with the magazines and other mediums (15%)
4. To review and approve major sales deals and finalize points of a transaction in which the [s]alesperson or [g]eneral [m]anager is unable to resolve. (15%)
5. To review employees work/sales figures, discussions and meetings with [g]eneral manager and sales associates regarding major business issues, [and] employee training (15%)
6. Oversee and manage all financial budget and personnel salary operations as well as reviewing [the] [c]ompany's financial position with the [c]ompany's accountants (10%).
7. Reviewing/[a]llocating sales leads and following up on their progress with vendors and consignment sellers across North America. Head sales expansion strategies to neighboring countries; Canada, Mexico, and Central America (15%)

The petitioner further explained that:

[The beneficiary] will continue to be the individual responsible to plan and develop the overall business of our corporation and she will see to the negotiating of contracts, [and] the hiring and firing of personnel including managers and supervisory staff. In her executive capacity, [the beneficiary] will set policy and strategy for the business and also negotiate all the necessary financial affairs required for the operation of the business.

The petitioner submitted an organizational chart of the United States company, in which the beneficiary was depicted as overseeing the following personnel: a vice-president and general manager, a bookkeeping-collections person, a marketing associate, two store salespersons, a marketing coordinator, a delivery person, and three jewelry setters.

On November 30, 2005, the director issued a request for additional evidence directing the petitioner to submit the following documentation: (1) an organizational chart of the United States company identifying all employees under the beneficiary's supervision; (2) a brief job description of the job duties performed by each of the workers supervised by the beneficiary, their educational levels, and the source by which the employees are paid; and (3) copies of the quarterly tax returns filed by the petitioner for the first and second quarters of 2005.

Counsel responded in a letter dated February 17, 2006, referencing an attached organizational chart of the petitioning entity, which identified the beneficiary's subordinate employees as consisting of a general manager, a marketing associate, a marketing coordinator, a store salesperson, and a "[s]alesperson and

[d]eliveries." The AAO notes that in addition to excluding positions initially identified by the petitioner on its organizational chart, the latter organizational chart reflected a change in the positions held by the workers employed at the time of filing. Counsel also submitted copies of the requested quarterly tax returns.

In a decision dated March 15, 2006, the director concluded that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. The director considered the petitioner's organizational charts, as well as the wages paid by the petitioner to its employees. The director stated that the compensation received by the beneficiary's lower-level employees during the years 2001 through 2004 suggests that they were employed on a part-time basis. The director also stated that the petitioner had failed to demonstrate whether any of the employees held a baccalaureate degree, and therefore, may not be considered professional or managerial employees.

The director further concluded that the "nature of the petitioner's business" would not support the employment of a manager or executive. The director concluded that the beneficiary would likely assist in the performance of the business' day-to-day non-supervisory duties. The director also noted that merely assigning the beneficiary the job title of president does not demonstrate "that such a position will truly be executive in nature by virtue of the duties to be performed." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on April 13, 2006. In a subsequently submitted May 9, 2006 appellate brief, counsel contends that the beneficiary's proposed position satisfies the statutory criteria of both "managerial capacity" and "executive capacity." With respect to the beneficiary's employment as an executive, counsel states that the beneficiary would direct the company's operations through her general manager, which would include setting "policies, procedures, and guidelines that are to be followed by the other employees," and "[making] all decisions concerning the business strategy, fiscal management, and the hiring and firing of personnel," as well as those related to budget expenditures and the use of resources. Counsel explains that the beneficiary "is responsible for the [company's] overall well-being," and that, in connection with this responsibility, she reviews and analyzes its financial status and determines financial and sales goals, which are communicated to the lower-level employees through the general manager. Counsel further claims that as an executive, the beneficiary exercises wide latitude in discretionary decision-making, in that she makes all decisions related to the company's "capital resources, assumption of credit, expansion of operations, . . . and marketing []," and negotiates, approves and signs all contracts on behalf of the petitioner. In this role, the beneficiary "also developed and implemented the company website, proposed incentives for existing clients, such as gift cards and loyalty cards, and proposed sponsorship of various concerts and community events on behalf of the business."

In connection with the beneficiary's employment in a primarily managerial capacity, counsel states that the beneficiary "manages the company by overseeing the general manager and marketing coordinator . . . [and] has sole authority to hire and fire personnel and exercises wide discretion over all day-to-day operations of the corporation."

Counsel challenges the director's finding that the beneficiary would not be employed as a manager because of the lack of a subordinate "professional" staff, stating that the beneficiary's direct subordinate, the general manager, holds a baccalaureate degree in accounting, and manages four employees who are providing the services of the petitioner's jewelry business. Counsel states that each of the four lower-level employees also holds bachelor degrees, and contends that Citizenship and Immigration Services (CIS) "is incorrect in its statement that the employees supervised by the [b]eneficiary are neither professional nor managerial for

immigration purposes." Counsel also disputes the director's conclusion that the petitioner's lower-level staff is not employed on a full-time basis, claiming that the compensation identified on the petitioner's quarterly wage reports and 2005 federal income tax return demonstrate otherwise.

Finally, counsel contends that CIS incorrectly relied on the size of the petitioner's staffing levels when stating that the nature of the petitioner's business would not support the employment of a manager or executive. Counsel states:

The purpose of the business is to promote the sale of retail and wholesale jewelry to upper and middle class income groups in and around the Los Angeles area. A big part of the business' strategy involves catering to the Filipino community. . . . It does not take a big company with many employees to achieve such a goal. In fact, many jewelry retailers in the jewelry district located in downtown Los Angeles are small businesses. It would be irrational to assume that these businesses don't require a [p]resident or [o]perations [m]anager to oversee the operations of the business. Moreover, as explained above, [the] [b]eneficiary oversees the [g]eneral [m]anager . . . [who], in turn directly supervises the work performed by the [m]arketing [a]ssociate, [m]arketing [c]oordinator, [s]tore [s]alesperson, and [s]alesperson/[d]eliveries worker who are also professionals. Thus [the] [b]eneficiary does not perform the daily services of the company herself, but rather *supervises* an individual who directs others who provide the services of the company. In this capacity, she performs duties that are both executive and managerial in nature.

(Emphasis in original).

Upon review, the record does not demonstrate that the beneficiary would be employed by the United States 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).

While the beneficiary is represented as satisfying the statutory requirements of both "managerial capacity" and "executive capacity," the record is ambiguous as to the specific managerial or executive job duties associated with her job responsibilities. For example, the beneficiary is represented as acting as a liaison between the United States and foreign companies. The petitioner, however, does not explain the beneficiary's role as a liaison between the companies or specify her related managerial or executive job duties. Nor does the petitioner explain why the beneficiary's responsibilities of attending trade shows, researching new styles of jewelry, contacting stone vendors, or pursuing "higher end customers" should be considered managerial or executive in nature. *See* §§ 101(a)(44)(A) and (B) of the Act. Additionally, the record lacks detail as to the managerial or executive job duties performed by the beneficiary in relation to her responsibility of "[f]acilitat[ing] the supply and demand factor of products affecting the operations of the company." The AAO notes that counsel does not address these responsibilities on appeal. 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).

Taking into account the beneficiary's limited job descriptions as well as her other job responsibilities that are not managerial or executive in nature, it appears that the beneficiary would not be employed in a primarily

managerial or executive capacity, as claimed by counsel, but rather, would be responsible for performing many of the petitioner's day-to-day functions. The beneficiary appears to be personally responsible for contacting the petitioner's vendors, attending trade shows, handling the company's advertising and publicity campaigns in the Philippines, negotiating and entering into marketing contracts, "[h]ead[ing] sales expansion strategies" outside the United States, developing and expanding the company's website, and researching new jewelry designs. Information contained in the petitioner's June 2004 business plan corroborates the beneficiary's role in the performance of the company's inventory function, as she is identified as the business' sole contact with suppliers and distributors. Specifically, the petitioner emphasized the beneficiary's ability to speak several languages, including Farsi and Japanese, which the petitioner identified as "a 'must have' in communicating with [the company's] suppliers and distributors." The petitioner did not identify any other employees who had the capacity to communicate in Farsi and Japanese. Despite counsel's claims otherwise, the record suggests that the beneficiary would be performing non-managerial and non-executive administrative and operational functions of the petitioner's business. The AAO notes that 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).

The petitioner's staffing levels do not represent that the beneficiary would be relieved from performing the non-qualifying job duties associated with the petitioner's sales, advertising, marketing, purchasing, and inventory functions. The record contains inconsistencies as to the positions occupied in the petitioning entity at the time of filing. There is insufficient evidence that the petitioner employed a general manager when the petition was filed. As conceded by the petitioner, its original general manager is not identified on its quarterly tax returns or payroll records. The new general manager subsequently identified by the petitioner on its revised organizational chart was initially employed as the company's bookkeeper-collections person, a position that was omitted from the latter organizational chart. Additionally, except for the petitioner's note on its initial organizational chart of using jewelry setters on an as needed basis, the petitioner does not address the performance of these tasks, identify the use of jewelry setters on its revised organizational chart, or corroborate its claim of using outside jewelry setters with independent and objective evidence. Counsel did not address the revisions made to the petitioner's staffing levels on its second organizational chart. As a result of the unexplained inconsistencies, the AAO cannot conclude that the petitioner employed a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO further notes a discrepancy in the claimed staffing levels, which, while not determinative of the beneficiary's employment capacity, raises a question as to the credibility of the representations made by the petitioner. Based on the petitioner's quarterly tax return ending June 30, 2004, the period during which the instant petition was filed, the petitioner's delivery person, who was depicted on the organizational chart as holding a lower-level position in the company, was receiving the highest amount in compensation from the petitioner. The petitioner's general manager was represented as receiving \$50.00 less per quarter than the delivery person, while the remaining employees received between \$300 and \$600 less per quarter. While not an exorbitant difference in salaries, the general manager is depicted as holding a position two levels above that of the delivery person. The credibility of the petitioner's claimed staffing levels is therefore questionable. 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. *Id.*

Counsel correctly observes on appeal 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.*

As discussed above, the petitioner has not presented a clear depiction of the positions occupied in its organization at the time of filing. Based on the record as presently constituted, it does not appear that the petitioner's reasonable needs might plausibly be met through the beneficiary's purported employment in a primarily managerial or executive capacity.

Counsel represents on appeal that the purpose of the petitioner's business is to promote jewelry to consumers in Los Angeles. Without clarification of the petitioner's true staffing levels and a description of the job duties performed by each of the lower-level employees, particularly those represented as the marketing associate and marketing coordinator, the AAO cannot determine whether the petitioner's reasonable needs in light of its overall purpose and stage of development are satisfied. Rather, as already discussed, it appears that the beneficiary would be personally responsible for performing many of the administrative and operational tasks of the petitioner's business, including those associated with its sales, purchasing, inventory, marketing, and advertising functions.

Counsel claims on appeal that the beneficiary's subordinates hold baccalaureate degrees, and therefore, are professional employees. The AAO recognizes the copies submitted by counsel of the employees' college certificates conferring bachelor degrees. However, even if the beneficiary's subordinates are classified as professional, managerial or supervisory employees, the petitioner is required to satisfy each of the four criteria of "managerial capacity" in order for the beneficiary to be considered a manager. See § 101(a)(44)(A) of the Act. Here, the limited record fails to substantiate the petitioner's claim of employing the beneficiary in a primarily managerial or executive capacity.

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

The AAO will next consider the issue of whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing.

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.

In a June 10, 2004 letter submitted with the Form I-140, the petitioner represented the existence of an affiliate relationship between the foreign and United States entities, stating that the beneficiary owned both organizations. As evidence of the beneficiary's ownership of the petitioning entity, the petitioner submitted the minutes from a May 18, 2000 organizational meeting stating that the beneficiary purchased 600 shares of the petitioner's common stock in exchange for furnishing \$60,000, as well as a June 5, 2000 stock certificate identifying the beneficiary as the owner of 600 shares of stock.

With respect to the ownership of the foreign organization, the petitioner submitted: (1) an "Affidavit of Cancellation," dated February 2, 2000, in which the registered owner of the foreign entity, [REDACTED] noted his intent to cancel his certificate of registration and transfer ownership of the foreign entity to the beneficiary, who he noted was "the real owner who financed everything in order to establish aforementioned [foreign entity]"; (2) a copy of [REDACTED]' certificate of registration; (3) a February 16, 2000 certificate of registration registering the foreign entity in the name of the beneficiary; (4) an application made by the beneficiary as a sole proprietor for a "Mayor's Permit" to conduct business in general merchandising; (5) a January 24, 2004 "Mayor's Permit" allowing the beneficiary to engage in business overseas; and (6) copies of the company's tax receipts.

In his November 30, 2005 request for evidence, the director requested that the petitioner submit the following documentary evidence to establish the existence of a qualifying relationship between the United States and foreign organizations: (1) original wire transfer receipts identifying funds transferred from the beneficiary to the petitioning entity, or if funds did not originate with the beneficiary, an explanation of the source of the funds, and their affiliation to the beneficiary or to the foreign or United States entities; (2) the petitioner's bank statements corroborating its receipt of funds as consideration for the stock purportedly sold to the beneficiary; (3) a copy of the petitioner's California notice of transaction; and (4) the petitioner's stock transfer ledger reflecting all stock issuances and shareholders.

In his February 17, 2006 letter, counsel referenced bank statements belonging to an account held by the beneficiary at a bank in the Philippines as evidence that the beneficiary furnished consideration for her purported purchase of stock in the United States company. Counsel explained that the statements reflected the beneficiary's withdrawal of \$60,000, which counsel stated the beneficiary subsequently deposited in an account held by the petitioning entity.

In the attached documentation, counsel submitted a copy of a Citibank passbook from an account held at a bank in the Philippines that bears the name of the beneficiary as the account holder. An attachment depicted a copy of a passbook page that appears to reflect a deposit of \$60,000 on February 24, 2000. The AAO notes that the

second passbook page does not reflect an account number. Counsel provided a copy of the petitioner's bank statement for the period of June 26, 2000 through June 30, 2000, which reflected a deposit on June 26, 2000 in the amount of \$57,000. Counsel again submitted copies of the minutes from the petitioner's May 18, 2000 meeting, which identified the beneficiary as the owner of 600 shares of stock. Although counsel referenced in his letter the requested notice of transaction and stock transfer ledger, none have been provided for review. 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).

In his March 15, 2006 decision, the director concluded that the foreign and United States entities did not enjoy a qualifying relationship at the time of filing. The director recognized that the beneficiary had been identified as the owner of 600 shares of the petitioner's stock in its organizational minutes, yet noted that the information contained on the petitioner's 2001 through 2004 federal income tax returns did not corroborate the beneficiary's purchase of stock. Specifically, the director noted that Schedule L of the tax returns failed to assign a value to the petitioner's common stock. The director also noted that the petitioner had not issued a stock certificate to the beneficiary. The AAO notes that the record contains a copy of the stock certificate issued to the beneficiary on June 5, 2000. The director stated that the petitioner had failed to provide "unerring and concise evidence" of a qualifying relationship between the foreign and United States entities. Consequently, the director denied the petition.

In his appellate brief, counsel claims that the foreign and United States entities are affiliates. Counsel references the Affidavit of Cancellation, Certificate of Registration and Mayor's permit as evidence of the beneficiary's ownership of the foreign entity. Counsel also identifies the copy of the beneficiary's bank statement from her bank account in the Philippines as "demonstrating how she obtained the \$60,000 necessary to buy the shares of stock for the U.S. [p]etitioning entity." Counsel states that the beneficiary owns the entire amount of stock issued by the petitioner, and therefore, is the sole shareholder. Counsel contends that the beneficiary's ownership of both the foreign and United States companies demonstrates the existence of a qualifying affiliate relationship. Counsel again submits the above-mentioned affidavit, certificate, and permit, as well as the petitioner's issued stock certificate.

Upon review, the petitioner has not demonstrated that the foreign and United States entities enjoyed an affiliate relationship at the time of filing.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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.*, 19 I&N Dec. at 364-365. 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.

The record demonstrates that the beneficiary is the sole proprietor of the foreign organization. The petitioner, however, has not established the beneficiary's ownership of the United States company.

The petitioner's obligation in establishing "ownership" is twofold; the petitioner is required to present concrete documentary evidence such as a stock certificate, stock transfer ledger, or relevant minutes from organizational meetings naming the beneficiary as a stockholder of the United States organization, as well as documentation demonstrating the means by which the beneficiary acquired her purported share in the petitioning entity. While the petitioner's issued stock certificate and the minutes from its organizational meeting suggest that the beneficiary is the sole stockholder of the company, the record contains limited evidence demonstrating that the beneficiary furnished consideration in exchange for her purported stock ownership.

Here, the petitioner submitted a bank statement reflecting its receipt of \$57,000 on June 26, 2000 and a copy of a passbook account held by the beneficiary in the Philippines. As previously noted, the second page of the passbook, which incidentally does not portray an account number, appears to reflect a deposit of \$60,000 on February 24, 2000, not a withdrawal as suggested by counsel. The record does not corroborate counsel's claim that the beneficiary furnished \$60,000 in exchange for her purported ownership of 600 shares of the petitioner's stock. The AAO notes that, on appeal, counsel's claim of an affiliate relationship relies solely on this limited documentation. Counsel did not present additional evidence corroborating the claim that the beneficiary furnished monies to the petitioner as consideration for her claimed stock ownership in the United States company. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Moreover, none of the petitioner's tax returns for the years 2001 through 2004 reflect a value for the company's common stock. If the beneficiary had supplied the claimed \$60,000 it would presumably be reflected in Schedule L of the petitioner's tax return as its capital stock value. The record is devoid of

evidence establishing that the beneficiary actually purchased shares of the petitioner's stock. The petitioner has not satisfied a critical element of ownership. As a result, the petitioner has failed to demonstrate the existence of an affiliate relationship between the foreign and United States entities. Accordingly, the appeal will be dismissed for this additional reason.

The AAO will next consider whether at the time of filing the petitioner had the ability to pay the beneficiary her proposed wages of \$3,200 per month.

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

Any petition filed by or for any 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 petitioner submitted with its initial filing an April 2004 bank statement reflecting an ending monthly balance of approximately \$11,800. The petitioner also submitted its 2003 federal income tax return reflecting a payment of \$22,348 in salaries and wages. The petitioner did not provide additional documentary evidence of its financial status or ability to pay the beneficiary's proposed monthly wages.

The director subsequently advised the petitioner of its obligation to demonstrate its "ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence."

In his February 17, 2006 letter, counsel for the petitioner referenced a May 4, 2004 Immigration and Naturalization Services (now CIS) memorandum instructing CIS on the analysis of the issue of a petitioner's ability to pay the beneficiary's proffered wages. Counsel noted that CIS should consider the petitioner's net income, net current assets or the previous amount in compensation paid by the petitioner to the beneficiary. Counsel stated that the petitioner's 2004 tax return, which reflected an annual gross profit of \$263,167 establishes its ability to pay the beneficiary's proposed annual salary of \$38,400.

In his March 15, 2006 decision, the director concluded that the petitioner had not established its ability to pay the beneficiary's proposed wages at the time of filing. The director noted the petitioner's taxable income for the years 2001 through 2004 as reflected on its federal income tax returns, which were comprised of the following figures, respectively: \$335, \$7,087, \$8,341, and \$13,730. The director stated that "[t]he petitioner has not established that they have continuously had the ability to pay the beneficiary's wage[s] from the time the priority date was established up to the present." Consequently, the director denied the petition.

On appeal, counsel for the petitioner again cites the CIS memorandum addressing the proper analysis of a petitioner's ability to pay, and submits a copy of the memorandum for the record. Counsel challenges the director's statement that the beneficiary's salary is not reflected on the petitioner's federal income tax returns. Counsel states:

[A] closer review of the corporate tax returns reveals that the tax preparer lists the compensation for [the] [b]eneficiary under the "Board of Director's fee" on the last page of the federal tax return [F]orm 1120. In 2002 and 2003, the Board of Director's fee was \$70,000. In 2004 and 2005, the Board of Director's fee was \$80,000. These amounts are consistent with [the beneficiary's] personal tax returns. Thus, the [p]etitioner has demonstrated the ability to pay [the beneficiary] the proffered wage of \$38,400 each year since the priority date was established to the present.

Upon review, the petitioner has demonstrated its ability to pay the beneficiary's proffered wages at the time of filing.

Counsel suggests that the petitioner's federal income tax returns demonstrate the petitioner's ability to pay the beneficiary's proposed salary as they reflect deductions made by the petitioner for a board of director's fee purportedly paid to the beneficiary in the amount of \$70,000 in the years 2002 through 2003 and \$80,000 in 2004 and 2005. Counsel references the beneficiary's personal income tax returns as evidence of her receipt of compensation from the petitioner equal to or greater than her proposed wages.

In 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.

As discussed by counsel, the petitioner's income tax returns indicate that the petitioner paid a board of director's fee in the amount of \$80,000 in 2004 and 2005. The petitioner's 2003 federal income tax return reflects a board of director's fee in the amount of \$70,000. Schedule C of the beneficiary's 2003 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, identifies the beneficiary's receipt of \$70,000 as income. The record demonstrates that at the time the priority date was established the beneficiary was receiving compensation that was greater than the wages proposed by the petitioner at the time of filing. Accordingly, the petitioner has demonstrated its ability to pay the beneficiary's proposed annual salary of \$38,400. The director's decision with respect to this issue alone will be withdrawn.

Notwithstanding the partial withdraw of the director's decision, the instant appeal will be dismissed as a result of the petitioner's failure to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity or that a qualifying relationship existed between the foreign and United States entities at the time of filing.

Beyond the decision of the director, an additional issue is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year during the three years preceding her entry into the United States as a nonimmigrant.

The record is not sufficient in demonstrating that the beneficiary's employment in the foreign entity was primarily managerial or executive in nature. The petitioner claimed that the beneficiary was employed as the foreign company's "proprietor and president" since 1996, and provided a list of her related job duties. The AAO notes, however, that the organizational chart offered by the petitioner of the foreign corporation reflects the company's staffing in April 2004, more than six years after the beneficiary left the Philippines. The petitioner did not offer evidence of the foreign entity's staffing levels from 1996 through 1998. Also, several

of the foreign entity's permit applications, while undated, reflect a total staff of one or two employees. Moreover, as the beneficiary did not obtain ownership of the foreign company until the year 2000, it is questionable whether, prior to this time, she occupied the role of president. Absent additional documentation of the beneficiary's employment in the foreign company, the AAO cannot conclude that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. 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)).

According to CIS records, the petitioner filed an L-1A nonimmigrant visa petition on November 3, 2000 requesting the employment of the beneficiary. A review of the representations made by the beneficiary on her Form G-325A, Biographic Information, submitted in connection with her concurrently filed Form I-485, reveals doubt as to whether the beneficiary could have possessed the requisite employment experience with the foreign entity prior to her entering the United States as a nonimmigrant.

Specifically, the petitioner represented that she resided in Iran from July 1998 through December 1999, and subsequently entered the United States in December 1999, where she remained until the filing of both the nonimmigrant and immigrant visa petitions. According to the beneficiary's account of her prior residences, she could not have been employed by the foreign entity after July 1998, and therefore does not appear to have one year of qualifying employment within the requisite time period. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason, the petition will be denied.

The AAO recognizes that CIS previously approved two L-1A nonimmigrant petitions filed by the petitioner on behalf of the beneficiary. It should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. See 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do

not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approvals by denying the present immigrant petition.

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The 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.