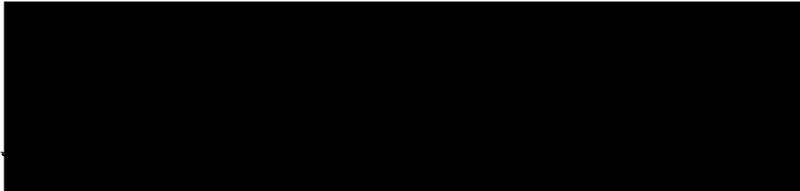


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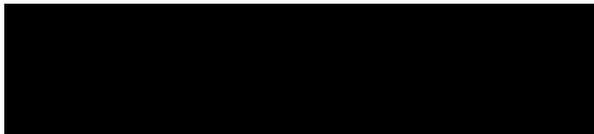
FILE: WAC 05 222 50218 Office: CALIFORNIA SERVICE CENTER Date: **APR 10 2007**

IN RE: Petitioner:  
Beneficiary:



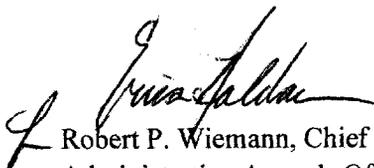
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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 Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized in the State of California that acts as an organizer of international trade exhibitions and fairs. The petitioner seeks to employ the beneficiary as its president.

The director denied the immigrant visa petition concluding that the petitioner had not demonstrated that: (1) the beneficiary's foreign employer and the United States entity enjoyed a qualifying relationship at the time of filing; and (2) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that the record demonstrates that the petitioner is a wholly owned subsidiary of the foreign organization and that the beneficiary would be employed as "an executive or manager" in the United States entity. Counsel submits a brief and 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.

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

The first issue in the instant proceeding is whether the beneficiary's foreign employer and the United States entity enjoyed a qualifying relationship at the time of filing the immigrant visa petition.

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

*Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

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

The petitioner filed the Form I-140 on August 8, 2005. In an attached letter, dated August 3, 2005, the petitioner claimed the existence of a parent-subsidiary relationship between the foreign and United States entities, stating that the beneficiary's foreign employer owns 100 percent of the petitioner's issued stock. The petitioner submitted financial documentation related to the foreign company and the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the year 2003, which identified the foreign entity as the sole shareholder of the petitioning entity.

The director issued a request for evidence on January 18, 2006 directing the petitioner to submit the following evidence of a qualifying relationship between the foreign and United States entities: (1) documentary proof of the foreign entity's purchase of the petitioner's stock, including copies of original wire transfer receipts evidencing funds transferred from the foreign entity to the petitioner, canceled checks, deposit receipts, and banks statements, and, for transfers not initiated by the foreign company, an explanation of the source and reason for the use of a third-party transferor, the names of the account holders depositing the funds and their affiliation to the foreign and United States companies; (2) copies of minutes from the petitioner's meeting of shareholders that identify the company's shareholders and ownership interests; (3) copies of all stock certificates issued by the petitioning company; (4) copies of the petitioner's stock transfer ledger; (5) the petitioner's articles of incorporation; and (6) a detailed list of the petitioner's shareholders and their corresponding stock ownership.

Counsel for the petitioner responded in a letter dated April 6, 2006. In her letter, counsel explained that with respect to the foreign entity's "original deposit" in the United States company, the documentation had been misplaced during the company's relocation. As evidence, counsel submitted a copy of the petitioner's August

2001 business checking account statement reflecting a balance of \$2,000 and an August 15, 2001 letter from its bank stating that the petitioner maintained a balance of \$108,000 in its money market account. An attached canceled stock certificate indicated that the petitioner had originally issued 100,000 shares of stock to the beneficiary's foreign employer on August 6, 2001. An appended number two stock certificate reflected a name change on the part of the foreign entity in July 2003 and a reissuance of the 100,000 shares of stock to the foreign company under its new name. The petitioner's stock transfer ledger identified the canceled stock transaction made to the beneficiary's foreign employer in August 2001 and an "original issue" to the foreign entity under its new name. The minutes from an August 6, 2001 meeting of the petitioner's shareholders identified the beneficiary's foreign employer as the recipient of 100,000 shares of stock in exchange for \$100,000. Counsel also submitted copies of the petitioner's 2001 through 2002 and 2004 federal income tax returns.

In a June 21, 2006 decision, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities. The director noted that while the petitioner maintained a money market account balance of \$108,000, an amount "roughly equal to the value of the stock sold," it did not submit evidence linking the funds held in its bank account to the foreign entity. The director also noted that the petitioner's income tax returns for the years 2001 through 2004 do not reflect a value of capital stock in the organization, and explained that the information presented on the petitioner's tax returns was inconsistent with the foreign entity's purported stock ownership. The director also stated that the petitioner had not presented clarification as to why stock certificate number one had been canceled. The director stated that the inconsistencies in the petitioner's stock ownership precluded a finding of the claimed parent-subsidary relationship. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on July 20, 2006. In an attached appellate brief, counsel challenges the director's finding that the petitioner failed to demonstrate the existence of a qualifying relationship. With respect to the foreign entity's purported purchase of the petitioner's stock, counsel explains:

Due to stringent Foreign Reserve Control imposed by China, \$90,000.00 out of [the] \$100,000.00 subscription amount was initially loaned to [the] petitioner by the company's secretary [REDACTED] and \$10,000.00 out of [the] \$100,000.00 subscription amount was deposit[ed] by cash by [the beneficiary] from the part of fund [sic] of the foreign parent company [ ] that was brought to [the] US by [the beneficiary]. A copy of Certification of Deposit showing a total fund of \$110,000.00 was in Bank of Orient on August 15, 2001 is attached hereto as Exhibit D and made a part hereof[.] The Certificate of Deposit of \$110,000.00 included \$90,000.00 [the] loan from [REDACTED] and \$20,000 cash brought to [the] US by [the beneficiary] from the foreign parent company's fund.

On November 11, 2001, the foreign parent company [ ] returned \$10,000.00 to Mr. [REDACTED] by borrowing \$10,000.00 from petitioner. On April 5, 2002, the foreign parent company [ ] returned \$80,000.00 to M [REDACTED] by borrowing \$80,000.00 from [the] petitioner.

On February 18, 2003, the foreign parent company [ ] returned [the] \$30,000.00 loan to the petitioner by wire-transfer. On April 24, 2003, the foreign parent company [ ] returned [the] \$60,000.00 loan to the petitioner by wire-transfer[.]

A copy of [the] wire transfer notice showing the transfer of fund of \$30,000.00 dated February 18, 2003 (\$22.00 has been deducted by the intermediary bank before reaching petitioner's depository bank, Bank of Orient, which resulted in a showing of receipt of \$29,978.00) and \$60,000.00 dated April 24, 2003 (\$15.00 has been deducted by the intermediary bank before reaching Bank of Orient which resulted in a showing of receipt of \$59,985.00) are attached hereto as Exhibit E and made a part hereof.

The notes, receipts and payment records showing the loan between [REDACTED] and the foreign parent company and the petitioner as set forth above were destroyed and/or misplaced due to a burglary [that] occurred on or about June 3, 2005 in [the] petitioner's office where the burglar ransacked the entire office. A copy of [the] police report is attached hereto as Exhibit F and made a part hereof.

As evidence of the foreign entity's name change, counsel submits a copy of a July 1, 2003 consent by the petitioner's directors and shareholder to cancel stock certificate number one and reissue 100,000 shares of its stock in the foreign entity's new name. Counsel submits the translated minutes from a June 25, 2003 meeting by the foreign entity, in which it agreed to change its corporate English name.

Counsel also provides copies of the petitioner's 2001 through 2004 amended income tax returns. Counsel states that the value of the petitioner's capital stock was erroneously left blank by the company's accountant, but that the amended returns reflected the foreign entity's ownership of the United States company.

Upon review, the petitioner has not demonstrated that the foreign and United States entities enjoyed a qualifying relationship at the time of filing the immigrant visa petition.

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.

In the instant matter, the petitioner has not resolved the discrepancies raised by the director as to the funds used to purchase the petitioner's stock. As noted above, the means by which the foreign company's purported stock ownership is derived is a reasonable and relevant factor to determining whether ownership and control, and ultimately a qualifying relationship, exists between the foreign and United States entities.

The record lacks sufficient evidence corroborating the petitioner's claims that the foreign entity furnished consideration for the petitioner's stock through loans and transfers from its secretary and the beneficiary. The petitioner claims that documentary evidence of these transactions was destroyed or misplaced as a result of its office being burglarized in June 2005. The AAO notes that counsel originally claimed in her April 6, 2006 response to the director's request for evidence that proof of the foreign entity's stock purchase was not available "[d]ue to the company's relocation." Also, while the referenced police report mentions various personal articles stolen from the office and states that the safe had been broken into, there is no indication of business records or documents being taken or destroyed. In fact, the beneficiary indicated in the police report that the sole contents in the safe were checks. The petitioner's claim of unavailability due to destruction or theft 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Additionally, based on counsel's statement on appeal that \$90,000 "was initially loaned to the petitioner by the company's secretary [REDACTED] it is unclear whether the funds given to the petitioner were to finance its operations or whether the \$90,000 constituted monies furnished on behalf of the foreign entity for the purpose of purchasing the petitioner's stock. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, the petitioner has not offered evidence of the foreign entity's ownership of the initial \$20,000 claimed to have been physically transported by the beneficiary to the United States. Relevant evidence would include the foreign entity's bank statements reflecting a withdrawal in the amount of \$20,000 prior to August 15, 2001, the date on which the petitioner claims the funds were held in its money market account, and on or around the time that the beneficiary purportedly entered the United States. The AAO notes that the record indicates that the beneficiary was transferred to the United States as a nonimmigrant intracompany transferee during December 2002 to assume the position of president in the petitioning 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)).

Furthermore, the record does not substantiate the petitioner's claim that the foreign entity borrowed \$90,000 from the United States company in November 2001 and April 2002 to reimburse [REDACTED] or his purported loan. The petitioner's 2001 income tax return, which corresponds to the calendar year beginning August 1, 2001 through July 31, 2002, identifies a loan to its shareholder in the amount of \$79,747. Even if the beneficiary's foreign employer were considered the petitioner's sole shareholder, this amount is not representative of the \$90,000 claimed by the foreign company to have been borrowed to reimburse [REDACTED]

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine 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). In this case, the discrepancies catalogued above undermine the petitioner's claim that the foreign entity furnished consideration in exchange for its purported stock ownership in the United States entity. The petitioner has not presented independent and objective evidence demonstrating that a qualifying relationship existed between the foreign and United States entities at the time of filing. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is 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 indicated on the Form I-140 that the beneficiary would be employed as the president of the six-person United States company. In an attached letter, dated August 3, 2005, the petitioner discussed the beneficiary's current and proposed employment as president of the United States company as follows:

[The beneficiary] has successfully set up a systematic operation for [the foreign company] in the United States, and built the customer network throughout US, Canada and Mexico. She supervises the daily operation of the company. She is the policy decision maker for the sales and marketing of the company's services in the United States. She is also the person to carry out the marketing development plan decided by the board of directors of [the foreign entity]. [The beneficiary] is the key person representing [the foreign entity] in the process of negotiation with major Fortune 500 companies in the U.S. for participating in various exhibitions and fairs in China, Hong Kong and Taiwan. Under the management and supervision of [the beneficiary], [the petitioning entity] has developed a significant customer portfolio and built up a long term business relationship with major exporting companies in the United States.

[The petitioner] has employed six (6) employees including the beneficiary and the company's operation is expanding continuously. The [p]resident of [the United States company] takes charge of the entire business operation. In her position as [p]resident, [the beneficiary] has a group of 2 managerial employees directly reporting to her. They include [m]anager of [m]arketing and IT [d]epartment and [m]anager of H.R. [m]anagement and [f]inancial [d]epartment. Each of the management level employees in turn have sales and marketing personnel reporting to them. In the area of human resources management, [the beneficiary] exercises authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions, and remuneration. She conducts performance reviews and ensures that her staffs [sic] followed corporate procedure.

Functioning autonomously, [the beneficiary] is responsible for managing and directing all activities of [the petitioning entity] which includes [sic] supervision of the company's daily operation, policy decision making in regard to sales and marketing, and representation of [the petitioner] in negotiation and forming of strategic alliance with other US exhibition companies. She had also arranged and coordinated various trade shows in major cities in

China, Hong Kong and Taiwan, and brought major US companies to participate in the fairs and shows. She represents the unique concerns and requirements of the international operations to headquarter in Beijing and provides significant contributions in the formulation of strategic plan as well as sales and marketing plan to ensure that the business and strategic policies are effectively incorporated into [the foreign entity's] global business activities.

[The beneficiary] also establishes and promotes the standardization of customer support and service based on the corporate model of [the foreign entity]. She meets regularly with various managers of subsidiaries of [the foreign entity] to review current policies and procedures and develop appropriate plans necessary to ensure consistency of development and marketing practice in accordance with corporate standards. She formulates strategies and plans to improve the communication between various subsidiaries of [the foreign entity] and establishes and promotes standardization in the delivery of information and services to the customers of [the foreign company].

In his January 18, 2006 request for evidence, the director asked that the petitioner submit the following evidence establishing the employment capacity of the beneficiary: (1) the petitioner's organizational hierarchy outlining its managerial and staffing levels on the date the petition was filed, identifying the beneficiary's position and those of the employees supervised by the beneficiary, and describing the job duties, educational levels, and dates of employment of the petitioner's employees; (2) a "more detailed" description of the specific job duties performed by the beneficiary and the percentage of time the beneficiary would spend performing each task, including "a thorough account of a typical workday for the beneficiary" and a list of the qualifications necessary to perform in the position of president; and (3) copies of the quarterly wage reports filed by the petitioner for the last six quarters.

In response, counsel submitted a statement identifying the beneficiary as occupying the position of chief executive officer. An additional appended statement outlined her associated duties and responsibilities as:

- Make business decisions concerning the pricing and sales. (5%)
- Supervise managers, preparing work schedules and assigning specific duties to managers. (15%)
- Review managers' reports concerning financial statements, sales and activity reports, and other performance data to assess productivity and goal achievement and to determine areas needing cost reduction and program improvement. (10%)
- Establish and implement company policies, goals, objectives, and procedures, conferring with board members, organization officials, and staff members as necessary. (12%)
- Determine staffing requirements, and interview, hire and train new employees, or oversee those personnel processes. (3%)
- Monitor businesses to ensure that they efficiently and effectively provide needed services while staying within budgetary limits. (25%)
- Oversee activities directly related to making trade shows or providing services. (20%)
- Direct and coordinate company's financial and budget activities to fund operations, maximize investments, and increase efficiency (10%).

The beneficiary was also identified as coordinating the operations of the petitioning entity, "formulating policies, managing daily operations, and planning the use of materials and human resources."

Counsel submitted an organizational chart that depicted the beneficiary as occupying the position of chief executive officer and directly supervising the administrative and e-marketing departments. The two departments were comprised of employees in the positions of office manager, secretary, e-marketing manager, sales executives and market research analysts. Despite the staffing levels depicted on the petitioner's organizational chart, the quarterly wage report corresponding to the period during which the instant petition was filed establishes that at the time of filing the beneficiary's subordinate staff included an administrative manager, an e-marketing manager, a sales executive and two market research analysts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971)(concluding that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts).

In his June 21, 2006 decision, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director outlined the beneficiary's job duties and responsibilities, and stated that the "vague and nonspecific description . . . fails to demonstrate what the beneficiary does on a day-to-day basis." The director stated that the petitioner did not identify the businesses or agencies monitored by the beneficiary or the trade show activities and services overseen by the beneficiary. The director further noted that the petitioner had not identified any employees who would be responsible for "making trade shows or providing services," which the director indicated appeared to be a "fundamental aspect of the petitioner's business." Consequently, the director denied the petition.

On appeal, counsel for the petitioner submits a more detailed list of the beneficiary's job responsibilities and duties and those associated with the subordinate personnel. Despite counsel's attempt to clarify the record on appeal, the new evidence will not be considered by the AAO in its review of the beneficiary's employment capacity. 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 Obaighena*, 19 I&N Dec. 533 (BIA 1988). The director specifically requested a "more detailed" and "specific" job description for the beneficiary's position and noted that the submitted evidence should include "a thorough account" of the beneficiary's typical workday. If the petitioner had wanted the evidence submitted on appeal 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 and does not consider the sufficiency of the evidence submitted on appeal.

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner has not clarified either the specific position to be occupied by the beneficiary or the beneficiary's proposed employment capacity. On the Form I-140, the petitioner identified the beneficiary as occupying the position of president, however, documentation subsequently submitted in response to the director's request for evidence and on appeal identify the beneficiary as the company's chief executive officer. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner's inconsistent representations of the beneficiary's proposed position are further magnified by its failure to clarify in which capacity the beneficiary would be employed. The petitioner did not initially state whether the beneficiary would be primarily performing managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel subsequently states on appeal that "the beneficiary is acting as an executive or manager in the US because she (i) manages the entire business operation petitioner as well as the foreign parent company, (ii) supervises and directs the management of the petitioner and exercises wide discretion over day-to-day business operation of the petitioner; (iii) establishes the goals and policies of the petitioner and make final decision of the petitioner, and (iv) is head of the petitioner and the foreign parent company and reports to the board of directors and shareholders of the organization directly." A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's limited statements do not demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other 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).

As correctly noted by the director, the statements offered by the petitioner do not identify the specific managerial or executive job duties to be performed by the beneficiary. In its August 3, 2005 letter, the petitioner offered vague statements of the beneficiary's employment and related responsibilities, such as supervising the company's daily operation and policy decision making, carrying out its marketing development plan, exercising authority to hire, fire, train, and delegate assignments to employees, ensuring that employees follow corporate procedure, "provid[ing] significant contributions in the formulation of strategic plan as well as sales and marketing plan," "promot[ing] the standardization of customer support and service," regularly meeting with managers of the foreign entity's subsidiaries, and "promot[ing] standardization in the delivery of information and services to [ ] customers." Following the director's request for a detailed and specific description of the beneficiary's job duties and typical workday, the petitioner provided an even more generalized description of the beneficiary's proposed position, and neglected to outline the activities performed by the beneficiary during a typical day. The petitioner's additional representations that the beneficiary would "[m]ake business decisions," determine work schedules, review financial and sales reports, "[e]stablish and implement policies, goals, objectives and procedures," and make personnel decisions are simply insufficient to demonstrate what managerial or executive job duties the beneficiary would perform on a daily basis, or to establish that the beneficiary's position would be primarily managerial or executive in nature. Moreover, it is not clear what role the beneficiary still holds with respect to the foreign company, and why her interactions with the overseas company should be considered managerial or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations

require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The beneficiary's limited job description is particularly relevant as it contains unexplained responsibilities that suggest that the beneficiary would not be primarily performing managerial or executive tasks. For example, as president of the United States company, the beneficiary: "built a customer network" for the foreign company in the United States, Canada, and Mexico; represents the petitioning and foreign companies in negotiations and in "forming strategic alliance[s] with other US exhibition companies;" and "arrange[s] and coordinate[s] various trade shows." The AAO notes that in the petitioner's April 6, 2006 response to the director's request for evidence, the beneficiary was identified as "oversee[ing] activities directly related to making trade shows," rather than personally organizing the trade shows, as originally represented by the petitioner. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Nonetheless, without a clarification of the tasks associated with the above-named responsibilities, it is unclear whether these responsibilities may be deemed managerial or executive in nature. As noted by the director, because the petitioner is operating as an organizer of international exhibitions and trade fairs, the above-listed job responsibilities suggest that the beneficiary is personally performing services of the petitioning entity, particularly in light of her coordinating trade shows in China, Hong Kong and Taiwan. 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 has failed to explain who is responsible for performing the services offered by the United States company.

The AAO also notes further uncertainty as to the beneficiary's subordinate staff and whether the beneficiary would be relieved from performing non-qualifying tasks of the petitioning entity. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the petitioner employed the beneficiary, an administrative manager, an e-marketing manager, a sales executive and two market research analysts. The AAO notes however that the annual salaries of \$12,000 offered to the petitioner's market research analysts, who are both identified as having achieved a doctorate of philosophy, do not appear to be consistent with their positions and educational levels. The advanced levels of education of the market research analysts begs the question of whether they are occupying a full-time position with the petitioner or whether the annual salary of \$12,000 represents compensation for services offered on a part-time basis. The employment status of each of the beneficiary's subordinate employees is relevant to establishing that the petitioner employs a staff sufficient to support the

beneficiary in a primarily managerial or executive capacity. While certainly not conclusive of the beneficiary's employment capacity, the educational levels and positions of the petitioner's lower-level staff raises questions as to whether the beneficiary would be occupying a primarily managerial or executive position in the United States entity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Based on the above-outlined unexplained inconsistencies and the deficient record, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The AAO recognizes that CIS previously approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 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). Furthermore, 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 approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approval and denying the immigrant petition.

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.