



U.S. Citizenship
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EAC 04 115 54215

Office: VERMONT SERVICE CENTER

Date: JUL 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)

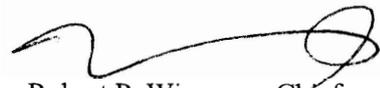
ON BEHALF OF PETITIONER:



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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, Vermont Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the matter for further action, consideration, and entry of a new decision. The AAO ordered that the new decision be certified to the AAO for review. After requesting and receiving additional evidence, the director denied the petition and certified the decision to the AAO, which affirmed the director's decision.

On February 9, 2006, the petitioner was properly afforded 30 days in which to submit a brief and/or evidence in support of the certification proceeding. As of May 1, 2006, the date on which the AAO's unfavorable decision was issued, no additional evidence had been incorporated into the record of proceeding, and the AAO's decision was therefore based on the evidence that had already been reviewed by the director. The petitioner has now provided evidence that it did in fact submit a brief and evidence, along with a complete copy of its submission.¹

The AAO will therefore withdraw its May 1, 2006 decision and reopen the matter pursuant to 8 C.F.R. § 103.5(a)(5)(ii) in order to consider the additional evidence submitted in support of the certification proceeding. The AAO will affirm the director's decision.²

The petitioner is an organization incorporated in the Commonwealth of Massachusetts in February 2001. It claims to provide promotional products and services to corporations. It seeks to employ the beneficiary as its managing director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

¹ The AAO observes that the director's instructions included in the Form I-290C, Notice of Certification, dated February 9, 2006 were confusing and undermined the petitioner's ability to follow the appropriate procedure in submitting additional evidence in the certification proceeding. On the first page of the Form I-290C, the director properly advised the petitioner that the matter was being certified to the AAO, and that it had 30 days in which to submit a brief to the AAO. On page six of the Form I-290C, the director incorrectly advised the petitioner that it could appeal the decision by filing a Form I-290B, Notice of Appeal to the Administrative Appeals Unit, and instructed the petitioner to submit a completed Form I-290B with a filing fee of \$385.00, to the Vermont Service Center within 33 days. The petitioner ultimately completed a Form I-290B and submitted it to the Vermont Service Center with the filing fee on March 14, 2006, 33 days following the director's decision, noting in its cover letter the confusion created by the instructions provided on Form I-290C. Due to the director's error, the petitioner's failure to submit additional evidence directly to the AAO within 30 days of the Notice of Certification will be excused as reasonable, and the documentation received by the Vermont Service Center on March 14, 2006 will be considered herein.

² Pursuant to 8 C.F.R. § 103.5(a)(5)(ii), on January 17, 2007, the AAO advised the petitioner that the matter is being re-opened, and notified the petitioner that it had 33 days in which to submit a brief in support of the petition. The petitioner submitted a brief and additional documentary evidence on February 16, 2007.

The petitioner filed the immigrant petition on March 9, 2004. The director denied the petition on August 25, 2004, without requesting further evidence. The director noted that the record did not include sufficient documentation to clearly establish that the beneficiary's managerial experience and education qualifies him as an executive/manager. In a decision dated June 7, 2005, the AAO withdrew the director's decision, remanded the petition to the director, and instructed the director to request additional evidence regarding the beneficiary's proposed employment capacity in the United States, as well as evidence related to the beneficiary's employment with a qualifying organization abroad; evidence to establish that the petitioner had been doing business in the United States for one year prior to filing the instant petition; evidence that the petitioner had the ability to pay the beneficiary's proffered wage; and any other evidence she deemed necessary in order to determine the beneficiary's eligibility for the benefit sought.

As instructed, the director issued a request for further evidence on July 28, 2005. The petitioner provided its response on October 19, 2005. The director denied the petition on February 9, 2006, determining: (1) that the petitioner had failed to establish that the beneficiary would be employed in either a managerial or executive capacity; (2) that the evidence of record did not clearly establish a qualifying relationship between the United States and foreign entities; and (3) that it was uncertain that the petitioner had sufficient physical premises to house a United States office as its office space is in the beneficiary's home.

The director certified her decision to the AAO, and informed the petitioner that it could submit a brief to the AAO within 30 days after service of the notice. The AAO affirmed the director's decision to deny the petition on May 1, 2006. As noted above, the AAO's decision was made without the opportunity to review additional evidence submitted in support of the certification proceeding.

In the instant proceeding, the AAO will take into account the complete record of proceeding, including the petitioner's March 14, 2006 submission, and additional documentation submitted by the petitioner on February 16, 2007 in response to the AAO's service motion to reopen.

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

Prior to addressing the issues, the AAO must emphasize that the critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If the petitioner or beneficiary becomes eligible under a new set of facts, the proper course of action is to file a new petition. Despite the previous denial, there is no bar to the petitioner's filing of a new petition supported by new evidence of eligibility.

The first issue in this matter is whether the petitioner established that the beneficiary would be employed by the United States entity in a 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. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

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

The immigrant petition was filed on March 9, 2004. In a December 28, 2003 letter appended to the petition, the petitioner offered a permanent executive position to the beneficiary as its managing director that commanded an annual salary of \$75,000. The petitioner listed the position's duties and responsibilities as:

- Directing and controlling the corporate business through the implementation of the corporate business plan;
- Overseeing and directing the completion of new product development;
- Liaising with clients, distributors, Industry [sic] groups and vendors;
- Liaising with Marketing, Engineering, Manufacturing, Financial and human resources of corporate clients [sic];
- Overseeing and monitoring all national and international contracts;
- Developing the Corporate Annual Plan;
- Developing of the Corporate Five (5) Year Plan;
- Overseeing and developing Corporate Budget Control;
- Overseeing product Quality Control;
- Planning and executing advertising policies;
- Formulating plans to create new accounts and maintain existing accounts;
- Planning and administering media programs;
- Conferring with product managers to establish media goals; and
- Studying demographic data and consumer profiles to identify target audiences[.]

The petitioner provided its 2002 Internal Revenue Service (IRS) Form 1120, showing that the petitioner's officer was paid \$35,000 and that no additional salaries were paid. The record also includes the beneficiary's IRS Form W-2, Wage and Tax Statement, issued by the petitioner, showing that the beneficiary was paid \$35,000 for the 2002 year.

The director denied the petition on August 25, 2004 without requesting additional evidence, concluding that the record did not establish that the beneficiary would function as an executive or manage a subordinate staff of employees who would relieve him from performing non-executive/non-managerial duties for the United States entity.

The director's decision was subsequently withdrawn by the AAO and remanded to the director, who issued a request for additional evidence on July 28, 2005. Specifically, the director requested documentary evidence to establish that the beneficiary would be employed in an executive/managerial position in the United States, including evidence that the petitioner was paying its employees; evidence of the petitioner's staffing including the number of employees, their titles and the duties performed by each supervisor/manager/executive; and a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis.

In an October 19, 2005 response, the chief financial officer of the foreign entity indicated that the petitioner did not employ any subordinate supervisors and referenced an unpublished decision and two federal court decisions in support of the proposition that a sole employee may be a manager or an executive if the petitioner utilizes outside independent contractors or where the business is complex. The foreign entity claimed that the petitioner outsourced its operations: to an accountant to handle administration; to crew recruitment services for camera operators, sound recorders, and teleprompter operators; to an equipment rental service; to an editing facility for video production support services; to two individuals for direct mail services; to various organizations for "fulfillment," printing, and electronic marketing; and to an individual for "creatives."

The foreign entity noted that the beneficiary spent at least 90 percent of his time on executive/managerial duties including:

Business strategy	10%
Business development – acquisition	30%
Financials – budgeting, control and reporting	5%
Communication Director:	
Client Director	15%
Executive Producer	10%
Executive Publisher:	
Business Development and Financial control	10%
Executive supervision of the operational partners/out sourced services	10%

The foreign entity indicated that the beneficiary spent 10 percent of his time on non-executive tasks, including making travel arrangements, five percent of the time, and on handling administration tasks not handled by the accountant, five percent of the time. The foreign entity also stated that the beneficiary's discretionary authority in the United States is without limitation.

The foreign entity explained that the petitioner and the foreign entity provide corporate video communication services, including defining communication needs, developing communication strategies, creative treatments, and producing the related communication tools as well as providing marketing, communication, and publishing services to a magazine launched in 2003. The petitioner provided: copies of proposals made by the beneficiary in 2005 to provide video production services; consulting agreements dated February 23, 2005, May 13, 2005, and October 3, 2005; and a statement in its 2005 business report referencing the petitioner's on-line and off-line production and consultancy services to a magazine beginning in 2003 and generating a cumulative revenue of \$100,000 for 2005.

The director denied the petition on February 9, 2006, again determining that the record did not clearly establish that the beneficiary had been or would be employed in a primarily executive or managerial capacity, or that the petitioner could currently support such a position. The director presumed, based on the evidence in the record, that the beneficiary would be engaged primarily in the non-managerial, day-to-day operations involved in producing a product or providing a service. The director noted that an executive may manage a function but that the petitioner must demonstrate that the beneficiary does not directly perform the function. The director again noted that the record did not contain a comprehensive description of the beneficiary's duties or establish that the beneficiary would function as an executive or manage a subordinate staff of employees who would relieve him from performing non-executive/non-managerial duties. The director specifically questioned the petitioner's claim that it outsourced its services noting that the petitioner's 2004 IRS Form 1120 did not show any expenses associated with paying for labor. The director certified her decision to the AAO and advised the petitioner on Form I-290C that it had 30 days in which to submit additional evidence in support of the petition. As discussed above, the petitioner has now submitted evidence that it did in fact submit additional documentation to be considered in the certification proceeding, and this evidence will be considered herein.

In a letter dated March 8, 2006, the petitioner emphasized that the U.S. company made a strategic decision to minimize the cost of staff and overhead by utilizing freelance talent to provide the company's services, while the beneficiary has been responsible for "establishing business relations, developing a network of local experts," and serving as the executive producer and publisher for the supervision and orchestration of all the hired specialists involved in developing the products and services." The petitioner cited an unpublished AAO decision, as well as *Mars Jewelers v. INS*, 702 F. Supp. 1720 (N.D. Ga. 1988) to stand for the proposition that the terms "manager" and "executive" were not intended to be limited to persons who supervise large numbers of employees or large enterprises, and to support its position that even a sole employee could be found to be employed in an executive capacity when outside contractors are utilized.

The petitioner further stated that the beneficiary established a relationship with Ode USA, L.L.C., and since "the middle of 2004," the petitioner has been responsible for selecting, hiring and managing subscription, e-marketing and Direct Mail business partners on behalf of Ode USA. The petitioner states that the beneficiary is "the executive that sets the business objectives and defines the operating policies for each related department. He is defining the financial parameters of the partnerships and is reviewing the performance of the selected partners." The petitioner indicated that the U.S. entity receives a monthly retainer of \$8,333 from Ode USA, while all charges for "outsourced and supervised services of the publishing specialists are charged directly to Ode USA and are not reflected in the P&L of the United States entity." The petitioner submitted

letters from three companies who state that they were hired by the beneficiary to provide printing, fulfillment, consulting, and list rental services on behalf of Ode magazine. The outsourced companies indicate that the beneficiary "directs a team of designers and fulfillment specialists," "is responsible for defining the objectives of the fulfillment operation and for designing systems and procedures for that operation," and is responsible for "defining the magazine's direct mail strategy, supervising the list selection and implementing "list brokerage services."

The petitioner also submitted a letter from [REDACTED] dated March 13, 2006, confirming that the petitioner was hired in 2004 to co-develop the magazine's business plan, and noting that responsibility for organizing and supervising subscription and fulfillment, e-marketing, and direct mail activities is outsourced and managed by the petitioning organization.

In addition, the petitioner elaborated upon the beneficiary's role in the petitioner's "corporate video communication services" business, noting that the company secured its first major contract with [REDACTED] in December 2004. The petitioner further explained:

The development of a video program involves many disciplines. It starts with the ability to define the communication objectives of the clients and to define an effective communication strategy. This is typically the senior responsibility in which the beneficiary represents the United States entity as the Client/Communications Director. . . . This is the pre-production phase in which the scope of the assignment is defined, the budget is to be made and agreed upon and contracts are signed. Only the beneficiary has the authority to make these agreements.

Once the contracts are signed a whole range of video production experts get involved. A director is hired to develop the creative treatment; graphic designers are hired for computer animations and graphic effects; video crews are hired – including directors of photography and sound technicians. . . . For the post Production[,] post production facilities are booked - both video and audio editors are included to create the required video and sound sequence. A producer is hired to organize the shoot and to manage the post production process. It is the task of the beneficiary – being the Executive Producer – to supervise the process, to manage the involved producers and to monitor the requirements of the client.

The petitioner stated that the petitioner has increased the number of video assignments with Johnson & Johnson from one in 2004 to ten in 2005, representing an increase in revenue from \$60,000 in 2004 to \$179,000 in 2005. The petitioner attached copies of several 2005 contracts made between the petitioner and Johnson & Johnson for video production projects, which the petitioner states "support the description of the production process and the whole range of freelance specialists." The petitioner submitted letters from Johnson & Johnson Pharmaceuticals Research & Development, LLC, confirming its contracts with the petitioning company, and from [REDACTED] which confirms that it provides the petitioner with various services, including video editing facilities, video, camera and sound crews, telestream services and graphic design services.

The petitioner acknowledged the director's question as to whether the U.S. entity outsources services, as such expenses were not clearly indicated on the petitioner's corporate tax returns. The petitioner noted that the company includes its outsourced services as "cost of produced goods" on its tax returns, not as "cost of labor," as assumed by the director. The petitioner referenced its 2005 income tax return, on which it reported \$211,000, reflecting the company's costs for outsourced video services.

Finally, the petitioner addressed the director's finding that it appeared that the beneficiary will be engaged in the non-managerial, day-to-day operations involved in producing a product or providing a service. The petitioner discussed the beneficiary's employment history as a manager and business communication specialist and emphasized that the beneficiary "has no operational skills to make a video" such as video, audio, editing or design skills. The petitioner further explained the beneficiary's role as follows:

He acts as the 'executive producer.' He is responsible for the overall communication objective, for the financials of the project, and for the end result in terms of quality and effectiveness. In the film industry all skills are extremely departmentalized. Each department is a profession in itself. Having the ability to put a team together to secure investments for a project and supervise the specialists with the help of line producers is the task of the executive producer. . . .

To provide the Corporate Publishing Services we would like to underline that here again the beneficiary is not trained and skilled to perform any of the day to day tasks of the operation. He is not a Subscription manager or specialist, he is not a direct mail copy writer, he is not a printer, he is not a database manager; he is not an e-marketing specialist. All these disciplines are required to develop a successful publishing entity or to provide the related services.

It is the responsibility of the Beneficiary executive to select the right partners that have all the required expertise and talent, to contract these partners and to orchestrate the overall objective – being the executive publisher.

Finally, as noted above, the petitioner has submitted additional evidence in response to the instant service motion to reopen. Upon review, much of the documentary evidence has been submitted previously and does not relate to the beneficiary's employment capacity as of the date this petition was filed. Counsel for the petitioner, in a brief dated February 16, 2007, states that the beneficiary is employed in an executive capacity and is responsible for the following duties:

- Financial Performance
- Implementation of and continuing development of the business development plan
- Supervise the execution of production and delivery of products and services
- Oversee and direct a network of viable work relationships with potential clients
- Oversee the 'contract out' component of the business
- Oversee all of the vendors to ensure quality control of the product and services
- Oversee and direct all national and international contracts
- Plan and execute advertising policies

- Plan and administer media programs
- Study demographic data and consumer profiles to identify target audiences

Counsel emphasizes that USCIS has consistently approved L-1A nonimmigrant petitions filed by the petitioner on behalf of the beneficiary and contends that the decisions with respect to the instant immigrant petition are "capricious and an abuse of discretion." Counsel states that the determination that the beneficiary is not employed in an executive or managerial capacity is "so manifestly absurd as to constitute an abuse of discretion."

Upon review of the record and the new evidence submitted by the petitioner, the director's February 9, 2006 decision in this matter will be affirmed.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The first iteration of the beneficiary's duties provided a generic overview of the beneficiary's duties. Statements such as directing and controlling the corporate business, overseeing and directing the completion of new product development, developing corporate plans, and overseeing and developing budget controls are insufficient to convey an understanding of what the beneficiary does on a daily basis. Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

Moreover, the beneficiary's responsibilities suggest that the beneficiary is the individual marketing and selling the petitioner's services and providing the market research to do the same. Specifically, the petitioner describes the beneficiary as meeting with clients, distributors, and vendors, planning and executing advertising policies, formulating plans to create new accounts and maintain existing accounts, conferring with product managers, and studying demographic data and consumer profiles. However, 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).

In response to the director's request for further evidence, the foreign entity acknowledged that the beneficiary was the petitioner's sole employee. The foreign entity confirmed that the beneficiary spent 30 percent of his time on business acquisition. However acquiring accounts or maintaining existing ones is an operational task, necessary to establish and continue the petitioner's business. Again, an employee who primarily performs the tasks necessary to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604.) The foreign entity stated that the beneficiary devotes an additional 25 percent of his time to providing the services as the petitioner's communication director, responsible for defining the client's needs, developing communication strategies, and supervising a creative and production team. The AAO observes that defining a client's needs and preparing or proposing a client's

communication strategy are operational tasks intrinsic to providing the petitioner's communications consulting services and have therefore not been shown to be managerial or executive in nature.

The new evidence considered in this proceeding emphasizes the petitioner's use of outside contractors to perform fulfillment, subscription, and direct marketing services for its publishing business, and its use of various specialized workers for its video production business. The petitioner emphasizes that the beneficiary is an "executive publisher" and an "executive producer"; however, the record does not substantiate that the beneficiary had a support staff to assist him with the day-to-day administrative, financial and other operational functions of the company, which have not been shown to be primarily managerial in nature. A review of the totality of the record indicates that the beneficiary himself is solely responsible for the creative work and research associated with developing client proposals, for marketing and selling the petitioner's services, and for handling the company's day-to-day finance activities and other office-related tasks.

The foreign entity, in responding to the director's requested for evidence, attributed 20 percent of the beneficiary's time to performing the duties of an executive publisher for Ode magazine, which was launched in December 2003. However, the petitioner did not provide any evidence substantiating that the beneficiary was initially involved in developing this client's business plan, supervising its U.S. budget, or managing outsourced specialists in conjunction with the magazine. Furthermore, in its March 8, 2006 letter, the petitioner stated that it began providing corporate publishing services in "the middle of 2004," and a March 13, 2006 letter from Ode magazine indicates that the petitioner was hired in 2004 to "co-develop" its business plan. The petitioner did not attempt to reconcile these statements with the petitioner's initial representation that the U.S. company provided services to Ode magazine in 2003. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

If the beneficiary was providing services to Ode magazine at the time the petition was filed in March 2004, it appears that his services were provided as a professional business consultant, not as the manager of the company's marketing and subscription department, or as its "executive publisher." The beneficiary's responsibility for managing outsourced services for the petitioner's publishing division will thus not be considered herein, as the record does not establish that the beneficiary performed these duties at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In addition, even taking into consideration the additional evidence submitted in support of the certification proceeding, the record does not contain documentary evidence substantiating the petitioner's claim that it employed outside contractors comprising a creative or production team when the petition was filed. 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)). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner emphasizes its

ongoing relationship with Johnson & Johnson, however, the evidence submitted confirms that the petitioner was first retained to provide video production services for this client in December 2004, nine months after the filing of the instant petition. The petitioner's 2004 corporate tax return identifies a figure of \$39,464 for costs of goods sold, and the petitioner indicates that its outsourced labor costs are included within this figure. These costs are reflected as "purchases" on Schedule A of Form 1120, and the AAO cannot determine that this figure includes payments for outsourced services utilized by the petitioner on or before March 2004. Absent copies of invoices from contractors or other evidence detailing payments for outside labor as of the time of filing, the petitioner has not established that the beneficiary supervised a creative or production team.

The petitioner in this matter does not provide a description of the beneficiary's duties sufficient to establish the beneficiary's eligibility for this visa classification. Conclusory and unsubstantiated assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The descriptions of the beneficiary's duties demonstrates only that the beneficiary, as the petitioner's sole employee, will be performing the petitioner's market research and promoting and selling the petitioner's services. The record does not substantiate that the beneficiary engaged in primarily managerial or executive tasks when the petition was filed.

The AAO notes that the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

In this matter the petitioner has not demonstrated that the beneficiary will primarily direct the management of or establish the goals and policies of the organization. As of March 2004, the petitioner had not attained the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the beneficiary's duties performed on a day-to-day basis. Instead the record shows that the beneficiary was focused on the necessity of establishing the petitioner's business by providing the petitioner's market research, proposing that other businesses use its services, as well as carrying out the administrative tasks of operating its office, and even directly providing business consulting services related to the start-up of Ode magazine. The petitioner has offered no evidence that when the petition was filed it employed or otherwise utilized the services of individuals who would carry out the petitioner's operational tasks, thereby relieving the beneficiary from performing primarily non-qualifying duties.

The petitioner has not provided evidence that the beneficiary performs or will perform primarily in a managerial capacity. As indicated above, the petitioner has not provided documentary evidence to substantiate that it utilized outside employees or services to carry out the petitioner's operational tasks. As the director determined, the record does not contain evidence that the beneficiary manages a subordinate staff of employees who would relieve him from performing non-qualifying duties. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The record does not contain sufficient evidence to establish that the beneficiary will direct or manage the petitioner's essential function. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d at 305. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages. Even if the beneficiary does not directly supervise employees, it is the petitioner's obligation to establish that someone other than the beneficiary performs the day-to-day non-managerial tasks of the function managed. As discussed above, the petitioner has not met this burden.

Counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel correctly observes 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). The AAO acknowledges counsel's contentions that the requested visa classification was not intended to be limited to individuals who supervise a large number of employees or large enterprises, to exclude employees who supervise independent contractors rather than direct employees. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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 as managing director. The record does not support a conclusion that the petitioner was utilizing independent contractors to provide services to clients at the time of filing. Nor has the petitioner submitted evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company, which would reasonably include administrative, financial, marketing, creative and operational tasks associated with developing the petitioner's business. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a single employee who performs primarily managerial or executive duties. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO acknowledges that a sole employee, in some circumstances, may provide primarily managerial or executive services for a petitioner. However upon review of the record in this matter, the petitioner has not provided substantiating evidence that the petitioner employed or would employ individuals to carry out the marketing and sale of the petitioner's services to its prospective clients. Further, the record does not contain substantiating evidence that the petitioner utilized the services of outside contractors to carry out the petitioner's basic operational tasks. The petitioner has not established that the beneficiary's duties and those of his claimed outside service providers elevate the beneficiary's position to a primarily managerial or executive position. Again, the petitioner's increase in business activities and use of independent contractors subsequent to the filing of the petition are not relevant to this proceeding. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the director's decision will be affirmed.

The second issue in this matter is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same

employer (i.e. a U.S. 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).

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 December 28, 2003 letter submitted in support of the petition, the petitioner referenced the beneficiary's foreign employer as the petitioner's parent company. The petitioner noted that the beneficiary was one of the founding partners of the foreign entity, [REDACTED] established in Naarden, The Netherlands in 1984. The petitioner further noted that in 1992, the beneficiary partnered with [REDACTED] in 1994, the beneficiary and [REDACTED] established [REDACTED] and in 2001 decided to found a company in the United States. The petitioner provided its stock certificate number 1 issued to [REDACTED] for 1,000 shares, dated March 1, 2001. The petitioner's 2002 IRS Form 1120, at Schedule K, indicated that [REDACTED] owns 100 percent of the U.S. company.

The director did not address the issue of qualifying relationship in her August 25, 2004 decision. The AAO observed when remanding the matter to the director, that a stock certificate alone was insufficient to establish a qualifying relationship. The AAO instructed the director to request evidence that would demonstrate that the foreign entity had actually paid for its interest in the petitioner. On July 28, 2005, the director requested this information, as well as a copy of the petitioner's stock ledger.

In an October 19, 2005 response to the director's request for evidence, the chief financial officer of [REDACTED] stated that the petitioner's stock ledger was with its former attorneys and that it was proving difficult to retrieve it. The petitioner re-submitted its stock certificate number 1. The record also contains the petitioner's 2001, 2003, and 2004 IRS Forms 1120, all of which identify [REDACTED] as the petitioner's 100 percent owner. The petitioner did not supply evidence or an explanation demonstrating that the foreign entity had in fact paid for its ownership of the petitioner.

The director concluded on February 9, 2006, without discussion, that the evidence of record does not clearly establish that there is a qualifying relationship between the United States and the foreign entity.

In response to the notice of certification, the petitioner submitted a letter from the foreign entity's accountant, dated March 6, 2006, stating that the U.S. company is wholly owned by [REDACTED]. The petitioner's response included the petitioner's stock ledger, an April 2001 bank statement for the U.S. company showing a \$100,000 wire transfer credit that purportedly originated with the Dutch company, and other documentation showing that [REDACTED] is the sole owner of the U.S. company. The petitioner also included a group organizational chart showing [REDACTED] as the owner of the petitioning company, a Dutch subsidiary, [REDACTED], and a Belgian subsidiary, [REDACTED].

In support of the instant service motion to re-open, counsel re-asserts that [REDACTED] owns and controls 100 percent of the petitioning company. The petitioner's supporting evidence includes a copy of the petitioner's stock certificate number one issued to the claimed parent company, a copy of the petitioner's articles of organization, and an un-translated 2004 annual report for [REDACTED].

The record also contains an excerpt from the Trade Register of the Chamber of Commerce and Industry for Gooiland and Eemland, The Netherlands, which indicates that [REDACTED] was formed as a partnership in 1994. The document, which is dated December 22, 1999, shows that the partners of the company are [REDACTED] V. and [REDACTED].

Upon review, the director's conclusion on this issue will be affirmed. The petitioner has not submitted clear evidence identifying the beneficiary's last foreign employer abroad. The petitioner initially indicated that the beneficiary's foreign employer was [REDACTED]. However, the petitioner's stock certificate was issued to [REDACTED]. The record shows that [REDACTED] was established in the Netherlands as a subsidiary of [REDACTED], the sole owner of the petitioning company. However, it is not clear that [REDACTED] continues to exist, particularly as the company is not identified on the petitioner's current group organizational chart. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The AAO clarifies that the ownership of the petitioning entity is not in question. However, in order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it maintains a qualifying relationship with the beneficiary's foreign employer; the foreign corporation or other legal entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C). A multinational executive or manager is one who "seeks to enter the United States in order

³ The AAO observes that the beneficiary appears to be the sole shareholder of [REDACTED] as noted in a translated document issued by the Gooiland and Eemland Chamber of Commerce.

to *continue* to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.” Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The petitioner must establish eligibility at the time of filing the immigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The fact that the petitioner continues to be part of a multinational group is irrelevant in this proceeding, absent evidence that the foreign company that employed the beneficiary continues to exist as part of this group.

None of the evidence offered subsequent to the director's decision assists in clarifying whether the Dutch entity referred to as [REDACTED] and identified as the beneficiary's last employer abroad continues to exist. The AAO will not simply assume that this is the same company as Norvell [REDACTED], as it appears to have been established as a separate entity in 1994. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

As the director determined, the record is not sufficiently clear to establish that the petitioner and the beneficiary's foreign employer, [REDACTED] continue to enjoy a qualifying relationship as defined by the regulations. For this additional reason, the petition will not be approved.

The final issue addressed by the director is whether the petitioner has sufficient physical premises to house the U.S. company. The director observed that the petitioner operates out of the beneficiary's home.

In response to the director's decision, and in support of the certification proceeding, the petitioner explained that the office space available in the petitioner's home is approximately 1,200 square feet and includes office and meeting space which is more than sufficient for a small business. The petitioner also emphasized in its letter dated March 8, 2006 that the beneficiary often travels to meet clients on-site in New York and New Jersey, while clients do not normally visit the petitioner's physical office. The petitioner provided a copy of the lease agreement between the beneficiary and the petitioner, color photographs of the premises, and a floor plan showing the layout of the leased space.

Upon review, the petitioner's assertions are persuasive. The evidence of record, considered with the nature of the petitioner's business, is sufficient to establish that the petitioner has adequate premises for its operations. The director's decision with respect to this issue only will therefore be withdrawn.

Finally, beyond the decision of the director, the petitioner has not established that the beneficiary's employment for the foreign entity was in a primarily managerial or executive capacity, as the record does not contain a comprehensive description of the beneficiary's duties for the foreign entity. As instructed by the AAO, the director requested specific information on this issue in its request for evidence dated July 28, 2005. In response, the chief financial officer of the petitioner's parent company referenced the past approvals of the petitioner's L-1A nonimmigrant petitions submitted on behalf of this beneficiary. However, past approvals do not establish the beneficiary's eligibility for this visa classification. *See* discussion below. 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). For this additional reason, the petition cannot be approved.

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

The last issue in this matter regards references to past approvals of the beneficiary as an L-1A nonimmigrant intracompany transferee. The AAO has consistently determined that prior nonimmigrant approvals do not preclude CIS from denying an extension or a separate immigrant petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity and on similar definitions of qualifying relationship/organization. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44) and 8 C.F.R. § 204.5(j)(2) and 8 C.F.R. § 214.2(l)(1)(ii). Although the statutory definitions for managerial and executive capacity are the same and the definitions of qualifying relationship/organization are similar, the question of overall eligibility requires a comprehensive review of all of the provisions, not just these definitions. 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 general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form 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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form 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).

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. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition does not guarantee that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying approval of the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same unsupported 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).

Further, 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 petitioner has not provided evidence or argument for the record that is sufficient to overcome the director's decision.

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

ORDER: The director's February 9, 2006 decision is affirmed.