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FILE: [REDACTED]
SRC 03 186 52496

Office: TEXAS SERVICE CENTER Date: JUN 20 2007

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

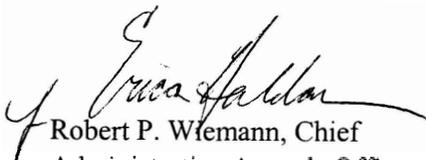
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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


Robert P. Wemmann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant 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 under the laws of the State of Texas that is operating a gasoline and convenience store. It claims to be the affiliate of the beneficiary's foreign employer in India. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not established that: (1) a qualifying relationship existed between the foreign and United States entities at the time of filing the visa petition; (2) the foreign entity was doing business in India on the date of filing; or (3) 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 Citizenship and Immigration Services (CIS) erred in its denial of the immigrant visa petition. In support of the appeal, counsel submits a brief rebutting the findings of the director.

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 two issues in this proceeding are interrelated in that pursuant to the regulation at 8 C.F.R. § 204.5(j)(3)(i)(C), in order to establish a qualifying relationship between the foreign and petitioning entities,

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. The AAO will therefore consider together whether on the filing date, the beneficiary's foreign employer continued to do business overseas, and whether the petitioner and the foreign employer enjoyed a qualifying relationship.

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 regulation at 8 C.F.R. § 204.5(j)(2) further defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petitioner filed the instant visa petition on June 23, 2003. In an appended statement, the petitioner claimed the existence of an affiliate relationship between the foreign and United States entities as a result of the beneficiary's purported ownership and control of both organizations. With the initial filing, the petitioner submitted documentary evidence of the establishment of both the foreign and United States organizations and the foreign entity's operations prior to the instant filing, but did not submit documentation directly related to establishing the claimed affiliate relationship.

In a Notice of Intent to Deny, dated August 3, 2005, the director noted that the record failed to demonstrate the existence of a qualifying relationship between the foreign and United States entities, and requested that the petitioner submit documentary evidence related to the foreign company's ownership and "proof of payment for stock in the US company" purportedly owned by the beneficiary and Shaukat Prasla. The director requested an explanation as to why the beneficiary paid for his purported share of the petitioning entity with personal funds, rather than with monies transferred from the foreign entity. The director further requested invoices, bills of sale, and product brochures related to the foreign company's business in India from June 2003 through the time of the notice. The director also noted that the telephone number given for the foreign company is registered instead to an individual, who, when contacted, identified himself as the beneficiary's brother. The director requested copies of the foreign company's telephone directory listings.

Counsel responded in a letter dated September 26, 2005, claiming that the beneficiary's foreign employer is a partnership comprised of three individuals, of which the beneficiary is a majority partner. Counsel contends that based on the beneficiary's ownership and control of both the foreign and United States entities, an affiliate relationship exists between the two organizations. Counsel states: "The fact that the U.S. Consulate has confirmed that the foreign company is a family business and the Beneficiary worked for the foreign company is consistent with evidence provided by the Petitioner." Counsel further claims that the ownership of the foreign entity as a partnership is not negated by CIS' observation that the foreign entity's telephone number is registered to an individual rather than in the name of the partnership. As evidence of the ownership of the foreign partnership, counsel submitted a copy of a December 1, 1995 partnership deed naming the entity's partners and their corresponding profits and losses as:

1)	[REDACTED] (beneficiary)	51%
2)	[REDACTED]	25%
3)	[REDACTED]	24%

In an appended February 1, 2005 affidavit, the beneficiary's brother attested to having personal knowledge of the beneficiary's ownership of 51 percent of the foreign partnership and of the ownership interests of the remaining two partners. The beneficiary's brother also stated that "it is easier and customary in Mumbai to get a land telephone account under [a] personal name than under the business name," confirming that the foreign business' telephone number is registered under his name. The AAO notes that an organizational chart of the foreign entity identifies the beneficiary's brother as the general manager of the business. Counsel also submitted copies of the foreign entity's sales invoices, utilities bills, bank statements, and tax assessments for the years 2002 through 2003. The AAO notes that the sales invoices relate primarily to the years 2004 and 2005, with only two identifying sales made in December 2003.

With respect to the United States company, counsel again noted that the beneficiary used his personal funds to purchase his purported majority ownership in the petitioning organization, and challenged that it is not unlawful for the beneficiary to have personally purchased the stock. Counsel submits copies of two number two stock certificates, each dated October 20, 2000. The beneficiary is identified as the owner of 600 shares of the petitioner's stock, while the individual [REDACTED] is identified as owning the remaining 400 shares of stock. On an attached stock ledger, both the beneficiary and [REDACTED] are again identified as shareholders.

Counsel further submitted a February 17, 2005 affidavit, in which the beneficiary attested to his 51 percent and 60 percent interests in the foreign and United States organizations, respectively. The beneficiary also claimed to have contributed \$36,000 as consideration for his interest in the petitioning entity.

In a decision dated October 14, 2005, 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 the petitioner's failure to resolve the discrepancy of labeling both of the petitioner's issued stock certificates as number two, and stated that the petitioner had not provided "evidence of payment for stock in the petitioner by the beneficiary or by [REDACTED]." The director concluded that the lack of evidence precluded a finding of the "true owners of the stock . . . [or] that the [purported] owners of the stock in fact paid for the stock." The director further noted that while the record contained evidence of the foreign entity's business operations in the years 2001 through 2002 and years 2004 through 2005, there was only limited evidence that

the partnership was doing business in 2003, the period during which the petition was filed. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on November 25, 2005. In his November 14, 2005 appellate brief, counsel challenges the director's finding that the petitioner had not presented evidence of the foreign entity's ownership, again stating that the beneficiary, as a majority partner, owns the foreign organization with two relatives. Counsel contends that because the beneficiary also owns a majority interest in the United States company, the foreign and United States organizations are affiliates. Counsel addresses the director's observation that both stock certificates from the petitioner are labeled number two, claiming that it is "due to a typographical error." Counsel further challenges the director's reference to the beneficiary's use of personal funds to purchase the petitioner's stock, stating that the regulatory definition of "affiliate" "requires an individual to own the U.S. and the foreign entit[ies]." Counsel did not address the director's finding that the foreign partnership had ceased operating during 2003.

Upon review, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities.

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

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

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies,

property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

As noted by the director, the record does not contain sufficient evidence documenting the claim that the beneficiary furnished consideration in exchange for his purported majority interest in the United States entity. The beneficiary claimed in his February 17, 2006 affidavit to have purchased 600 shares of the petitioner's stock in exchange for \$36,000. However, despite the director's request for "evidence of proof of payment for stock in the US company," the petitioner neglected to offer documentation in the form of canceled checks, wire transfer receipts, deposit slips, or bank statements corroborating the beneficiary's claimed deposit 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)). A petitioner's 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).

The AAO further notes that the information contained on the United States company's income tax returns does not substantiate the petitioner's claim that the beneficiary furnished \$36,000 in exchange for his purported ownership of 600 shares of stock. Rather, the company's common stock is valued at \$2,000 on its years 2001 through 2004 income tax returns. 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).

As noted above, the means by which the majority owner's purported stock ownership is derived is a reasonable and relevant factor in determining whether ownership and control, and ultimately whether a qualifying relationship exists between the foreign and United States entities. Here, the petitioner has not resolved the director's finding that the beneficiary furnished consideration in exchange for an interest in the petitioning entity. Therefore, the beneficiary cannot be considered a majority shareholder of the United States corporation.

Similarly, the record does not demonstrate that the beneficiary owns a majority of the foreign partnership in India. The AAO notes that a previously submitted L-1A nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary has been incorporated in the present record. In connection with this earlier filing, the petitioner submitted copies of the foreign entity's income statements for assessment years 2001 through 2002 and 2002 through 2003, and a list of the associated capital accounts. In both income statements, the beneficiary and his two partners were identified as owning equal shares in the foreign partnership, or 33.33 percent. These documents directly contradict the information contained in the foreign entity's partnership deed, in which the beneficiary is named as the owner of 51 percent of the organization. The record is devoid of additional evidence, such as an amended partnership agreement, resolving this relevant discrepancy in the beneficiary's claimed ownership of the foreign partnership. 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 record as presently constituted fails to establish the beneficiary as a majority partner in the foreign entity. As a result, the AAO cannot

conclude that the foreign and United States entities enjoyed a qualifying relationship at the time of filing. Accordingly, the appeal will be dismissed.

With respect to the foreign entity's operations in India, it appears from the documentary evidence submitted that the foreign entity has continued to do business overseas following the beneficiary's transfer to the United States as an L-1A nonimmigrant. While the petitioner submitted limited evidence related to its sales in 2003, the surrounding record demonstrates that the foreign business exists and continues to operate in India. Although the director's decision with respect to this specific issue will be withdrawn, the appeal will be dismissed, as the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities.

The third 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.

In a statement appended to the Form I-140, the petitioner identified the beneficiary as occupying the position of president in the United States entity, during which he would hold the following responsibilities:

[H]iring and firing managers; supervising subordinate employees; overseeing preparation of sales and inventory reports; reviewing an[d] analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers.

The petitioner stated that as the president, the beneficiary would receive limited supervision from the company's board of directors, and would "exercise wide discretion and latitude in the performance of his duties."

In her August 3, 2005 notice of intent to deny, the director requested a "definitive statement" of the beneficiary's proposed job duties, including: his position title; the percentage of the beneficiary's time allocated to each task; and, the subordinate managers, supervisors, or employees reporting directly to the beneficiary, as well as a brief description of their positions. The director also requested an organizational chart of the United States entity, and documentary evidence in the form of quarterly tax returns and Internal Revenue Service (IRS) Form W-2 of the workers employed on the date of filing the immigrant visa petition.

With his September 26, 2005 response, counsel submitted a September 28, 2005 letter, in which the petitioner provided the following job description for the beneficiary, which is essentially the same as that previously offered, and included an allocation of amount of time the beneficiary would spend on each task:

Ten percent (10%) of his time hiring and firing managers, and supervising subordinate employees; Fifteen Percent (15%) overseeing preparation of sales and inventory reports; Fifteen Percent (15%) reviewing an[d] analyzing sales data; Twenty Percent (20%) establishing and implementing policies to manage and achieve marketing goals; Fifteen Percent (15%) reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees; Twenty Five (25%) managing the company and overseeing marketing campaign developed by subordinate managers.

In his February 17, 2005 affidavit, the beneficiary restated the above-listed job duties as the responsibilities related to his employment in the petitioning entity.

In its September 28, 2005 letter, the petitioner also outlined the job duties performed by the beneficiary's four subordinate employees, who held the positions of store operations manager, assistant manager, and cashiers. Based on the June 30, 2003 quarterly wage report submitted for review by the petitioner, the two cashiers were working less than full-time during the period the immigrant visa petition was filed. The five positions, including the beneficiary as president, were also depicted on an organizational chart of the United States entity.

In her October 14, 2005 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 responsibilities of the beneficiary, noting that they are "vague and general in scope," and that "[t]he description does not provide any [sic] accurate portrayal of the day[-]to[-]day duties of the beneficiary." The director further noted that while the beneficiary is represented as spending 45 percent of his time overseeing the company's marketing, the petitioner has not identified the development "[of] any advertising or marketing to promote the company as a convenience store other than listing the petitioner in the yellow pages." The director questioned the "exact nature" of the petitioner's marketing campaigns and goals.

The director recognized the petitioner's staffing levels on the date of filing, noting that its two cashiers appear to have been employed on a part-time basis. The director noted that in a March 2002 letter submitted in connection with its earlier filing for an L-1A nonimmigrant visa petition, the petitioner identified its hours of operation as 7:00 am through midnight. The director expressed doubt that during a 17-hour workday the company's two part-time cashiers would be able to process the business' sales without the assistance of the beneficiary, and concluded that that beneficiary would likely devote a portion of his time to acting as a cashier.

The director referenced a prior arrest of the beneficiary for selling alcohol to a minor, stating that it substantiates the finding that the beneficiary has performed the non-qualifying duties of a cashier. The director rejected the petitioner's explanation that the beneficiary was merely filling in as the cashier as the result of an absent employee. Consequently, the director denied the petition.

On appeal, counsel challenges the director's finding, stating that CIS "appears to be saying that a company that employs four (4) workers plus one (1) manager to oversee the said workers is not in a position to file an [I-140] Petition [for classification as a multinational manager or executive] because the President of such a company will always be engaged in day-to-day functions." Counsel contends that the director's decision "is without any basis in logic, fact or law," claiming that "[a] typical corporation that operates retail businesses does not normally hire more than four or five workers, and someone has to be the manager of all the retail businesses." Counsel claims that CIS also failed to consider the beneficiary's role in locating additional retail locations, which he contends is "the essential function of the Petitioner's expansion of business in the United States." Counsel cites a "recent" district court decision as supporting the suggestion that "a retail store manager that supervises five (1) employees qualifies as an 'executive' or 'manager' as defined by [the Act]."

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

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The limited description repeatedly offered by the petitioner for the beneficiary's position as president is not sufficient to establish his proposed employment in a primarily managerial or executive capacity. The regulations require the petitioner to clearly describe the managerial or executive job duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). Merely restating the regulatory definitions of "managerial capacity" and "executive capacity" will not satisfy the petitioner's obligation. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990) (finding that 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).

Here, the petitioner stated only that the beneficiary would hire and fire personnel, analyze business reports and budgets, manage the company, and oversee marketing campaigns. The petitioner's broad statements fall significantly short of identifying the specific managerial or executive job duties related to the beneficiary's employment as president. Reciting the beneficiary's vague job responsibilities is not sufficient for purposes of classification as a manager or executive. *See generally* 8 C.F.R. § 204.5(j)(5). 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.

Despite the director's request for a "definitive statement" of the beneficiary's proposed job duties, the petitioner offered the same vague job description in its response to the director's notice of intent to revoke, as well as in the beneficiary's affidavit. In his February 17, 2005 affidavit, the beneficiary simply restated the job description without attempting to expound on the broadly-stated job responsibilities. Similarly, although the director addressed the insufficiency of the offered job description in her October 14, 2005 decision, counsel failed to provide on appeal an additional explanation of the specific managerial or executive job duties to be performed by the beneficiary. The AAO notes that the petitioner's 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).

Counsel suggests on appeal that the beneficiary would be employed in a primarily "executive/managerial capacity" as a result of being "engage[d] in the essential function of the Petitioner's expansion of business in the United States." The AAO first notes that counsel does not clarify whether the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Counsel's statement on appeal does not clarify the capacity in which the petitioner is claiming to employ the beneficiary.

Moreover, the record does not demonstrate that the beneficiary would be employed as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5).

Counsel cannot merely claim that the beneficiary's role in locating new business opportunities in the United States is an essential function sufficient to satisfy the criteria of a function manager. As noted above, the concept of function manager requires that the petitioner describe with specificity the function to be managed.

There is no indication in the record that searching for new business opportunities is essential to the petitioner's business operations as a gasoline and convenience store. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, a review of the record demonstrates that the petitioner's reasonable needs in light of its overall stage of development and purpose would not be met through the employment of its five-person staff. On the filing date, the petitioner employed the beneficiary as president, as well as an operations store manager, an assistant manager, and two part-time cashiers. As correctly observed by the director, it is doubtful that the business operations of the petitioning entity as a gasoline and convenience store, which is open daily from 7:00 am through midnight, would be met through the employment of the four-person subordinate staff, while supporting the beneficiary in a primarily managerial or executive capacity. Counsel's unsupported claim on appeal that "[typical] retail businesses [do] not normally hire more than four or five workers," is not sufficient to establish that the beneficiary would be relieved from primarily performing non-qualifying administrative or operational tasks of the business, particularly with respect to the company's sales function. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. Again, the unsupported assertions of counsel do not constitute evidence. *Id.* at 534. 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).

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

The AAO recognizes that CIS previously approved three L-1A nonimmigrant visa petitions filed by the petitioner on behalf of the beneficiary. Approval of the most recent nonimmigrant visa petition was revoked by CIS on June 22, 2005. With respect to the beneficiary's initial classification as a nonimmigrant intracompany transferee, it must be noted that many I-140 immigrant petitions are denied after CIS approves a prior nonimmigrant I-129 L-1 petition. *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. *See* 8 C.F.R. § 103.8(d). 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 approvals 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.