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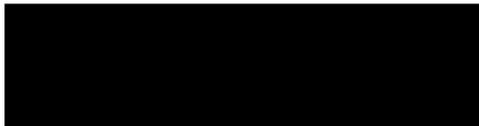
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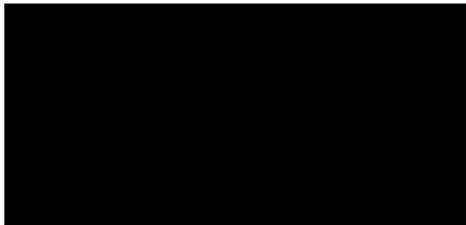
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Office: TEXAS SERVICE CENTER Date: MAR 27 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

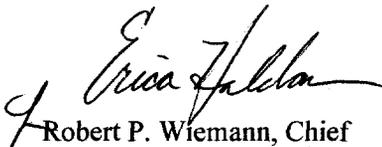
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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

The petitioner filed the instant immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Texas that claims to be engaged in retail trade and investment.¹ The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; or (2) the foreign and United States entities enjoyed a qualifying relationship on the date of filing. The director also noted that in 2003, the beneficiary had not received a salary equal to or greater than her proposed annual salary of \$40,000.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) ignored the petitioner's reasonable needs in light of its overall stage of development and incorrectly focused on the size of the petitioner's staffing levels when denying the petition. Counsel also claims that the petitioner provided sufficient evidence of a parent-subsidiary relationship between the foreign and United States entities. Counsel submits a brief in support of the appeal.

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this

¹ Documentation in the record, including the petitioner's Internal Revenue Service (IRS) Form SS-4, Application for Employer Identification Number, bank statements, and invoices demonstrate that the petitioning entity is doing business as a retail dollar store.

classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

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

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

The petitioner filed the visa petition on October 16, 2003 noting that the beneficiary would occupy the position of president in the three-person United States company. In an appended letter, dated October 8, 2003, the petitioner provided the following description for the beneficiary's proposed position:

Among other duties, [the beneficiary] confers with the parent company and develops long-range goals and objectives of the US Company. Directs and coordinates activities of the organization and formulates and administers company policies. Directs and coordinates activities relating to purchasing, production, operations and sales for which responsibility is delegated to and targeted to further attainment of goals and objectives. Reviews and analyzes activities, costs, operations, and forecasts data to determine progress toward stated goals and objectives. Discusses with employees to review achievements and discusses required changes in goals or objectives of the company.

On October 27, 2004, the director issued a request for evidence directing the petitioner to submit a "definitive" description of the beneficiary's proposed job duties in the United States company, as well as the percentage of time the beneficiary would spend on each task, and the subordinate employees who would report directly to the beneficiary. The director also requested a copy of the petitioner's organizational chart identifying the names and position titles of its employees.

Counsel for the petitioner responded in a letter dated January 17, 2005, in which counsel contended that the organizational chart and description of the beneficiary's position demonstrate that the beneficiary would supervise employees "who will carry out the day-to-day low-level operations of the organization . . . [and] will relieve the [b]eneficiary from performing non-qualifying duties." Counsel stated that the beneficiary's immediate subordinates "are professionals with college degrees and/or extensive experience," and that the lower-level cashiers perform the retail services of the business.

In an attached statement of personnel, the beneficiary's job duties as president were outlined as follows:

- Directs and coordinates activities of the organization and formulates and administers company policies [20%].
- In consultation with the management and the Pakistan firm develops long-range goals and objectives of the company – with emphasis on developing and guiding expansion policies [20%].
- Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary [20%].
- Directs and coordinates activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives [20%].
- Reviews and analyzes activities, costs, operations, and forecasts data to determine progress toward stated goals and objectives [10%].
- Reviews with management and employees company's achievements and discusses required changes in goals or objectives of the company [10%].

The petitioner also described the job duties associated with its six lower-level positions, which were comprised of business development manager, assistant for business development, store manager, store

supervisor, and two cashiers. Each of the six positions was also identified on the petitioner's appended organizational chart, which named the business development manager as the beneficiary's direct subordinate.

The director subsequently issued a notice of intent to deny, dated January 26, 2005, asking that the petitioner submit copies of its IRS Forms W-2 for the years 2003 and 2004. The director noted that the organizational chart submitted in response to her earlier request identified seven lower-level workers, while the petitioner indicated a staff of three on its Form I-140. The director also requested a copy of the contract for services rendered by the petitioner's cashier, who the petitioner identified as a contract employee.

In response, counsel submitted a February 11, 2005 letter noting the petitioner's "overall growth and development" since the immigrant visa petition was filed. The submitted IRS Forms W-2 indicated that during 2003 the petitioner employed five workers, however, it cannot be determined from the tax forms who was working at the time the petition was filed. Counsel also offered copies of the Forms W-2 issued by the petitioner in 2004.

In an April 13, 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 noted that corporate documentation relating to the petitioner's business in the State of Texas recognized the beneficiary's spouse rather than the beneficiary as the company's president, and pointed out that the IRS Forms W-2 issued by the petitioner in the years 2003 and 2004 identified the beneficiary's annual wages as less than the salary paid to her husband during these periods. The director also noted that based on the wages paid to its employees, the petitioner's staff was comprised of only two full-time employees during the years 2003 and 2004. The director stated that "[w]hen a company has a limited number of employees, it becomes questionable as to whether the beneficiary is acting primarily in a managerial or executive function." The director concluded that the beneficiary would likely primarily perform "a wide range of daily functions associated with running [the petitioner's] business," and stated that "the petitioner has not demonstrated that the beneficiary's primary assignment has been or will be directing the management of the organization nor that the beneficiary has been or will be primarily directing or supervising a subordinate staff of professional, or supervisory personnel, who relieve her from performing non[-]qualifying duties." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on May 13, 2005. In an appellate brief submitted with his June 7, 2005 letter, counsel challenged CIS' denial of the immigrant visa petition claiming that the director "overly focus[ed] on the number of subordinate employees" and overlooked the concept of function manager. Counsel stresses that the number of subordinate employees supervised by the beneficiary cannot be the sole basis for determining the beneficiary's employment capacity, and cites an unpublished AAO decision in support of the proposition that "an entire absence of subordinate employees would still not automatically mean that the beneficiary is not acting in an executive or managerial capacity." Counsel also cites a December 20, 2002 CIS (formerly Immigration and Naturalization Services (INS)) memorandum instructing that, for purposes of an L-1A nonimmigrant visa petition, the analysis of "managerial capacity" requires a review of all of the statutory elements. Counsel contends that based on the memorandum, "focusing on the number of subordinate staff members to the exclusion of other elements cannot stand when adjudicating the [beneficiary's] executive and managerial capacity." Counsel states that at the time the petition was filed, the petitioner "was in early stages of operations (less than five years) and required few employees."

Counsel further asserts that CIS' focus on the petitioner's staffing levels vitiated the concept of function manager. Counsel claims that the beneficiary qualifies as a function manager as she "functions at a senior level of the organization (as indicated in the organizational chart), manages the essential function of food services, and . . . exercises discretion over the day-to-day operations of the activity." Counsel again stresses that because the petitioner began operating only two years prior to the present filing, it "does not require large staffing levels yet." Counsel claims that CIS considered the petitioner's business of two years and its overall stage of development as "a negative factor" in analyzing the job duties of the beneficiary and her proposed employment capacity.

Counsel also notes that CIS wrongfully questioned the amount of wages received by the beneficiary without considering that it is common for top executives, like the beneficiary, to accept a lower salary "for the long-term profits that are to be gained."

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

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 petitioner's vague job descriptions fail to demonstrate that the beneficiary would occupy a primarily managerial or executive capacity in the United States organization. The petitioner's initial statements that the beneficiary "formulates and administers company policies," "[d]irects and coordinates activities relating to purchasing, production, operations and sales," and "[r]eviews and analyzes activities, costs, operations," employee "achievements" and the goals of the company are simply too broad and nonspecific to determine what managerial or executive job duties the beneficiary would perform as president of the dollar store. *See id.* (requiring that the petitioner submit a statement at the time of filing clearly describing the managerial or executive job duties to be performed by the beneficiary). Despite the director's request for a "definitive" statement of the beneficiary's proposed job duties, the job description subsequently offered by the petitioner relies primarily on the same limited statements of directing the company's activities and employees and analyzing its policies, goals and data. The petitioner did not offer a detailed statement clarifying the specific managerial or executive job duties related to the beneficiary's employment as president. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO notes that 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).

Besides being vague, a portion of the representations made in the petitioner's supplementary job description does not appear credible. Specifically, the petitioner stated that the beneficiary would spend twenty percent of her time directing managers and employees "in the production, operations, purchasing and marketing departments." The AAO notes that the petitioner's organizational chart does not reflect the existence of a production, operations, purchasing or marketing department. Nor do any of the purported six subordinate employees, four of whom appear to have been hired after the instant filing date, hold positions consistent with performing tasks related to the production, operations, purchasing or marketing functions. A petitioner may

not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Here, the petitioner's claim that the beneficiary would possess managerial authority over four lower-level departments is not plausible. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, the record fails to clarify the true position to be occupied by the beneficiary in the United States company. As noted by the director, documentation in the record conflicts with the petitioner's claim that the beneficiary would occupy the position of president. For example, the petitioner's IRS Form SS-4, Form 940-EZ, Employer's Annual Federal Employment (FUTA) Tax Return, Texas Franchise Tax Public Information Report, and lease agreement all identify the beneficiary's spouse as the president of the petitioning organization. The AAO recognizes that the documents are dated prior to this filing date however, the petitioner has not acknowledged this relevant discrepancy in the beneficiary's proposed position or explained whether the beneficiary assumed the position of president from her husband. Moreover, the petitioner's claim in its October 8, 2003 letter of *currently* employing the beneficiary "on an L-1A status as the President of our [company]" begs the question of whether the positions held by the petitioner's staff have been accurately represented on documentation in the record. Counsel did not address on appeal the petitioner's inconsistent representations as to the beneficiary's and her husband's employment. 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 unexplained discrepancies call into question the veracity of the petitioner's claim of employing the beneficiary in a primarily managerial or executive capacity. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

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

Here, the record demonstrates that at the time of filing, the petitioner was operating as a dollar store. As discussed above, it is questionable whether the beneficiary would occupy the position of president. In addition, the petitioner has not clarified the workers employed on the filing date. The petitioner represented on the Form I-140 a staff of three employees, but did not identify the positions held by the employees other than the beneficiary. The additional documentation submitted in response to the director's request for evidence, including the petitioner's organizational chart and employee descriptions, identified employees hired after the petition was filed who will not be considered in the instant analysis. *See Matter of Katigbak*,

14 I&N Dec. 45, 49 (Comm. 1971) (stating that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts). The petitioner also failed to submit its third quarter wage report, which would identify its employees during the period the immigrant visa petition was filed. As determined by the director, the IRS Form W-2 issued by the petitioner in 2003 and its 2003 second quarter wage report suggest that on the date of filing the petitioner employed two full-time employees, the beneficiary and her spouse, and a part-time employee.

The limited evidence offered in connection with the petitioner's three-person staff restricts the analysis of whether the petitioning entity's reasonable needs would be met through the employment of the beneficiary and two additional employees, one of whom was employed on a part-time basis. Nonetheless, considering the petitioner's overall purpose as a two-year-old dollar store, it does not seem plausible that the daily tasks related to such functions as sales, accounts payable, inventory, including ordering, processing and stocking supplies, and marketing would be performed by the beneficiary's spouse and the petitioner's part-time employee, while the beneficiary remained employed in a primarily managerial or executive position. Rather, the record suggests that the petitioner's staffing levels in light of its overall purpose and stage of development are not sufficient to support the employment of the beneficiary in a primarily managerial or executive capacity.

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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The record does not support counsel's additional claim 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). 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.

In the present matter, counsel failed to specifically document the beneficiary's role as a function manager. Counsel merely claims that the beneficiary would be employed in this capacity because she satisfies the statutory requirements of function manager. Counsel's circular argument is not sufficient for purposes of establishing the claimed employment capacity, particularly in light of his claim that the beneficiary "manages the essential function of food services," a function not addressed or defined in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of 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). As discussed above, the record does not demonstrate that the beneficiary would be relieved from performing the non-qualifying tasks related to functions of the petitioner's business. Instead, it appears that the beneficiary would be primarily responsible for performing non-managerial and non-executive job duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

The AAO recognizes counsel's references to two unpublished decisions in which the AAO considered the managerial or executive capacity of a beneficiary in light of the beneficiary's employment as one of two employees or as the sole employee. Counsel, however, has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. The prior analysis of the petitioner's three-person staff, in light of its stage of development and overall business function, demonstrates that the beneficiary would not be relieved from primarily performing the non-managerial or non-executive tasks related to the operation of the petitioner's dollar store, or that the beneficiary would be primarily managing an essential function of the business. The AAO notes that 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 also references *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Again, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited case. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the petitioner is obligated to establish that the beneficiary's position consists of primarily managerial or executive job duties. The petitioner has not satisfied this basic eligibility requirement.

Based on the foregoing discussion, the record does not establish 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 second issue in this proceeding is whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing.

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

The regulation 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 the October 8, 2003 letter submitted with the Form I-140, the petitioner identified the United States company as a subsidiary of the beneficiary's foreign employer, a Pakistani corporation. The petitioner submitted documentation establishing the formation and existence of the foreign company. As evidence of the claimed parent-subsidiary relationship, the petitioner offered a copy of a November 21, 2000 business resolution in which the foreign company's board of directors agreed to pursue an investment in the United States' retail industry. In the business resolution, the board of directors' noted their intention to establish a United States subsidiary. The petitioner also offered copies of the following: (1) the December 4, 2000 certificate and articles of incorporation of the United States company; (2) a December 4, 2001 stock certificate naming the foreign entity as the owner of 1,000 shares of the petitioner's issued stock; and (3) the petitioner's stock transfer ledger reflecting an original issuance of 1,000 shares of stock on December 4, 2000 to the Pakistani company.

In her January 26, 2005 notice of intent to deny, the director directed the petitioner to submit "a copy of [its] articles of incorporation with the stock transfer ledger and receipts from all transactions."

In his February 11, 2005 letter, counsel referenced the petitioner's stock transfer ledger, share certificate and "associated receipt," stating that the transfer of stock from the petitioner to the foreign entity "was done as an administrative matter" to make the petitioner a subsidiary of the foreign corporation. Counsel submits a copy of another stock certificate, dated December 4, 2000, rather than December 4, 2001, as noted on the first stock certificate, and naming the foreign entity as the owner of the petitioning company. The associated receipt suggests that the petitioner issued 1,000 shares of stock as an original issuance to the foreign company.

In her April 13, 2005 decision, the director concluded that the petitioner had not demonstrated that the foreign and United States entities enjoyed a qualifying relationship at the time of filing. The director stated that the affiliation between the companies was "unclear," particularly since the petitioner's 2001 and 2002 corporate income tax returns failed to identify the foreign company's purported ownership and the petitioner did not submit the requested receipts reflecting the foreign entity's purported stock purchase. Consequently, the director denied the petition.

On appeal, counsel claims that the director erred in concluding that the petitioner had not submitted documentary evidence of a parent-subsidiary relationship between the foreign and United States entities. Counsel states:

If [CIS] was expecting a 'cash receipt' of some type, that was an unrealistic expectation. As explained, [the petitioning entity] was incorporated for the purpose of giving [the foreign

entity] a subsidiary's presence in the United States. The transfer of ownership was thus an 'administrative matter' done at arms length without need of cash transfers. In effect, the corporate transactions were done on 'agency' for [the foreign entity].

Counsel again references the foreign entity's business resolution, as well as the stock certificate, stock transfer ledger, and stock transfer receipt as sufficient evidence that the petitioning entity is a subsidiary of the foreign company. Counsel states that the requested cash transfer receipts "are inapplicable and were never generated."

Upon review, the petitioner has not established that the foreign and United States entities enjoyed a qualifying relationship on the date of filing.

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* 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.

Here, counsel seems to concede that the foreign entity did not furnish consideration in exchange for its purported ownership of the petitioning entity. Counsel's references to the "administrative" and "agency" relationship between the foreign and United States companies suggest a relationship similar to that based on a contract, rather than a permanent affiliation formed under the exchange of consideration for stock. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (noting that a contractual agreement between the foreign petitioning organization and the U.S. corporation can be terminated as opposed to one in which the foreign

organization and a domestic organization are permanently tied together and not limited to a single, specific venture). Similarly, the petitioner's stock transfer ledger suggests that the foreign entity did not render cash or property as consideration for the 1,000 shares of issued stock. Based on these representations alone, the record fails to demonstrate ownership of the petitioning entity by the foreign organization.

The documentary evidence offered by the petitioner is not sufficient to corroborate the foreign entity's claimed ownership and control of the United States company. As noted previously, stock certificates alone are not sufficient to establish the foreign entity's ownership and control of the United States organization. In the instant case, the two stock certificates offered for the record reflect different issuance dates, and therefore, cannot be considered independent concrete evidence of the foreign entity's stock ownership. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Moreover, as noted by the director, the petitioner's 2001 and 2002 federal income tax returns do not identify the foreign entity as the company's owner. Similarly, the foreign company's year 2000 income tax return fails to recognize the existence of the United States entity as a subsidiary company, despite representations that the United States company was established in November 2000 and that the foreign entity acquired its ownership interest the following month. The limited and inconsistent evidence in the record undermines the claim that the United States company is a subsidiary of the foreign organization. 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)).

The petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities. Accordingly, the appeal will be dismissed for this additional reason.

While the director noted in her April 13, 2005 decision that the wages received by the beneficiary in 2003 and 2004 were less than her proffered annual salary of \$40,000, the director did not specifically consider the issue of whether the petitioner possessed the ability to pay the beneficiary her annual wages.

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

Any petition filed by or for any employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary at a salary equal to or greater than the proposed wages. Additionally, the beneficiary's IRS Form W-3 indicates that she received \$28,300, or \$11,700 less than the proposed annual salary, during the year 2003. Based on the 2004 IRS Form W-2, the beneficiary received \$12,800 the following year. The record as presently constituted does

not establish the petitioner's ability to pay the beneficiary's proffered wages. For this additional reason, the petition will be denied.

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

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

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

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

previous nonimmigrant approval by denying the present immigrant petition. The director is instructed to review the previous nonimmigrant approval for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

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

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

ORDER: The appeal is dismissed.