



U.S. Citizenship
and Immigration
Services

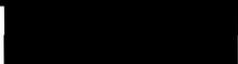
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B4



FILE:



Office: NEBRASKA SERVICE CENTER

Date: DEC 01 2008

LIN 06 215 51970

IN RE:

Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation which claims to be in the real estate business and to have a qualifying relationship with the beneficiary's previous employer in the United Kingdom. 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.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner disputes the director's findings, asserts that the beneficiary will be employed in a primarily executive capacity, and submits additional evidence in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) must be accompanied by a statement from an authorized official of the "petitioning United States employer" which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The primary issue in this proceeding is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary 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) 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--

- (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 does not clearly state in the underlying petition whether the beneficiary will be employed in a managerial or executive capacity. While counsel on appeal argues that the beneficiary will be employed in an executive capacity, and not in a managerial capacity, the AAO will nevertheless consider both classifications on appeal. The AAO reviews appeals on a *de novo* basis. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Counsel describes the beneficiary's proposed duties in the United States in a letter dated July 10, 2006 as follows:

As president of [the petitioner], [the beneficiary] is responsible for directing the operations and general management of the company. He works directly with architects, engineers, contractors, and sub-contractors to attain desired objectives and to ensure that construction projects are being completed as scheduled and within budgeting guidelines. [The beneficiary] negotiates company and project financing to provide necessary funding for new developments and to maximize return on corporate investments. He personally monitors activity reports and the financial statements to determine progress and to revise business strategies as necessary to meet company objectives.

Although [the beneficiary] is responsible for developing and managing the portfolio of [the petitioner's] properties, he delegates much of the day to day business, property maintenance and administration of construction contracts and leases to independent, professional construction related and real estate companies in order to maintain cost containment policies as required by the company. He works closely with architects, engineers, government officials, bankers, real estate brokers and construction professionals on a daily basis. In delegating authority to professionals who are qualified to make the necessary decisions and determinations on a daily basis, he is able to maintain a clear overall picture from a[n] executive/managerial standpoint to ensure that overall corporate goals and endeavors are within the scope of the long and short term financial plans for the company.

The petitioner also submitted a letter dated July 6, 2006 in which it alleges to employ "independent contractors on a project basis" in its administration of the petitioner's claimed 21 commercial properties. Accordingly, the petitioner asserts that it "does not have a significant payroll." The petitioner submitted its most recent quarterly wage report which indicates that the petitioner employs one person, the beneficiary.

The petitioner also submitted an organizational chart for the United States operation. The chart portrays the beneficiary, the petitioner's sole employee and president, at the top of the organization supervising residential and commercial realtors, builders, architects, and bankers.

On May 23, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's proposed duties, a breakdown of the amount of time the beneficiary will devote to each of his ascribed duties, an organizational chart, and descriptions of the duties of all immediate subordinates.

In response, the petitioner submitted a letter dated July 19, 2007 in which it further describes the beneficiary's proposed duties in the United States as follows:

As President of [the petitioner], [the beneficiary] does not directly manage subordinates, however he is the senior level person in the [U]nited States hierarchy, responsible for expanding, organizing, directing and developing the business enterprise.

As President of [the petitioner, the beneficiary's] duties include, but are not limited to:

- Planning, developing, and establishing executive and financial policies as well as managing objectives of the business enterprise. **[The beneficiary] spends approximately 30% of his time with these duties.**
- Developing organization policies to coordinate functions and operations between engineers, contractors, etc. **[The beneficiary] spends approximately 30% of his time with these duties.**

- Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives in accordance with current conditions. **[The beneficiary] spends approximately 10% of his time with these duties.**
- Directing and coordinating the formulation of financial programs to provide funding for new and continuing developments to maximize returns on investments and to increase profitability. **[The beneficiary] spends approximately 10% of his time with these duties.**
- Analyzing financial information to forecast business, industry, and economic conditions for use in making investment decisions. **[The beneficiary] spends approximately 10% of his time with these duties.**
- Analyzing company financial statements, industry, regulatory and economic information and financial periodicals and newspapers, interpreting the data concerning price, yield, stability and future trends in the property development field. **[The beneficiary] spends approximately 10% of his time with these duties.**

On October 27, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary will be employed primarily in an executive capacity. Specifically, counsel argues that the beneficiary delegates "tasks to service providers and independent contractors," including day-to-day tasks. Counsel also argues that "the decision-making process and skill involved in the entering of complex contracts for services which bind [the petitioner] into short and long term legal obligations are executive in nature and is a major function of the organization." Finally, counsel asserts that the beneficiary will devote a majority of his time performing the executive duties outlined in the July 19, 2007 letter.

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. The petitioner states that the beneficiary will devote most of his time to "planning, developing, and establishing executive and financial policies as well as managing objectives of the business enterprise" and "developing organization policies to coordinate functions and operations between engineers,

contractors, etc." However, the petitioner fails to specifically describe these "policies" and "objectives," or to establish what, exactly, the beneficiary will do on a day-to-day basis to perform these duties. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. 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. *Id.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties in his operation of the enterprise as the petitioner's sole employee. As noted above, the petitioner asserts that the beneficiary will "manage" objectives and "coordinate functions and operations" between the various realtors, bankers, contractors, and architects engaged by the enterprise to assist in buying, selling, leasing, and developing the petitioner's real estate investments. However, the petitioner also claims that the beneficiary is its only employed worker, and the record does not establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to his ascribed duties, or to the operation of a bona fide business enterprise, by a subordinate staff. The petitioner has not established that the tasks related to reviewing and negotiating real estate and construction contracts, analyzing data, forecasting conditions to make investment decisions, arranging for financing, and developing relationships with bankers are bona fide managerial or executive duties, and the record is devoid of evidence that the beneficiary will be relieved from the need to perform the non-qualifying tasks inherent to these duties as well as to the administration of a small business in general, e.g., preparing correspondence, keeping files, and other clerical tasks. While the petitioner claims that the petitioner has engaged independent contractors to perform many of the leasing and property management tasks associated with administering a real estate portfolio, the record is devoid of evidence establishing that the petitioner has engaged employees or contractors to perform the other non-qualifying tasks which are apparently performed by the beneficiary. Accordingly, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks in his administration of the enterprise as its sole employee. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will not supervise any subordinate employees. Although the petitioner claims that the beneficiary will supervise independent contractors, these persons are not "employees" of the enterprise and it has not been established that the beneficiary will truly control these individuals. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Regardless, the supervision and control of independent contractors is not a qualifying duty as a matter of law. The Act is quite clear that only the management of *employees* may be considered a

qualifying managerial duty for purposes of this visa classification. *See* section 101(a)(44)(A)(ii) of the Act. Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.¹

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. 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. 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 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-day 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The beneficiary's job description is so vague that it cannot be discerned what, exactly, the beneficiary will do on a day-to-day basis. Furthermore, and as explained above, it has not been established that the beneficiary will be relieved from primarily performing non-qualifying administrative or operational tasks such that he will be able to devote a majority of his time to primarily performing qualifying duties in his administration of the business as its sole employee. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

¹While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, 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. *See* 8 C.F.R. §§ 204.5(j)(2) and (5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record does not establish that the beneficiary will more likely than not primarily perform qualifying tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, 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).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary will be "employed" by the petitioner, or that he will be an "employee" of the petitioner, as required by the Act and regulations.

Section 203(b) of the Act states in pertinent part that visas shall be made available to qualified multinational executives and managers who, *inter alia*, will be employed in the United States "in a capacity that is managerial or executive." Furthermore, section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), defines both managerial capacity and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing both the multinational executive and manager immigrant visa classification and the L-1 nonimmigrant intracompany transferee classification. See 8 C.F.R. 204.5(j) and 8 C.F.R. § 214.2(l). Neither the legacy Immigration and Naturalization Service nor CIS has defined the terms "employee," "employer," or "employed" by regulation for purposes of these classifications. Therefore, for purposes of the multinational executive or manager immigrant visa category, these terms are undefined.

The Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying

assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; see also Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an "employee," CIS must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Within the context of multination executive or manager immigrant petitions, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, as is the case here, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." See *Clackamas*, 538 U.S. at 449-450; see also *New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, such as the beneficiary in this matter, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.

- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Again, it is important to note that this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Id.* at 450 (citing *Darden*, 503 U.S. at 324). Moreover, in applying the above test, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; *cf. Matter of Church Scientology International*, 19 I&N Dec. at 604 (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" of the petitioner in the United States. Despite the petitioner's failure to establish its actual ownership (*see infra*), the beneficiary is claimed to own 100% of the petitioner and is the petitioner's sole employee. The beneficiary also appears to be the "president" of the petitioner, a Florida corporation. The petitioner did not submit an agreement, employment contract, or any other document describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an "employee" as defined above. It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be "employed" as an "employee," and the petition may not be approved for that additional reason.

Accordingly, the petitioner has failed to establish that the beneficiary will be "employed" by the petitioner or that he will be an "employee" of the petitioner as required by the Act.

Beyond the decision of the director, the petitioner has failed to establish that the petitioner "is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(C).

A "subsidiary" is defined at 8 C.F.R. § 204.5(j)(2) as:

[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.

Likewise, an "affiliate" is defined in pertinent part at 8 C.F.R. § 204.5(j)(2) as:

- (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[.]

The regulations 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 Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593. In the context of this 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 at 595.

In this matter, the petitioner claims to be 100% owned by the beneficiary. In support of this assertion, the petitioner submitted a copy of its articles of incorporation as well as copies of its 2003, 2004, and 2005 Forms 1120, U.S. Corporation Income Tax Return. The 2005 return lists the beneficiary in Schedule E as an officer but does not indicate that he owns any percentage of the petitioner's stock, common or preferred. The petitioner also avers in Schedule K to the 2005 return that no individual owned, directly or indirectly, 50% or more of the corporation's voting stock and that the petitioner does not have any foreign stockholders owning more than 25% of its shares. However, the petitioner's 2003 and 2004 tax returns indicate that 100% of the petitioner's stock is owned by G & M Estates Limited, a British business entity. The record does not contain a copy of any stock certificates pertaining to the petitioner.

Upon review, the petitioner has failed to establish that it "is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(C). The petitioner has failed to establish the ownership and control of the United States petitioner, a Florida corporation. As noted above, the record is devoid of evidence establishing ownership and control. The record does not contain a stock certificate or other evidence of stock ownership. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Furthermore, the record contains serious unresolved inconsistencies regarding the petitioner's ownership and control. While the

petitioner claims to be 100% owned by the beneficiary, the petitioner submitted 2003 and 2004 tax returns which indicate that it is 100% owned and controlled by G & M Estates Limited, a British business entity. Likewise, the petitioner submitted a 2005 tax return which indicates in Schedule K that no individual owned, directly or indirectly, 50% or more of the corporation's voting stock and that the petitioner does not have any foreign stockholders owning more than 25% of its shares. Accordingly, averments in all three corporate tax returns are inconsistent with the petitioner's claim to be 100% owned and controlled by the beneficiary, and the record is devoid of evidence resolving these inconsistencies. 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).

Accordingly, as the petitioner has failed to establish its ownership and control, it has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility as discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

As a final note, CIS records indicate that the beneficiary has previously been approved for L-1 employment with the instant petitioner. However, with regard to the beneficiary's L-1 nonimmigrant classification, 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 Form I-129 nonimmigrant 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 at 29-30 (recognizing that CIS approves some petitions in error).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. See e.g. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant 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).

In addition, 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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.