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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

File: SRC-00-245-51755 Office: TEXAS SERVICE CENTER Date: FEB [illegible] 2005

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The petitioner subsequently filed an appeal, which the director incorrectly withdrew after the petitioner's former counsel submitted a letter withdrawing her legal brief. The petitioner subsequently challenged the director's decision in federal court. *Nidhin Creations Inc. v. Department of Homeland Security*, CA No. H-04-2533 (S.D. Tex.). As the director incorrectly withdrew the petitioner's appeal, the AAO agreed to consider the appeal and render a decision on the merits. Accordingly, the matter is now before the AAO on appeal. Although the AAO will discuss the merits of this petition, the appeal will be rejected as untimely filed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its President as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that operates as an importer and marketer of garments and other merchandise. The petitioner claims that it is the affiliate of Nidhin Creations, located in Kochin, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the record contains sufficient evidence to show that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel specifically states that the petitioner's small size should not defeat its petition, and that the petitioner's growth in recent years supports that the beneficiary is acting as a manager or executive. Counsel further provides that the beneficiary has managed contract employees. In support of these assertions, counsel submits a brief, additional evidence, and previously submitted documents.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a CIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the director issued the decision on December 29, 2000. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. According to the date stamp on the Form I-290B Notice of Appeal, it was received by CIS on February 6, 2001, or 39 days after the decision was issued. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the

last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

As the appeal was untimely filed, the appeal must be rejected.

However, as stipulated in federal court, the AAO will discuss the merits of the petition.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will 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), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 the initial petition filed on July 21, 2000, the petitioner described the beneficiary's job duties as follows:

> As President, [the beneficiary] will be primarily responsible for executing the company's business plans, [and] managing the company's financial and human capital to maximize profits and plan for future expansion and growth of the company.
>
> [The beneficiary] has done all the preliminary business planning to get the US company off the ground. His continued presence is critical to complete the company's start-up operations and take the company fully operational. He will continue to establish the goals and policies of the company, hire, train and supervise employees, negotiate major contracts and exercise wide latitude in discretionary decision making.

On September 18, 2000, the director requested additional evidence. Specifically, the director requested: (1) an organizational chart for the petitioner; (2) an organizational chart for the foreign entity; (3) the petitioner's corporate tax returns for 1998 and 1999; (4) the petitioner's State Quarterly Reports for the previous six quarters; and (5) evidence establishing that the beneficiary will be employed in an executive or managerial position, including the number of subordinates who report to the beneficiary and a description of their titles and duties, or in the alternative, a description of the essential function within the petitioner's organization that the beneficiary manages.

In a response dated December 7, 2000, the petitioner submitted: (1) an organizational chart for the foreign entity; (2) a prospective organizational chart for the petitioner; (3) copies of the petitioner's 1998 and 1999 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return; (4) a copy of the petitioner's Texas State Employer's Quarterly Report for the second quarter of 2000; (5) a copy of the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2000; (6) a copy of the petitioner's Texas Sales and Use Tax Permit; and (7) a letter describing the beneficiary's job duties and the petitioner's operations. In the letter, the petitioner provided that it "is still in the start-up phase." The petitioner indicated that it "currently employs 1 employee. However, additional full-time employees will be hired when [the petitioner's] retail outlet opens . . . ." The petitioner restated the beneficiary's job description exactly as provided in the initial petition, quoted above. The petitioner further stated that:

> The proposed organizational chart shows that the beneficiary will supervise other supervisory employees or employees who manage an essential function in the organization, including the Retail Outlet Manager, Wholesale Manager, [and] Warehouse Manager. He will also coordinate activities with independent service providers such as [a] Certified Public Accountant and Shipping & Freight Forwarding companies and Custom[s] Brokers.

On December 29, 2000, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive

capacity. Specifically, the director noted that the petitioner failed to submit its most recent state quarterly report. The director further provided that, though the petitioner's organizational chart lists 10 positions, "[e]vidence submitted only establishes that the president position has been filled, which is the beneficiary." Thus, the director concluded that "as there is no proof that there are any subordinate manager employees, it is concluded that the [beneficiary] will be carrying out the day to day operations of the [petitioner] and not supervising them." Regarding the petitioner's claim that it is still in a start-up phase, the director noted that "[t]he beneficiary has already been given the one year allowed by the regulations to establish a new office. More time cannot be allowed to establish a new office."

On appeal, counsel for the petitioner asserts that the record contains sufficient evidence to show that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel specifically states that the petitioner's small size should not defeat its petition. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (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. Counsel references an unpublished AAO decision to support the assertion that "[a] person may be a manager or executive even if he is the sole employee of the company where he utilizes outside independent contractors or where the business is complex." Counsel asserts that "[e]ven though the petitioner only had one employee . . . other than the beneficiary, the petitioner worked regularly with two other 'employees,' namely, a freight forwarder and a CPA." Counsel further provides that the level of commerce of the petitioner indicates that "the beneficiary worked in a complex operation overseeing contract employees." Counsel alleges that the petitioner's 1999 and 2000 tax returns show that the petitioner had contract employees and employees on its payroll. Counsel references the petitioner's 2001, 2002, and 2003 tax returns and asserts that the petitioner's growth in recent years supports that the beneficiary is acting as a manager or executive.

In support of these assertions, counsel submits a brief, previously submitted documents, and additional evidence including: (1) copies of the petitioner's Texas State Employer's Quarterly Reports for the third and fourth quarters of 2000, and the first quarter of 2004; (2) copies of the petitioner's 2000, 2001, 2002, and 2003 Forms 1120, U.S. Corporation Income Tax Return; (3) copies of the petitioner's 2003 Forms 1099-MISC showing funds paid to three individuals during that year; and (4) a letter from Michael Goodfriend, Management Consultant, assessing the beneficiary's employment capacity. In the brief, counsel discussed the beneficiary's duties as follows:

> [The beneficiary] was responsible for evaluating business opportunities including export/import trade opportunities; gathering information on trade regulations, treaties, and policies; establishing banking and other business relationships; conducting feasibility studies and developing business plans; developing marketing strategies; preparing budgets for business operations; establishing contacts with wholesalers and major national retail chains for the sale of manufactured apparel and other merchandise; developing and directing the company's sales and marketing strategies; controlling financial and accounting activities.
>
> [The beneficiary] was a manager or an executive because he was primarily responsible for executing the company's business plans, managing the company's financial and human capital

> to maximize profits and plan for future expansion and growth of the company. He acted in an executive or managerial capacity because he established the goals and policies of the company, hired, trained, and supervised employees, negotiated major contracts, and exercised wide latitude in discretionary decision making.

The letter from Michael Goodfriend, Management Consultant, states that "[t]he undisputed documentation clearly shows that . . . [i]n 2000, the [petitioner] was an import-export business with contract employees . . . [and] [s]ince 2003, the [petitioner] has experienced remarkable growth." Mr. Goodfriend further states that "in my professional opinion as an expert in the field, I conclude that it is reasonable that [the beneficiary] will be primarily engaged in the duties of a President, given the current organization of the company."

Upon review, counsel's assertions are not persuasive. 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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner does not clearly state whether the beneficiary will perform managerial or executive tasks. On Form I-129, the petitioner describes the beneficiary's position as "Executive." In his brief, counsel cites the regulatory definition of executive capacity provided at 8 C.F.R. § 214.2(l)(1)(C). These representations reflect that the petitioner intends for the beneficiary to be employed in an executive capacity. However, counsel further discusses the beneficiary's managerial responsibility over subordinate employees, and counsel asserts that the beneficiary "may be a 'function manager.'" Thus, counsel also represents that the beneficiary will be acting in a managerial capacity. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

The job description submitted by the petitioner is brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statement that the beneficiary will "establish the goals and policies of the company . . ., negotiate major contracts and exercise wide latitude in discretionary decision making" provides no indication of the actual tasks the beneficiary will perform on a daily basis. The petitioner indicates that the beneficiary will "manag[e] the company's . . . human capital" and "hire, train and supervise employees." Yet, considering the beneficiary was the only documented employee of the petitioner as of the date of filing the petition, these statements are not congruent with the reality of the petitioner's operations or the beneficiary's true duties. In fact, the petitioner's job description is little more than a restatement of the statutory definition of executive capacity as provided in section 101(a)(44)(B) of the Act. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job

description does not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be operational or administrative in nature. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because counsel's description of the beneficiary's position includes tasks that do not fall directly under traditional managerial duties as defined in the statute. For example, counsel indicates that the beneficiary will "[gather] information on trade regulations, treaties, and policies" and "[conduct] feasibility studies" which do not appear to be managerial or executive tasks without further explanation. Counsel states that the beneficiary will "[establish] contacts with wholesalers and major national retail chains for the sale of manufactured apparel and other merchandise" and "[develop] marketing strategies" which appear to be non-qualifying sales functions. As the petitioner has not provided an indication of the portion of the beneficiary's time committed to these tasks, the AAO cannot determine whether the beneficiary is primarily performing the duties of an executive or manager. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel asserts that the petitioner had "one employee . . . other than the beneficiary" at the time of filing the petition. However, in response to the director's request for evidence, the petitioner stated that it "currently employs 1 employee." Thus, the petitioner indicated that the beneficiary was the sole employee as of the date of filing the petition. 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).

The record contains no evidence to support that the petitioner employed an additional employee on the date of filing. Counsel alleges that the petitioner's 1999 and 2000 corporate tax returns serve as evidence that the petitioner had "contract employees and employees on the payroll." However, the petitioner's 1999 Form 1120 reflects that no salaries or wages were paid in that year. The petitioner's 2000 IRS Form 1120 reports that $4,680 was paid in salaries and wages, yet no documentation has been provided to show when during 2000 these salaries or wages were paid. As the petition was filed on July 21, 2000, the petitioner's 2000 Form 1120 does not serve as conclusive evidence that the petitioner paid salaries or wages on or before that date. Finally, neither the 1999 nor the 2000 tax return reflect any "cost of labor" expenditures at line 3 of Schedule A or otherwise reflect any payments to contract labor. 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).

Counsel asserts that "the petitioner worked regularly with two other 'employees,' namely, a freight forwarder and a CPA." However, the petitioner has provided no evidence to show that it utilizes the services of a CPA. Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. Evidence reflects

that the petitioner has used the services of freight forwarding companies, yet the petitioner has not identified an individual person who acts as a freight forwarder who is under the direct supervision of the beneficiary. The petitioner's use of freight forwarding services is more akin to one's use of the United States Postal Service (USPS), and the beneficiary's managerial authority over the employees of the freight forwarding services appears to be no more than that exercised over a USPS clerk. Thus, evidence does not support that the beneficiary manages subordinate employees as contemplated by section § 101(a)(44)(A)(ii) of the Act.

Counsel further provides that the level of commerce of the petitioner indicates that "the beneficiary worked in a complex operation overseeing contract employees." Counsel references the petitioner's 2001, 2002, and 2003 tax returns, as well as 2003 IRS Forms 1099, and asserts that the petitioner's growth in recent years supports that the beneficiary will act as a manager or executive. The petitioner further submitted numerous documents reflecting that it ordered merchandise and conducted business after the date of filing the petition. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As the petition was filed on July 21, 2000, the petitioner's documentation of business activity after that date, including the 2002 and 2003 tax forms, and merchandise orders, is not probative of the petitioner's eligibility as of the date of filing. Further, as discussed above, the petitioner's 2000 Form 1120 does not provide a monthly apportionment of the petitioner's financial activity during that year, and thus, by itself it does not serve as evidence of the petitioner's business activity on or before July 21, 2000. 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. at 190.

Counsel asserts that the beneficiary can be considered a function manager. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, here the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. For this reason, the AAO cannot determine whether the beneficiary is primarily performing 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).

Counsel references an unpublished AAO decision involving an employee of the Irish Dairy Board to support the assertion that "[a] person may be a manager or executive even if he is the sole employee of the company where he utilizes outside independent contractors or where the business is complex." Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Furthermore, 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 cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (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. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that

both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations specifically call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii). Additionally, regarding *Mars Jewelers, Inc.*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district, in contrast to the broad precedential authority of the case law of a United States circuit court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

Yet, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to an intracompany transferee. *See* section 101(a)(44)(C), 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). As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner has not articulated how the reasonable needs of the operation will be satisfied with the beneficiary acting as the sole employee in the claimed managerial or executive capacity. The petitioner operates as an importer and wholesaler of food items and other merchandise. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as placing orders for goods, answering questions from customers about merchandise, tracking the petitioner's inventory, managing a checking account and paying bills, answering telephones, filling out shipping forms, receiving deliveries, conducting sales transactions, and providing custodial services. As the beneficiary is the sole employee of the petitioner, it is clear that he must perform all of these non-qualifying tasks. Thus, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner submits a letter from Michael Goodfriend, Management Consultant, in which he states "in my professional opinion as an expert in the field, I conclude that it is reasonable that [the beneficiary] will be primarily engaged in the duties of a President." Mr. Goodfriend makes no specific reference to evidence in the record, thus his statements are conclusory and carry no weight in this proceeding. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may

give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Further, Mr. Goodfriend highlights that "[s]ince 2003, the [petitioner] has experienced remarkable growth," and he qualifies his assessment with the phrase "given the current organization of the company." As discussed above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The fact that the petitioner has experienced growth since filing the petition, or the state of the current operations of the petitioner, are not probative of the petitioner's eligibility as of the date of filing.

Based on the foregoing, the record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, as discussed above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner has not established that it has a qualifying corporate relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). On the initial petition, the petitioner indicated that it is the affiliate of the beneficiary's foreign employer. The petitioner asserts that this relationship is established because the foreign entity is a sole proprietorship of K. P. Geetha, and K. P. Geetha owns 50 percent of the petitioner. The petitioner submitted copies of its 1998, 1999, 2000, 2001, 2002, and 2003 IRS Forms 1120, U.S. Corporation Income Tax Return, a line and block chart illustrating the corporate relationship, the petitioner's certificate of incorporation, minutes of the petitioner's organizational meeting, and two stock certificates for the petitioner.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1) defines "affiliate" as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L)(2) defines "affiliate" as "[o]ne of two legal entities owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity." The term "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.

The petitioner is 50 percent owned by the beneficiary and 50 percent owned by K. P. Geetha, yet K. P. Geetha owns 100 percent of the foreign entity as a sole proprietor. Therefore, the two entities are not affiliates as defined by 8 C.F.R. § 214.2(l)(1)(ii)(L)(2), as the beneficiary and K. P. Geetha do not own and control

approximately the same share or proportion of each entity. Documentation suggests that K. P. Geetha owns and controls the foreign entity. While K. P. Geetha owns 50 percent of the petitioner, the evidence of record reflects that he does not control the company. Instead, the submitted documentation clearly shows that the beneficiary actually controls the petitioner. For example, the minutes of the petitioner's organizational meeting reveal that the beneficiary is the sole board member, holding the positions of Chairman, Director, President, Secretary, and Treasurer. As the beneficiary is the sole signor on all of the petitioner's documentation, including decisions of the board of directors and stock certificates, it is evident that the beneficiary controls the petitioner, not K. P. Geetha. Thus, the two entities are not affiliates as defined by 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), as they are not both owned and controlled by the same parent or individual. Thus, the record is insufficient to show a qualifying corporate relationship.

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 notes that the CIS Texas Service Center previously approved a prior petition filed by the petitioner on behalf of the beneficiary, specifically the initial "new office" petition. The director's decision does not indicate whether he reviewed the prior approval of the previous nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same corporate relationship as documented in the current record, the approval would constitute material and gross error on the part of the director. Further, the prior approval of the petitioner's prior nonimmigrant worker petition does not preclude the AAO from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Omni Packaging, Inc. v. INS*, 930 F. Supp. 28, 33-34 (D.P.R. 1996); *Matter of Khan*, 14 I. & N. Dec. 397 (BIA 1973)(finding that the agency is not required to approve an application where eligibility has not been demonstrated, merely because of a prior approval, which may have been erroneous). 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). Additionally, the AAO's authority over the service centers is generally comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition 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*, 534 U.S. 819 (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 met this burden.

ORDER: The appeal is rejected.