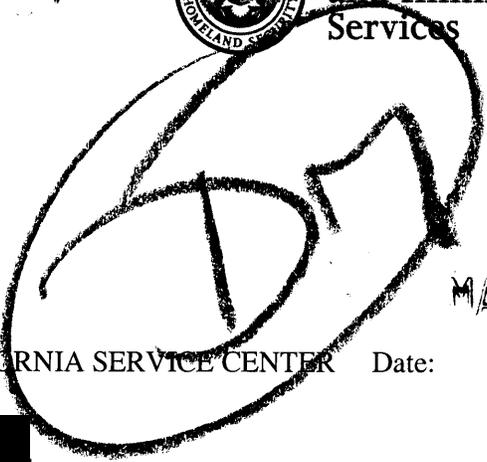


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MAY 20 2005

File: WAC 02 133 51527 Office: CALIFORNIA SERVICE CENTER Date:

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

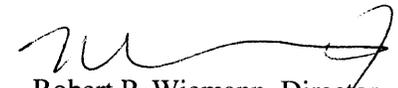
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 New York that is primarily engaged in selling international pre-paid telephone cards and telephone lines. The petitioner claims that it is the subsidiary of I.P.S. Inc., located in Tokyo, Japan. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and was subsequently granted an extension of stay. The petitioner now seeks to extend the beneficiary's stay for an additional two-year period.

The director denied the petition concluding that the petitioner provided insufficient evidence to demonstrate that the beneficiary will continue to be employed in the United States in a 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 director's decision contained "mere accusations and false assumptions to support their reasons to deny the petition." Counsel contends that the petitioner submitted sufficient evidence to establish that the beneficiary has been and will continue to be employed in an executive capacity, and suggests that the director applied an inappropriate standard of evidence. In support of these assertions, counsel submits a brief and additional evidence.

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 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 a letter submitted with the petition, dated February 10, 2002, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will continue to ensure that [the petitioning organization], the U.S. branch office, is fully operational and the company's expansion efforts will prove to be successful in the U.S. market. As the president of [the petitioning organization], [the beneficiary's] duties and responsibilities will include planning, developing, establishing and modifying new policies and objectives of IPS, INC, our Japanese parent company.

[The beneficiary's] specific responsibilities are to promote and develop business and trade in the consumer field in the United States, facilitate the supply and demand factor of products, set corporate goals and policies, management of all financial, budget and personnel operations. He will oversee recruitment and training of personnel, warehouse operations, budget allocation and control and contract negotiations with suppliers and distributors. Our aim is to establish responsibilities and procedures to achieve smooth flow of operations.

In addition, [the beneficiary] will continue to plan and develop public relations policies designed to further improve our branch office's public image, as well as relations with the clients, employees, and the public.

[The beneficiary] will direct and coordinate the formulation of procedures to increase efficiency of operations and to increase profits. He will review financial statements to determine progress and status in attaining profitability. He will revise objectives and plans accordance [sic] with current conditions.

[The beneficiary] will also evaluate the work performance of employees of our branch office. He will look for compliance with established policies and objectives of our company and the contributions of the employees in attaining our objectives.

[The beneficiary] will ensure that the qualify of service provided to clients of our U.S. branch office, [the petitioning organization], is in strict adherence to the standards set by our Japanese parent corporation, IPS, INC.

On the I-129 Petition, the petitioner indicated that it has seven employees in the United States. In support of the petition, the petitioner submitted an organizational chart showing that the beneficiary supervises a clerk/secretary, a technical support manager, a sales/marketing manager (who is shown to supervise local sales staff in New York), and the manager/Los Angeles office (who is shown to supervise "local staff" in Los Angeles.) The organizational chart also reflects that the beneficiary indirectly supervises [REDACTED] "Philippines Customer Service," and "Brazil Customer Services."

On June 26, 2002, the director requested additional evidence.<sup>1</sup> Specifically, the director requested: (1) an original letter explaining the need for the beneficiary's L-1 nonimmigrant extension; (2) balance sheets and statements of income and expenses showing the foreign entity's financial position; (3) the foreign company's bank statements for the last twelve months; (4) the total number of employees at the U.S. location where the beneficiary will be employed; (5) a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The director specified that the chart should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision; clearly identify the beneficiary's position in the chart; list all employees under the beneficiary's supervision by name and job title; and include a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision.

In response, the petitioner submitted a letter from the petitioner, dated July 20, 2002, stating:

[The beneficiary's] position has been an executive/managerial position within the organization. He will initially recruit three (3) qualified U.S. workers to fill positions of different division [s] of the company. Thereafter, [the beneficiary] will hire an Administration Director to recruit other employees for different positions.

The petitioner also provided a list of three employees: a sales manager, whose salary is listed as \$40,000, a resident of New York; a sales assistant manager, whose salary is listed as \$24,000, a resident of California; and an accountant, whose salary is listed as \$18,000, also a resident of California. The petitioner states that the accountant has a Bachelor's degree in accounting from the Philippines. The other two employees are claimed to have at least some college-level education. The petitioner submitted no supporting evidence to document employment of these individuals.

The petitioner did not provide a job description for its accountant. The other two employees were claimed to have the following duties:

Sales manager – negotiate with telephone carrier company which is like quest, mci [sic].  
[A]rrange between Philippine staff in Philippine and their client.

Sales assistant manager – negotiate with Asian grocery store, restaurant of phonecard dealer, support to his client, trouble shooting with his client and assist of [sales manager].

In addition, the petitioner submitted an organizational chart depicting an entirely different structure for the company, with responsibility for accounts, sales development and technology divided among three "sections." The chart lists additional staff, including a financial analyst, a clerk/secretary, a systems engineer, technical

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<sup>1</sup> The AAO notes that the request for evidence issued on June 26, 2002 was more than one page in length. However, only one page is included in the record. Upon review of the petitioner's response to the request for evidence, it appears that the petitioner responded only to the first page of the request. It is therefore possible that the petitioner received an incomplete request for evidence. The AAO will take this into consideration in reviewing evidence submitted for the first time on appeal.

support staff, and sales representatives. No employee names were indicated on this chart. Finally, the petitioner submitted a new group organizational chart, showing that all three of the above-mentioned "sections" report to the president of the parent company in Japan.

On December 12, 2002, the director denied the petition. The director noted the inconsistencies in the record regarding the number of individuals employed by the petitioner, and the petitioner's failure to provide the requested Forms DE-6, Quarterly Wage Report and Federal income tax returns.<sup>2</sup> The director determined that, "from the evidence submitted, it appears that at the end of the one year period,<sup>3</sup> the petitioner failed to establish that the beneficiary supervises any other executives or managers or that the business has expanded to a point where it will support an executive position." The director further noted that the evidence submitted indicates that the beneficiary will be involved in "substantially all aspects of the actual day to day duties rather than directing activities through managers, executives, or professionals." The director concluded that the submitted evidence was insufficient to demonstrate that the beneficiary has been or will be functioning primarily in a managerial or executive capacity.<sup>4</sup>

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services' (CIS) decision "contained mere accusations and false assumptions to support their reasons to deny the petition where in fact such decision was only grounded by citing "the burden of proving eligibility for the benefit sought remains entirely with the petitioner." Counsel further contends that the petitioner has met its burden of proof by providing "conclusive evidence" which indicates that the beneficiary has performed and will continue to perform in an executive capacity as the petitioner's president. Counsel provides a more detailed overview of the operations of the petitioner's group and states that the petitioner "has expanded to a point where it will support and is in need of an executive position to direct its operations." In addition, counsel states that the "majority of dealings of [the petitioning organization] are dealt with the Philippine Branch," apparently referring to the petitioner's claimed affiliate, [REDACTED] (PIMS). Counsel notes that "the primary function of the U.S. Office is to market the services and the products being offered. Nonetheless, [the petitioning organization] directs and manages the Philippine office."

Counsel for the petitioner includes in his letter the same job description for the beneficiary already quoted in full above, and submits that these duties "are not substantial aspects of the day to day duties involved in the

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<sup>2</sup> The AAO notes that there is no request for the petitioner's Forms DE-6 and federal income tax returns in the record of proceedings as presently constituted. Since it appears the petitioner received an incomplete copy of the request for evidence, the AAO will consider the petitioner's 2001 Form 1120, which is submitted for the first time on appeal.

<sup>3</sup> The AAO notes for the record that the instant petition was not filed as an extension request for a new office under 8 C.F.R. § 214.2(l)(14)(ii) as suggested by this statement by the director. The petitioner had been active for over three years at the time the petition was filed and the beneficiary was previously granted an extension of stay.

<sup>4</sup> In his decision, the director stated "Title 8 CFR 204.5(g)(2) requires that the petitioner establish that it has the ability to pay the wages of the beneficiary and its employees since the filing date of the visa petition." The cited regulation applies only to petitioners in immigrant proceedings and has no bearing on the instant petition. Accordingly, the director's statement is withdrawn.

operations of the company. The daily operation of [the petitioning organization] is in the area of distribution of the company's products. The [petitioning organization], it being a marketing platform of the foreign company, I.P.S. Japan, is primarily involved in finding potential marketing scheme in distributing the products of the mother organization, one of which are telephone prepaid cards." Counsel goes on to state that "it is the brainchild of [the beneficiary] to utilize 'distribution channels' to assure that the actual day to day operation of the company is met. As of 2002, there exists sixteen (16) various distribution points from different states." Counsel attaches copies of order invoices and consignment agreements dated 2000 and 2001 issued by the petitioner for the sale of pre-paid calling cards.

Counsel for the petitioner asserts that the beneficiary employs three professionals and oversees sixteen distributors, and also attaches the petitioner's "W-2 tape list" for 2001. The AAO notes that the list includes only the beneficiary, who received wages of \$44,000; the employee previously identified as the accountant, who received \$3,920 in 2001 despite petitioner's previous claim that his annual salary is \$18,000; and the employee previously identified as the sales manager, who received \$28,594.49 in 2001, despite the petitioner's previous claim that he earns an annual salary of \$40,000. The record contains no evidence of payments to the "assistant manager" mentioned by counsel.

In his brief, counsel provides the following job descriptions for the beneficiary's subordinates:

Sales Manager – Directly oversees the distributors; reports directly to president; seeks the overall approval of the president in management actions; negotiate with telephone carrier company; arranges the transaction between the Philippine and USA company.

Assistant Manager – Assists the manager in his duties; negotiates with other potential distributors;

Accountant – Arranges the finances of the company; directly reports to the president.

Counsel submits that employing three professionals is no indication that the petitioner "is not capacitated to support an executive position" and further submits that "the complexity of the global operations of the company, and that the U.S. Companies [sic] is a significant component of the global operations of the whole organization are adequate basis to provide the need for an executive position." Counsel contends that the beneficiary, in his discretion, "deems that the company can smoothly operate with only three (3) professionals" and states that CIS had no basis for denying the petition based on the number of employees, since "directing the management of the organization is not directing activities of managers, other executives and professionals, as the Service asserts."

On appeal, counsel notes the discretion exercised by the beneficiary in initiating transactions in the Philippines, and notes that "because of the huge potentiality of this particular market, [the beneficiary] also directs and oversees the Philippine Operations," referring to the petitioner's claimed affiliate, PIMS. Counsel states that the director of the Philippine branch reports directly to the beneficiary and provides him with relevant documentation regarding the status of local operations, employees and shipping. In support of this assertion, counsel attaches a contract signed between the petitioner and PIMS, a list of PIMS' employees, and various other documents in support of this assertion. The agreement indicates that the petitioner will conduct

telephone service business in the Philippines and that PIMS “will perform in-bound and out-bound teleshopping business in behalf of IPS USA for Filipinos living in USA.” As additional evidence of the beneficiary’s discretionary authority, counsel notes that the beneficiary is in the process of hiring a market research analyst and submits copies of employment ads placed by the petitioner.

Finally, counsel states that “[the beneficiary] is the president of the company and his ways and methods of managing his area of responsibility must not be questioned and must be respected.” Counsel cites *Mindseye v. Ilchert*, C-987-2062-WWS (N.D. Cal. March 4, 1988), in support of this assertion. In addition, counsel questions the standard of proof applied by the director in making his decision in this case.

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.* In the instant petition, the petitioner identifies the beneficiary’s position as that of an executive under section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

On review, the petitioner has provided only a vague and nonspecific description of the beneficiary’s duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary “will direct and coordinate the formulation of procedures to increase efficiency of operations,” “facilitate the supply and demand factor of products,” and “set corporate goals and policies” and that his “vital task is to penetrate the competitive market of the industry.” The petitioner did not, however, define the beneficiary’s goals, policies or clarify who actually performs the primary function of the organization, which the petitioner claims is marketing. 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)). 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. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

Further, rather than providing a specific description of the beneficiary’s duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For instance, on appeal, counsel for the petitioner states that the beneficiary (1) primarily directs the management of the organization and the major component or function of the organization; (2) heads the organization in establishing its goals and policies; (3) exercises wide latitude in discretionary decision-making; and (4) occupies the highest position and receives only general supervision or direction. However, merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989); *Avyr Associates, Inc. v. Meisner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Further, the AAO notes that the petitioner stated in its letter dated February 10, 2002 that the Board of Directors of the Japanese parent company “exercises complete control over the U.S. branch and determines its goals and policies.” This statement by the petitioner, particularly in light of the petitioner’s failure to define the beneficiary’s job duties in concrete, quantifiable

terms, raises questions regarding the extent of the beneficiary's claimed discretionary authority to establish the goals and policies of the organization.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). Counsel contends that "[the beneficiary] is the president of the company and his ways and methods of managing his area of responsibility must not be questioned and must be respected." In support of this assertion, counsel cites an unpublished decision of a federal district court in California. Counsel asserts that in this matter, CIS conceded that it "may not question the approach of a company in meeting its need." The record does not support counsel's claim, as counsel has not provided a copy of the court's decision. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

Moreover, contrary to counsel's assertions that the beneficiary's "methods of managing his area of responsibility must not be questioned," 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.* In the instant case, the petitioner has entered into the record numerous contradictory and unsupported statements and documents regarding its staffing levels.

At the time of filing, the petitioner was a three-year old company engaged primarily in selling long distance international and domestic pre-paid telephone cards and telephone lines that claimed to have annual income of \$315,818 and seven employees as of March 2002. With the initial submission, the petitioner submitted only an undated "W-2 tape list" which does indeed list seven employees, including the beneficiary. As noted above, the organizational chart submitted showed that the beneficiary supervised a clerk/secretary, a technical support manager, a sales/marketing manager, who in turn supervised local sales staff in New York, and a Manager, Los Angeles office, who supervised local staff in Los Angeles. The chart also shows that the beneficiary indirectly supervised [REDACTED] Philippines Customer Service" and "Brazil Customer Services." No further explanation of the company's staffing levels was provided.

In response to the director's June 2002 request for additional information regarding the petitioner's staffing levels, the petitioner submitted a statement indicating that the beneficiary supervises three employees, a sales manager, an accountant and a sales assistant manager. Only one of these employees, the sales manager, appears on the "W-2 tape list" submitted with the petition. Although the petitioner indicates this employee's salary as \$40,000, the only evidence submitted by the petitioner shows that the sales manager was paid \$14,789.40. In its letter dated July 20, 2002, the petitioner stated that the beneficiary "will initially recruit three (3) qualified U.S. workers to fill positions of different division [sic] of the company. Thereafter, [the beneficiary] will hire an Administration Director to recruit other employees for different position." With this submission, the petitioner included a different organizational chart depicting the division of the company into three "sections": an "account section" headed by the beneficiary as President/Financial Manager and supervising a financial analyst and a clerk/secretary; a "technology section" consisting of a system engineer and technical support staff; and a "sales development section," headed by a sales manager with two sales representatives. It is not clear from the record if this chart was meant to reflect the petitioner's current organization or if it is a proposed chart related to the "different divisions" referenced in the petitioner's letter.

On appeal, counsel asserts that the beneficiary manages three professionals, oversees sixteen distributors, and oversees the parent company's Philippine branch office. In his brief, counsel lists the same three employees identified in the petitioner's response to the director's request for evidence, and provides a different undated "W-2 tape list," claimed to be for 2001, showing the beneficiary and two other employees. The sales manager received a salary of \$28,594.49 and the accountant received only \$3,920, suggested that his services were only part-time. The assistant sales manager is not listed. The AAO notes that the sum of the wages reported in this "tape list" do not match the salaries and wages reported on the company's 2001 Form 1120, and that the beneficiary's wages are variously reported as \$44,000 on the tape list, \$48,000 on the petitioner's Form 1120, and \$56,000 on the beneficiary's 2001 Form W-2. No explanation is provided for these discrepancies.

Counsel also provides on appeal evidence of the petitioner's relationships with distributors of pre-paid phone cards and with its Philippine affiliate. However, counsel does not explain how these documents support counsel's claim that the beneficiary exercises discretionary authority in the oversight of the distributors' or the affiliate's operations. In fact, all corporate organizational charts submitted for the petitioner's group show that the Philippine company reports directly to the president of the parent company in Japan. Without probative documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

In view of the inconsistent and unsupported statements made by the petitioner, and the lack of supporting evidence, the AAO must conclude that at the time of filing, the petitioner employed the beneficiary, a sales manager and a part-time accountant who appears to have received a total of \$5,720 in wages in the two years preceding the filing of the instant 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 evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The director also noted in his decision that the petitioner listed a New York residential address for the sales manager as of August 2002, while the company claims it is based in

California. If the sales manager is based in New York, the beneficiary would be the sole employee located in the company's Los Angeles office.

The petitioner states that the sales manager's responsibilities include directly overseeing distributors, negotiating with telephone carrier companies and arranging the transactions between the Philippines and the petitioner. As these duties do not appear to encompass the whole of the day-to-day operations of the company, and since there is no probative evidence the petitioner employs other full-time employees, the beneficiary must be directly involved in marketing, which is claimed to be the organization's primary purpose, as well as the company's daily financial activities, clerical or administrative tasks, and other routine, non-executive duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a re-evaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. If the beneficiary is performing the marketing function, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the petitioner's multiple descriptions of its organizational structure suggest that it is trying to materially change the beneficiary's level of authority within the organizational hierarchy. However, 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). 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).

Finally, on appeal counsel suggests that the director applied an inappropriate standard of proof in the instant proceeding, relying on an excerpt from the INS Adjudicator's Field Manual which states that strict rules of evidence used in criminal proceedings do not apply in administrative proceedings, and further states that "the service need not prove ineligibility." *See* INS Adj. Field Manual 10.3. However, the AAO does not find that an inappropriate standard was applied in the instant matter. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional professionals and other employees in the future. 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. [REDACTED]

The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization or establishing its goals and policies. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. 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. at 604. For this reason the appeal will be dismissed.

Beyond the decision of the director, on Schedule K of the petitioner's 2001 Form 1120 federal tax return it declares that it is not a subsidiary or in an affiliated group, and no individual or corporation directly or indirectly owns more than 50% or more of the corporation's voting stock. Schedule E of Form 1120 indicates that the beneficiary owns 40% of the company's stock. This document directly contradicts the claim on the petition form that it is a wholly-owned subsidiary of the foreign entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Consequently, there is insufficient evidence to establish that the petitioner maintains a qualifying relationship with a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, the petition cannot be approved.

Finally, the AAO notes that the petitioner submitted with the petition and on appeal a corporate profile for the IPS group, which appears to have been prepared in 2001. The company profile lists a single company, "Dolphincall USA, Inc." operating in the United States. The Los Angeles address listed for this company is the address on record for the petitioner. The beneficiary was previously employed in the petitioner's New York office and is now claimed to work in the Los Angeles office, although the petitioner made no statements regarding the date of establishment of the new office, or the date of the beneficiary's transfer. The petitioner makes no specific reference to [REDACTED] so the AAO can only speculate as to whether this is a trade name for the petitioner, a successor-in-interest, or a completely separate company. The absence of the petitioner's name from the latest corporate profile also raises questions regarding the ownership of the company and the beneficiary's continued employment with the petitioner. As the appeal will be dismissed based on the grounds stated above, this issue need not be examined further.

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).

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. Accordingly, the decision of the director is affirmed and the petition is denied.

**ORDER:** The appeal is dismissed.