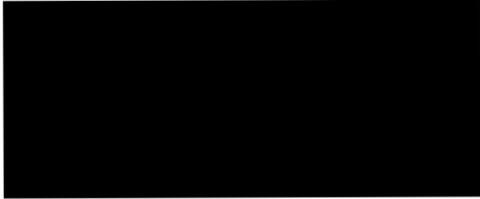


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**U.S. Citizenship
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Services**

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File: EAC 04 217 52994 Office: VERMONT SERVICE CENTER Date: **MAR 28 2006**

IN RE: Petitioner:
Beneficiary:



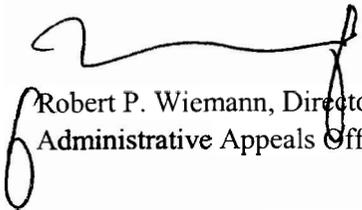
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Vermont 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 chief executive 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 claims to be engaged in the import, export and distribution of silver and gold jewelry. The petitioner states that it is the subsidiary of [REDACTED], located in Sharjah, United Arab Emirates. 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 for three years.

The director denied the petition, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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, the petitioner contends that the director abused his discretion in denying the petition, and asserts that the director placed undue emphasis on the petitioner's staffing levels, rather than considering the beneficiary's actual job duties. The petitioner asserts that the beneficiary manages an essential function and performs only managerial and executive duties. The petitioner submits a brief and additional evidence in support of the appeal.

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 managerial 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 would be employed by the United States entity in a primarily managerial or executive capacity under the extended petition.

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.

The petition was filed on July 16, 2004. In a July 12, 2004 letter, the petitioner described the beneficiary's duties as follows:

His proposed duties in the U.S. company will be to direct, coordinate and manage the entire business operations of [the petitioner]; overseeing the establishment of the U.S. Company, planning and developing the U.S. investment, executive [sic] or recommending personal actions, determining which and from where the raw silver and gold to be purchased; hiring other managers for sales and marketing, training those managers and if need arises to fire them also; supervising all financial aspects of the company and set policies and objectives; confer with company's officials here and abroad. He will have full discretionary authority in day to day business. His position involves executive functions only. The current purchasing director as well as the marketing director were hired 4 months ago because the previous manager lacked certain technical know how. They are responsible to [the beneficiary] as well as a staff of five independent contractors and one accountant.

The petitioner indicated on Form I-129 that it had three employees at the time of filing. The petitioner submitted its IRS Form 941, Employer's Quarterly Tax Return, for the first quarter of 2004, showing the beneficiary as the only employee. The petitioner also submitted two letters of appointment for the beneficiary's subordinates, including: one for a "general manager/director purchase" dated March 26, 2005, stating that the employee was hired on a full-time basis at an annual salary of \$32,500; and one for its "director marketing & distribution," dated June 28, 2004, stating that the employee was hired on a full-time basis at an annual salary of \$31,500.

On September 14, 2004, the director requested additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. Specifically, the director instructed the petitioner as follows:

Please provide a list of all employees and contractors. Please indicate their job title, job description, how long they have been employed by the petitioner, and their daily interaction with the beneficiary. Further, please provide copies of all W-2's and respective W-3 for the 2002 and 2003 tax years. Please provide a detailed description of the beneficiaries' [sic] hourly duties.

In a letter dated December 3, 2004, the petitioner provided the following expanded job description for the beneficiary:

(1) Chief Executive (beneficiary) functions at a senior level within the organization hierarchy which consists of General Manager/Director Purchase, Director Marketing & Distribution, Office Manager/Accountant, 5 independent contractors. (2) Holds telephone conferences to include oversees [sic] conferences, directs all the managers and contractors in carrying out business operations. (3) Beneficiary does not perform tasks to physically market or distribute the products. (4) Devise plans, locating outlets and arranging for their establishments [sic], negotiating and hiring contractors to run the operations. (5) Beneficiary would have total discretion over expansion sites and the projected rate of expansion. (6) Coordinates the key activities necessary to achieve technical and commercial success. (7) Supervises all the financial aspects of the company and set policies and goals. (8) Exercises his discretionary authority to hire/fire managerial staff and contractors.

The petitioner indicated that its general manager/director purchase is employed on a full-time basis and performs the following duties: managing the key operations of the company including purchasing raw materials; conducts surveys to identify sources for purchasing cost effective materials; supervises the director marketing and distribution and independent contractors; negotiates contracts for the final approval of the beneficiary; manages inventory; assists the beneficiary with banking and accounts management; and assists the beneficiary with hiring of new staff.

The petitioner stated that its director, marketing and distribution is responsible for market analysis; setting strategic goals, negotiating sales and payment terms with U.S. contractors; setting sales quotas and expenses, developing advertising and promoting products in the United States; selecting new territories for expansion, and advising the beneficiary on the profitability of specific products under budget constraints.

The petitioner submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2004, which confirm the employment of the general manager/purchase director at a monthly salary of \$600, and the employment of the director, marketing and distribution, at a monthly salary of approximately \$833. The Forms 941 show that both employees were first paid in April 2004.

With respect to its independent contractors, the petitioner provided the following list of companies and briefly indicate:

- ██████████ Atlanta, GA (wholesale distribution outside New York)
- ██████████ New York (Importers/ Sales)
- ██████████ New York (Sales and Marketing in New York)
- ██████████ Jersey City (Wholesale distributors inside New Jersey)
- ██████████ Jackson [Heights], [New York] (Wholesale distributors inside New York)
- ██████████ (Accountant / Office Manager)

The petitioner submitted a letter from five companies identified as independent contractors. The distribution executive of ██████████ confirmed that his company has a “business dealing” with the petitioner by sharing its network as an outlet for its jewelry products. The president of ██████████ indicated that his company has an “administrative arrangement” with the petitioner on a commission basis, noting that it assists the petitioner with importing materials, that its sales executive and staff have “sold some of their stuff,” and that “we strictly work under the guidance of [the petitioner’s] marketing and distribution director.” The president of ██████████ stated that the petitioner has utilized his company’s services as an independent contractor to sell and market its products in Sayville, New York. The president of Sai Jewelers stated that his company has a “business arrangement” with the petitioner to promote and distribute the petitioner’s products, under the supervision of the petitioner’s marketing and distribution director. Finally, the president of ██████████ stated that his company acts as a marketing and distribution agent for the petitioner on a commission basis, under the leadership of the petitioner’s marketing and distribution manager.

The director denied the petition on February 8, 2005, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the job description provided for the beneficiary was vague and general in nature and suggested that he would be directly involved in the company’s sales activities, based on his responsibility for negotiating and hiring contractors. The director also referred to the petitioner’s business plan, noting that the company had intended to hire five employees during its first year of operations. The director concluded that as the company had only three employees, it was not fully staffed and therefore the beneficiary would not be relieved from performing the day-to-day tasks of running the company.

On appeal, the petitioner asserts that the beneficiary qualifies as a manager because he “manages, directs and controls the Corporation.” The petitioner claims the director erred in determining that the beneficiary would directly supervise the sales activities of the independent contractors, noting that the beneficiary’s subordinate, the general manager, would perform this responsibility. The petitioner states: “The responsibility for hiring or firing [the independent contractors] is only one time activity over which the chief executive exercises discretionary authority.”

The petitioner also contends that the beneficiary’s responsibility for managing the petitioning company should be considered management of an “essential function” within the organization owned by the foreign entity. The petitioner states that the beneficiary is responsible for “developing sales and marketing strategies and plans; coordinating and developing new business opportunities; researching new markets; and gradually

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expanding the size of the corporation. . . . Therefore, he manages and controls essential functions and, as the highest ranking manager and executive of [the petitioner], functions at and holds a senior level post.” The petitioner cites an unpublished AAO decision in support of its assertion that “the issue of supervising other personnel is not a component to qualify for non-immigrant visa status as a functional manager.”

The petitioner argues that the burden of proof for large and small companies is identical and that pursuant to the Immigration Act of 1990, CIS is required to consider staffing levels in relation to the reasonable needs of the business and its stage of development. The petitioner asserts that the U.S. company has sufficient resources to hire additional staff but finds it unnecessary to do so, as its current staff of three employees and five contractors is sufficient to provide its services. The petitioner also emphasizes that it intends to hire additional permanent employees to replace its contractors, and indicates that it hired a sales manager in January 2005.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. In this matter, the petitioner utilizes the terms interchangeably, and also indicates that the beneficiary will serve as a “function manager. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive and a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. At a minimum, the petitioner must demonstrate that the beneficiary’s responsibilities will meet the requirements of one or the other capacity.

As noted by the director, the petitioner has failed to clearly define the beneficiary’s duties, even when put on notice that the job description provided with the petition was insufficient to establish that the beneficiary would be performing primarily qualifying managerial or executive duties. The petitioner initially indicated that the beneficiary’s position would involve “executive functions only” and that he would “direct, coordinate and manage the overall business operations,” “have full discretionary authority in day to day business,” and “set policies and objectives.” The petitioner’s initial description merely paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). 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).

In response to the director’s request for a detailed description of the beneficiary’s duties, the petitioner added that the beneficiary “functions at a senior level within the organization hierarchy,” “holds telephone

conferences,” “directs all managers and contractors in carrying out business operations,” “devise[s] plans, locat[es] outlets and “arrang[es] for their establishment,” has “total discretion over expansion sites and the projected rate of expansion,” and coordinates “key activities” necessary to achieve success. The petitioner did not, however, define what specific duties are involved in managing the daily activities of a three-person office, explain the nature or purpose of the beneficiary’s “telephone conferences,” clarify what specific duties the beneficiary performs to “coordinate” key activities or otherwise indicate what these key activities are, or provide evidence that the petitioner is actually in the process of establishing “outlets” or “expansion sites.” Without additional explanation, it is impossible to conclude that the beneficiary’s duties associated with these functions would be primarily managerial or executive. 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)). Reciting the beneficiary’s vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). The provided job descriptions do 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 non-managerial or non-executive. The petitioner’s statement that the beneficiary would “perform executive functions only” is not supported by a detailed job description or documentary evidence. Again, 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. at 165. Accordingly, the director specifically requested that the petitioner submit a detailed account of the beneficiary’s “typical day” in the form of a detailed description of the beneficiary’s hourly duties. This evidence is critical, as it would have assisted the director in ascertaining what percentage of the beneficiary’s time is devoted to performing qualifying versus non-qualifying duties. The petitioner neglected to provide the requested detailed job description. It must be emphasized that the petitioner bears the burden of documenting what portion of the beneficiary’s duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this reason, the petition cannot be approved.

Without a meaningful job description to evaluate, the director reasonably evaluated other factors, such as the petitioner's staffing levels, to determine whether the vaguely defined "executive" responsibilities were credible within the context of the petitioner's business. Counsel correctly states that, pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year-old company that claimed to be engaged in import, export and distribution of gold and silver jewelry. The evidence shows that the firm employed the beneficiary as chief executive, a "general manager/purchase director" and a "director, marketing and distribution." Although the petitioner indicated that the beneficiary's subordinates are both employed on a full-time basis at salaries in excess of \$30,000, the petitioner's quarterly tax returns show that these individuals were being paid monthly salaries of \$600 and \$833, respectively, at the time the petition was filed. In addition, the petitioner submitted a "letter of appointment" for the director marketing and distribution indicating that he was hired on June 28, 2004, yet, the petitioner's Form 941 shows that this employee received wages beginning in April 2004. 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). Moreover, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho* at 591. At most, the beneficiary's two subordinates appeared to be employed on a part-time basis at the time the petition was filed.

In addition, the petitioner's use of independent contractors has not been adequately documented in the record. The petitioner refers to the contractors as "import manager," "sales managers," and "wholesale distributors" but did not provide further explanation as to the nature and scope of the services they provide. The letters provided by the claimed contractors are written in very general terms, using vague language such as "administrative arrangement," "business arrangement," "business dealing," and "doing business with" to describe their relationship with the petitioning company. Only two of the five companies specifically state that they work with the petitioning company on a commission basis. The petitioner did not provide copies of agreements, contracts, invoices, or any other evidence to establish that the petitioner has actually paid for services provided by the claimed contractors. Again, 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. at 165. Without additional evidence, it is impossible to determine whether or to what extent these companies can be considered independent contractors who perform operational duties for the petitioning company, or whether the petitioner simply sells its products to these companies for re-sale. The AAO

acknowledges that the petitioner paid \$25,190 in commissions for the fiscal year ended April 30, 2004. However, there is insufficient evidence to establish to whom these monies were paid and for what purpose. The petitioner also claims to employ an "accountant/office manager" as an independent contractor. Again, the petitioner did not submit evidence of payments to this claimed employee or describe the type of services he provides. While it appears that an accounting firm prepares the petitioner's tax documentation, there is no evidence that an employee of the accounting firm performs the clerical and administrative duties of an "office manager" as claimed by the petitioner. The evidence of record does not substantiate the petitioner's claim that the independent contractors relieve the petitioner's other employees from performing routine tasks associated with importing, distributing and selling the petitioner's products, or the company's day-to-day office administration.

Based on the above discussion, the record establishes that the petitioner employs the beneficiary as a full-time chief executive, a part-time general manager/purchase director, and a part-time director of marketing and distribution, and achieves an unknown portion of its sales through outside commissioned staff. 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 whether the company is 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.* It is not possible to conclude from the totality of the evidence presented that the petitioner employs personnel who would relieve the beneficiary from performing the operational and administrative tasks necessary to operate the company. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On appeal, the petitioner asserts that the director overlooked evidence that the beneficiary will manage an "essential function," and asserts that a function manager is not required to supervise employees. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an essential function within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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 suggests that the beneficiary manages the "essential function" of overseeing the U.S. subsidiary for the petitioner's claimed parent company. The petitioner has not identified the function with specificity. More importantly, as noted above, the petitioner has not provided a comprehensive and detailed

description of the beneficiary's duties, nor has it established the proportion of the beneficiary's daily duties dedicated to managing these functions. The petitioner has not submitted evidence to establish that the beneficiary manages an essential function of the petitioning organization. Again, 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. at 165.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving as a "function manager" for L-1 classification even though the petitioner had only one other employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; the petitioner must, however, establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks.

In this matter, the lack of a detailed description of the beneficiary's actual duties, considered in conjunction with the inconsistent and vague information provided the petitioner with respect to the beneficiary's subordinates and the company's independent contractors, precludes a finding that the beneficiary would be performing primarily managerial or executive duties under the extended petition. The fact that an individual manages a small business and is assigned a managerial or executive job title does not necessarily establish eligibility as an intracompany transferee. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The petitioner indicates that it has hired an additional employee subsequent to filing the petition and plans to hire additional managers and 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, as noted above, the regulation at 8 C.F.R. § 214.2(i)(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. For this reason the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish the existence of a qualifying relationship between the United States and foreign entities.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

(G) *Qualifying organization* means a United States or foreign firm, corporation or other legal entity which meets exactly one of the qualifying relationships in the definitions of a parent, branch, affiliate or subsidiary specified paragraph (l)(1)(ii) of this section.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, director or indirectly, more than half of the entity and controls the entity; or owns, director 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.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) 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.

On the L classification supplement to Form I-129, the petitioner indicated that it is a wholly owned subsidiary of the foreign entity. The petitioner stated in its July 12, 2004 letter that the foreign entity owns 80 percent of the petitioner's stock. The petitioner also submitted a November 2, 2002 letter from its accountant who indicated that the beneficiary owns 80 percent of the U.S. company's stock, while another individual, [REDACTED] owns the remaining 80 percent. The petitioner provided its 2003 IRS Form 1120, which identifies the value of the company's stock as \$22,400 at the beginning of the year, and \$52,400 at the end of the year. The petitioner's financial statement for the fiscal year ended on April 30, 2004 identifies the value of the company's stock as \$100,000. The record also includes the foreign entity's audited financial statement for 2003, which indicates that the foreign company is owned by [REDACTED] who has a 51 percent interest, and the beneficiary, who has a 49 percent interest.

In his September 14, 2004 request for evidence the director requested that the petitioner submit copies of all share certificates, stock ledgers, or other evidence documenting ownership and control of each company. The director observed a discrepancy in the foreign entity's percentage of ownership in the petitioning company, but did not mention the other discrepancies and inconsistencies catalogued above.

In response, the petitioner stated that the petitioner's stock is distributed as follows:

[REDACTED], UAE	Parent Company	20%
[REDACTED] the petitioner]	USA Company	80%

The petitioner submitted its stock certificate numbers one and two, indicating that 160 shares were issued to the petitioning company itself on July 1, 2002, and 40 shares were issued to the foreign entity on the same date. The stock certificates indicate on their face that the company is authorized to issue 200 shares of common stock with no par value. The petitioner did not submit the requested stock transfer ledger or any additional evidence or explanation.

The petitioner has not established the existence of a qualifying relationship between the U.S. and foreign entities. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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

Given the number of discrepancies in this matter, the petitioner's stock certificates alone are not sufficient to establish the company's actual ownership. The petitioner has alternately claimed or submitted evidence showing that the foreign entity owns 100 percent, 80 percent, 20 percent or 0 percent of the petitioning company's stock. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In this case, the unexplained discrepancies with respect to the petitioner's actual ownership catalogued above lead the AAO to conclude

that the evidence of the petitioner's eligibility is not credible. For this additional reason, the petition cannot be approved.

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 CIS previously approved an L-1A petition filed on behalf of the beneficiary in order to allow him to open a new office in the United States. The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record with respect to the petitioner's claimed qualifying relationship with the foreign entity, 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).

Accordingly, the director is instructed to review the prior nonimmigrant petition approval for revocation pursuant to 8 C.F.R. § 214.2(i)(9)(iii).

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

ORDER: The appeal is dismissed.