

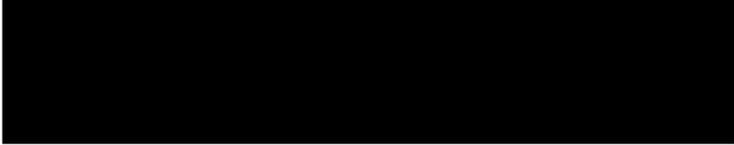


U.S. Citizenship  
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Services

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FILE: SRC 06 111 51328 Office: TEXAS SERVICE CENTER Date: APR 10 2007

IN RE: Petitioner:  
Beneficiary:



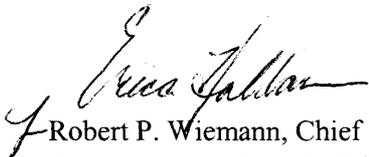
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Texas corporation, claims that it is a retail investment company. The petitioner states that it is a subsidiary of Super Salt & Chemical Works, located in Jambusar, India. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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 L-1A status. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president for a three-year period.

The director denied the petition on August 29, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that the petitioner operates a gas station and convenience store and it did not appear that the beneficiary supervises a staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Thus the director determined that the beneficiary will be primarily involved in performing the day-to-day services essential to running a business. In addition, the director noted discrepancies between the number of employees listed on the Form I-129 and the employees listed on the U.S. company's Forms 941, Employer Quarterly Federal Tax Return.

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 contends that the CIS "should not be deciding on the managerial or executive capacity merely on the basis of the number of employees that the beneficiary supervises or the job titles of the employees." Counsel contends that CIS cannot look at the company's size alone but must also take into account the reasonable needs of the organization and must consider the beneficiary's duties "in light of the overall purpose and stage of development" of the U.S. company. Counsel states that the U.S. entity is in an early stage of development as it commenced operations in 2002 and "suffered some setbacks in the initial stages of operations." Counsel further states that the beneficiary "would be employed at the highest position within the U.S. company." In addition, counsel cites several decisions to support the claim that a beneficiary as a sole employee or managing a small number of supervisors may qualify as a position of managerial or executive capacity. Finally, counsel for the petitioner asserts that the beneficiary is a function manager, and is employed by the petitioner in a primarily executive and managerial capacity. Counsel submits a brief in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

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

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

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

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

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

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

The nonimmigrant petition was filed on March 6, 2006. The Form I-129 indicates that the beneficiary will be employed in the position of president for the petitioner, which claimed to have five employees. In a support letter dated February 15, 2006, the petitioner explains that the petitioner manages a “profitable grocery/convenience store called ‘Hall’s Grocery,’ which currently employs five people. The petitioner stated that the U.S. entity is in the process of “setting up Janitorial Service and Deli operations within the store and plans to hire three more employees in the immediate future.” In addition, the beneficiary’s proposed duties in the U.S. are described as the following:

- Direct and coordinate marketing and business development activities of the organization
- Formulate and administer company policies
- In consultation with the management and the parent company in India, develop long-range goals and objectives of the company
- Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary
- Oversee new investment activities, including reviewing proposals and exploring other retail and convenience store businesses
- Direct and coordinate activities of employees in the operations, purchasing and marketing departments for which responsibility is delegated to further attainment of goals and objectives
- Oversee the financial and accounting activities of the organization, including budgeting, tax and regulatory matters
- Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives
- Discuss with management and employees to review achievements and discuss required changes in goals or objectives of the company

The petitioner also submitted a document entitled “Commercial Business and Family Residential Contract” for the sale of “Hall’s Grocery, house, garage” to [REDACTED], and “[REDACTED]” which was executed on

July 31, 2003. In addition, the petitioner submitted the deed of trust for the same property also issued to [REDACTED] and [REDACTED].

The petitioner also submitted several documents for the U.S. entity, including financial statements, tax returns, insurance policies, employee quarterly wage reports, and receipts and invoices, for 2003 and 2004.

In addition, the petitioner submitted a "Functional Flow Chart for the Beneficiary." The flow chart indicates the beneficiary as the executive officer/president and states that the beneficiary "operates primarily in an executive capacity." The chart indicates that the beneficiary will supervise the marketing and business development for both the U.S. entity and foreign company, including investment in retail and other service businesses. The chart also shows that the beneficiary will manage the finance and accounting functions for both the U.S. entity and the foreign company, and "directs the overall management, establishes goals and policies, exercises wide latitude in discretionary decision making." In addition, the chart indicates that the beneficiary will direct "overall management of foreign parent company," and "establishes goals and polices relations to the salt business."

On May 31, 2006, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested: (1) a description of the positions held by the four claimed employees of the U.S. entity; (2) a description of the position held by the beneficiary, including all duties performed and percentage of time spent on each duty; (3) an explanation as to how the beneficiary functions as a manager; (4) a copy of the Form 1120, U.S. Corporation Income Tax Return, for 2005; and, (5) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for all employees for 2005 and 2006.

In a response to the director's request, the petitioner re-submitted the original job description of the beneficiary's position in the United States but added the percentage of time spent on each duty:

- Direct and coordinate marketing and business development activities of [the petitioner] and [the foreign company] (15% of the time);
- Formulate and administer company policies by turning them over to the sales, store and finance managers (15% of the time);
- In consultation with the management and the parent company in India, develop long-range goals and objectives for [the petitioner] in order to increase profits, trim costs, and develop customer loyalty (20% of the time);
- Oversee new investment activities, including reviewing proposals and exploring other retail and convenience store businesses, particularly in the La Porte, Texas area (10% of the time);
- Direct and coordinate activities of employees in the sales, finance, operations, purchasing and marketing departments, for which responsibility is delegated, for further attainment of goals and objectives, such as the goals of reducing out-of-stocks (10% of the time);
- Oversee the financial and accounting activities of the organization, including budgeting, tax and regulatory matters (5% of the time);
- Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives, particularly the micro-marketing of price opportunities (5% of the time);

- Discuss with subordinates to review achievements and discuss required changes in goals or objectives of [the petitioner] (5% of the time);

The petitioner also provided job descriptions for employees supervised by the beneficiary which include the store manager, the finance manager, finance/accounts manager, cashier, and stocker. In addition, the petitioner submitted job descriptions for the beneficiary and the additional employees of [REDACTED]. The beneficiary is listed as the chief executive officer/president for this corporation. According to the descriptions, it appears that the beneficiary supervises a general manager, a store manager, two cashiers, and two cooks.

The petitioner submitted an organizational chart of the U.S. company. The chart indicates that the beneficiary is the chief executive officer/ president of the U.S. company which includes Hall's Grocery, Burger Express, and an operations and management agreement with [REDACTED] and [REDACTED]. The chart indicates that the beneficiary supervises the same employees as outlined above. However, the petitioner submitted a second organizational chart of the U.S. company which indicates that the beneficiary supervises a sales manager, a store manager and one finance manager. The chart also indicates three proposed positions in deli operation, deli manager, and food clerk. The sales manager listed on the second organizational chart is not listed on the job descriptions of the positions supervised by the beneficiary. In addition, the chart does not list the finance manager, cashier and stocker that are listed on the job descriptions for the U.S. company.

The petitioner also submitted the U.S. company's Form 1120, U.S. Corporation Income Tax Return for 2005 which indicated that the U.S. entity paid \$19,500 in compensation to officers, and paid \$6,074 in salaries and wages for 2005.

In addition, the petitioner submitted Form 941, Employer's Quarterly Federal Tax Return, for [REDACTED], for the quarters ended March 2006 and June 2006, and the state quarterly wage reports for the same quarters. The petitioner also submitted Form 941, Employer's Quarterly Federal Tax Return, for the U.S. entity for the quarters ended March 2005, December 2005, March 2006, and June 2006. The report for the first quarter of 2005 indicates one employee; for the last quarter of 2005 indicates zero employees; for the first quarter of 2006 indicates one employee; and for the second quarter of 2006 it indicates four employees. The petitioner did not submit the federal and state tax returns for all of 2005 and 2006 as requested by the director.

The director denied the petition on August 29, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that the petitioner operates a gas station and convenience store and it did not appear that the beneficiary supervises a staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Thus the beneficiary, as the only employee of the U.S. company, will be primarily involved in performing the day-to-day services essential to running a business. In addition, the director noted discrepancies between the number of employees listed on the Form I-129 and the employees listed on the U.S. company's Form 941, Employer Quarterly Federal Tax Returns. In addition, the director noted that in the response to the director's request for evidence, the petitioner claimed that it has an operating and management services agreement with a second company, however, the petitioner did not submit documentation to substantiate this claim.

On appeal, counsel for the petitioner contends that the CIS “should not be deciding on the managerial or executive capacity merely on the basis of the number of employees that the beneficiary supervises or the job titles of the employees.” Counsel contends that CIS cannot look at the company’s size alone but must also take into account the reasonable needs of the organization and must consider the beneficiary’s duties “in light of the overall purpose and stage of development” of the U.S. company. Counsel states that the U.S. entity is in an early stage of development as it commenced operations in 2002 and “suffered some setbacks in the initial stages of operations.” Counsel also states that the beneficiary “would be employed at the highest position within the U.S. company.” In addition, counsel cites several decisions to support the claim that a beneficiary as a sole employee or managing a small number of supervisors may qualify as a position of managerial or executive capacity. Finally, counsel for the petitioner asserts that the beneficiary is a function manager, and is employed by the petitioner in a primarily executive and managerial capacity.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a 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'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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I & N Dec. at 604.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner’s description of his proposed duties suggest that the beneficiary’s actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as the beneficiary will “direct and coordinate marketing and business development activities of [the petitioner] and [the foreign company]”; “develop long-range goals and objectives for [the petitioner] in order to increase profits, trim costs, and develop customer loyalty”; and, “oversee new investment activities, including reviewing proposals and exploring other retail and convenience store businesses, particularly in the La Porte, Texas area.” 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

provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will "formulate and administer company policies by turning them over to the sales, store and finance managers"; "direct and coordinate activities of employees in the sales, finance, operations, purchasing and marketing departments, for which responsibility is delegated, for further attainment of goals and objectives, such as the goals of reducing out-of-stocks"; "oversee the financial and accounting activities of the organization, including budgeting, tax and regulatory matters"; and, "review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives, particularly the micro-marketing of price opportunities." Since the petitioner has not provided evidence that the U.S. company hired any additional employees at the time the instant petition was filed, it appears that the beneficiary will be providing the services of accounting, finance, and business operations rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. at 604.

As noted above, according to the petitioner's statement on Form I-129, the U.S. company has five employees. However, the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the U.S. entity for the quarter ended March 2005 indicated one employee, for the quarter ended December 2005 indicated zero employees, for the quarter ended March 2006 indicated one employee, and for the quarter ended in June 2006 indicated four employees. Thus, for the quarter in which the instant petition was filed, and for most of 2005, the U.S. company employed one individual. As noted by the director, although the company employed four individuals in the second quarter of 2006, that was after the instant petition was filed. 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). In addition, the petitioner submitted the U.S. company's Form 1120, U.S. Corporation Income Tax Return for 2005 which indicated that the U.S. entity paid \$19,500 in compensation to officers, and paid \$6,074 in salaries and wages for 2005. Thus, it does not appear that the U.S. company employed five individuals in 2005.

As noted above, in response to the director's request, the petitioner submitted job descriptions for all individuals claimed to be employed by the U.S. entity, and an organizational chart of the U.S. entity. There are several discrepancies between the list of employees and the employees listed on the organizational chart. For example, the petitioner submitted a second organizational chart of the U.S. company which indicates that the beneficiary supervises a sales manager, a store manager and one finance manager. The chart also indicates three proposed positions in deli operation, deli manager, and food clerk. The sales manager listed on the chart is not listed on the list of employees supervised by the beneficiary. In addition, the chart does not list the finance manager, cashier and stocker that are included in the employee list for the U.S. company. 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).

As noted by the director, the original petition indicates that the U.S. entity is a gas station/convenience store with the name of Hall's Grocery. All the documentation submitted with the original petition pertains to this store. However, in response to the director's request for evidence, the petitioner submitted an organizational chart that indicates the beneficiary as the chief executive officer/president of the U.S. company which includes Hall's Grocery, and Burger Express, and has an operations and management agreement with [REDACTED] C [REDACTED]. The petitioner also submitted a list of job titles and duties for the employees supervised by the beneficiary employed by [REDACTED] and copies of the Form 941, Employer's Quarterly Federal Tax Return, for [REDACTED]. As noted by the director, the petitioner failed to submit any documentation to evidence a management agreement between the petitioner and [REDACTED] company. 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. Although the director clearly noted this deficiency in her decision, the petitioner has not submitted additional evidence on appeal to establish the relationship between the petitioning entity and [REDACTED]. Accordingly, the beneficiary's claimed duties and supervisory responsibilities will not be considered.

As noted above, the petitioner submitted a document entitled "Commercial Business and Family Residential Contract" for the sales of "Hall's Grocery, house, garage" to "[REDACTED]" and "[REDACTED]" which was executed on July 31, 2003. In addition, the petitioner submitted the deed of trust for the same property also issued to Ashvin and Daksha Patel. The petitioner does not explain why the beneficiary is the chief executive officer for the store, rather than the actual owners as listed on the contract and deed. The petitioner did not submit an agreement between the owners of the store and the petitioner indicating that the petitioner will manage and operate the convenience store. 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 correctly observes that a company's size alone, may not be the determining factor in denying a visa to a multinational manager or executive. 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.

Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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.*

At the time of filing, the petitioner was a four-year old company that managed a convenience store and gas station. According to the Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2006, the quarter in which the instant petition was filed, the U.S. entity employed one individual who is assumed to be the beneficiary. As the only employee of the U.S. entity, it appears that the beneficiary

will be performing all of the various operational tasks inherent in operating the gas station and a retail store on a daily basis, such as acquiring products, negotiating contracts with suppliers, preparing budgets, budgeting, bookkeeping, paying bills, maintaining inventory, handling customer transactions and customer service. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary alone. 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.

Although the petitioner did not provide its hours of operations, the AAO will assume that its gas station/convenience store, given the nature of the business, is open daily for at least ten hours, or a total of 70 or more hours per week. At the time of filing, the petitioner employed the beneficiary. The petitioner has not accounted for who is responsible for operating the store during the many operating hours with only one employee. The petitioner has not explained how the beneficiary alone is able to perform all of the day-to-day functions of ordering merchandise and supplies, arranging and stocking merchandise displays, cleaning the store and restrooms, processing customer purchases of groceries and gasoline, receiving deliveries, reconciling daily cash register receipts and many other routine duties associated with operating the business. Given the absence of employees who would perform the non-managerial or non-executive operations of the company, it is reasonable to conclude that the beneficiary would need to spend a significant portion of his time directly providing the services of the company. *See Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, on appeal, counsel asserts that the position offered to the beneficiary is executive in capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the beneficiary is the only employee, the U.S. company has not established a complex organizational structure which would elevate the beneficiary beyond a first-line supervisor.

As discussed above, the beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified any

employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

Finally, the AAO acknowledges counsel's contention that the service further erred in not identifying the beneficiary's position as one which manages an essential function within the petitioner's organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Other than stating that the proposed position is an essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

As discussed above, the totality of the record supports a conclusion that the beneficiary would be required to perform primarily non-qualifying duties associated with the petitioner's day-to-day functions, as the petitioner has not identified sufficient staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight

authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

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. It is the petitioner's obligation to establish however, through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although, as correctly noted by counsel, these employees need not be professionals. Here, the petitioner has not met this burden.

Furthermore, counsel for the petitioner discusses prior cases approved by the AAO where the AAO held that a small staff does not justify a denial where the beneficiary holds wide decision-making discretion. Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole 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.

Additionally, counsel observes that Congress omitted the language that discussed individuals who produce a product or provide a service from the Immigration Act of 1990 and asserts that this is a clear indicator that such individuals are not precluded from qualifying as multinational managers or executives. However, the AAO will not draw this conclusion based solely on an omission.

Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel's unsupported assertions are not persuasive on this point.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5<sup>th</sup> Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp 1570 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. 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 an L-1 nonimmigrant visa.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of

each individual case. *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. Based on the foregoing discussion, the submitted evidence is not relevant, probative, and credible.

Counsel for the petitioner noted that CIS approved a petition that had been previously filed on behalf of the beneficiary. The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition for an extension of the beneficiary's status after completing a one-year period to open a new office which is governed by a different set of regulations pertaining specifically to new office extensions. See 8 C.F.R. § 214.2(L)(14)(ii). The instant case is for an L-1 extension and as different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. The fact that a prior petition was approved on behalf of the beneficiary does not serve as prima facie evidence that eligibility has been established in the present proceeding.

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). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

Beyond the decision of the director, it does not appear that the petitioner has established that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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.

In the instant petition, the petitioner submitted stock certificate, number one, stating that the beneficiary is the holder of 490 shares of the U.S. company, and stock certificate, number two, indicating that the foreign company is the holder of 510 shares of the U.S. entity. However, in the company's Form 1120, U.S. Corporation Income Tax Return, for 2004, under Schedule E, the beneficiary is listed as the owner of 51% of the U.S. entity. 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). For this additional reason, the appeal will be dismissed.

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 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.