

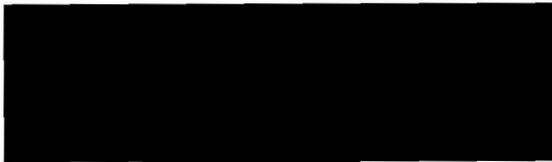


U.S. Citizenship
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Services

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File: [Redacted]
SRC 04 081 52261

Office: TEXAS SERVICE CENTER Date: **APR 30 2008**

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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director, Texas Service Center, initially approved the nonimmigrant visa petition. Upon further review, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of her intent to revoke the approval and the approval was subsequently ordered revoked. The petitioner appealed to the Administrative Appeals Office (AAO) which withdrew the decision and remanded the matter to the Texas Service Center for further consideration and entry of a new decision. The director again revoked the petition and certified her decision to the AAO for review. Upon review, the AAO will affirm the director's decision.

On January 26, 2004, the petitioner filed this nonimmigrant visa petition seeking to extend the employment of its "president" as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of Texas which allegedly operates a convenience store.

The director subsequently revoked the petition on June 22, 2005 concluding that the petitioner failed to establish (1) that it and the foreign employer maintain a qualifying relationship; and (2) that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, the director noted that the record contained conflicting evidence of the petitioner's ownership and that the beneficiary had been arrested for selling alcohol to a minor while operating the cash register, raising doubts regarding his claimed managerial or executive employment. The director made her decision to revoke the petition after concluding that the petitioner had not timely responded to the Notice of Intent to Revoke dated January 20, 2005.

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 to the petitioner asserts that a timely response to the Notice of Intent to Revoke was filed on February 22, 2005 and argues that the director erred in failing to consider its response.

On November 19, 2007, the AAO withdrew the director's decision and remanded the matter to the Texas Service Center for further consideration and entry of a new decision. The AAO concluded that it is more likely than not that the Texas Service Center received the petitioner's response to the Notice of Intent to Revoke and directed the Service Center to review this response and render a new decision.

On December 4, 2007, the director, Texas Service Center, rendered a new decision revoking the petition. The director again concluded that the petitioner failed to establish: (1) that it and the foreign employer are qualifying organizations; and (2) that the beneficiary will be employed in a primarily managerial or executive capacity. The director certified her decision to the AAO for review.

On March 26, 2008, counsel to the petitioner submitted a brief and additional evidence to the AAO. On certification, counsel asserts that the petitioner established that it has a qualifying relationship with the foreign employer and that the beneficiary will be employed in either a managerial or executive capacity in the United States.

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 primary issue in this matter is whether, after full consideration of the underlying record and the petitioner's response to the Notice of Intent to Revoke, the director's revocation of the petition was proper. Upon review of the underlying record, the petitioner's response to the Notice of Intent to Revoke, and counsel's brief and additional evidence submitted on March 26, 2008, the AAO concludes that the revocation was proper. The AAO will affirm the director's decision.

Under Citizenship and Immigration Services (CIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B). The director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(5) (approval of the petition involved gross error), as further explained below.¹ The director also indicated in the Notice of Intent to

¹The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. See *Black's Law Dictionary* 562, 710 (7th Ed. 1999) (defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001). As the term "gross error" was created by regulation, it is most instructive to examine the comments that accompanied the publication of the rule in the Federal Register. The term "gross error" was first used in the regulations

Revoke that she intended to revoke the petition because the facts stated therein are not true and correct. *See* 8 C.F.R. § 214.2(l)(9)(iii)(A)(4). Accordingly, the AAO will also consider the appropriateness of the revocation on this basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

I. Qualifying Organization

The first substantive issue in this matter is whether approval of the petition involved gross error, or whether the petition contains facts which are not true and correct, in relation to whether the petitioner and the foreign employer are "qualifying organizations."

In this matter, the petitioner claims in an attachment to the Form I-129 that both it and the foreign employer in India, AQSA Marble, are "majority owned" by the beneficiary and, therefore, are "affiliates." In support of this claim, the petitioner submitted copies of a variety of organizational and tax documents. For the foreign employer, the petitioner submitted a lease, tax returns, financial statements, tax receipts, bank statements, invoices, insurance information, and a brochure. The financial statements from 2001 and 2002 both list three persons, one of which is the beneficiary, as "partners" maintaining "capital accounts." The balances of the capital accounts do not show the beneficiary owning a majority interest in the foreign employer. Likewise, the financial statements indicate that profits were allocated to all three partners equally.

For the United States entity, the petitioner submitted articles of incorporation, stock certificates, income tax returns, and other business records. The articles of incorporation authorized 1,000 shares of stock. The two stock certificates, both identified as "number two," appear to represent the issuance of 600 shares to the beneficiary and 400 shares to a third party. Finally, the petitioner's 2001 and 2002 tax returns value the petitioner's "common stock" at \$2,000.00.

On January 20, 2005, the director issued a Notice of Intent to Revoke in which the directed noted that the record is not persuasive in establishing that the petitioner and the foreign employer are qualifying organizations. The Notice of Intent to Revoke further indicates that the director intends to revoke the petition

relating to the revocation of a nonimmigrant L-1 petition. In the 1986 proposed rule, an L-1 revocation would be permitted if the approval had been "improvidently granted." 51 Fed. Reg. 18591, 18598 (May 21, 1986) (Proposed Rule). After receiving comments that expressed concern that the phrase "improvidently granted" might be given a broader interpretation than intended, the agency changed the final rule to use the phrase "gross error." 52 Fed. Reg. 5738, 5749 (Feb. 26, 1987) (Final Rule). As an example of gross error in the L-1 context, the drafter of the regulation stated:

This provision was intended to correct situations where there was gross error in approval of the petition. For example, after a petition has been approved, it may later be determined that a qualifying relationship did not exist between the United States and the foreign entity which employed the beneficiary abroad.

Id.

because the facts therein are not true and correct and because the petition's approval was in error, and it gives the petitioner 30 days to submit evidence in opposition.

On June 22, 2005, the director revoked approval of the petition for the reasons set forth in the Notice of Intent to Revoke. Also, the director made her decision to revoke the petition after concluding that the petitioner had not timely responded to the Notice of Intent to Revoke.

On July 13, 2005, the petitioner filed an appeal in which counsel asserts that a timely response to the Notice of Intent to Revoke was filed on February 22, 2005, and argues that the director erred in failing to consider its response. Counsel also enclosed a copy of the response. The response includes an affidavit signed by the beneficiary in which he claims to own a 51% interest in the foreign employer and a 60% interest in the petitioner. The beneficiary also claims to have contributed \$36,000.00 to the petitioner in order to purchase the 60% ownership interest. The response also includes a copy of a 1995 "partnership deed" for the foreign employer which indicates that the "net profits or losses of the partnership business shall be divided between the parties" and that the beneficiary, who is one of the three parties to the agreement, shall be allocated a 51% portion.

As noted above, the AAO withdrew the director's decision on November 19, 2007, and remanded the matter to the Texas Service Center for further consideration and entry of a new decision.

On December 4, 2007, the director rendered a new decision revoking the petition and certified her decision to the AAO for review. The director concluded, *inter alia*, that the petitioner failed to establish that it has a qualifying relationship with the foreign employer, AQSA Marble, an Indian partnership. The director determined that, while the "partnership deed" for AQSA Marble indicates that 51% of the partnership's "net profits or losses" shall be allocated to the beneficiary, the "financial statements" submitted with the initial petition indicate that the beneficiary and the other partners each own 1/3 interests. Therefore, the director concluded that the petitioner and AQSA Marble are not affiliates because the record does not establish that the beneficiary owns a majority, or controlling, interest in AQSA Marble.

The director also noted that the two stock certificates purporting to represent the issuance of shares in the petitioner, a Texas corporation, are both identified as certificate "number two." The first certificate "number two" indicates that 600 shares were issued to the beneficiary and the other certificate "number two" indicates that 400 shares were issued to a third party. However, as the record is devoid of evidence establishing that the beneficiary purchased his shares for \$36,000.00, the director concluded that the petitioner failed to establish that the beneficiary owns and controls the petitioner. The director further noted that, as the petitioner's common stock is only valued at \$2,000.00 on its tax returns, the record contains unresolved inconsistencies undermining the petitioner's claim that the beneficiary paid \$36,000.00 for the petitioner's stock. Therefore, the director concluded that the petitioner failed to establish that the beneficiary owns and controls it and, thus, failed to establish that the petitioner and the foreign employer are qualifying organizations.

On certification to the AAO, counsel submitted a brief and additional evidence on March 26, 2008.² In

²It is noted that most of the additional evidence submitted on appeal consists of business, employment, and tax records pertaining to activities occurring after the filing of the instant petition on January 26, 2004.

response to the director's determination that the record is not persuasive in establishing that the beneficiary owns a 51% interest in the foreign partnership, counsel submits a document titled "Memorandum of Understanding" dated April 1, 2001 in which the three partners of AQSA Marble purportedly agreed as follows:

Here the Understanding between [the beneficiary] and [the other two partners] that the [beneficiary] having his 51% share in Partnership firm [i.e., M/s Aqsa Marble, will remain same and also his controlover [sic] on Busines[s] will be the same. But from today onwards [i.e. [April 1, 2001] he will receive Equal ratio of Company Book Profit and Loss. As per the Understanding all partners receive 33.33% of book profit from the Company. Because of the [beneficiary] is [sic] not physically attend the Business, so due to his Absency [sic] in Business site his book profit reduce to 33.33% instead of 51%. And [the other two partners] will receive 33.33% resp[e]ctively of book profit.

Counsel argues that this document establishes that the beneficiary has "majority ownership and control of the foreign entity" although his "compensation" has been based on a "different equation since April 2001."

In response to the director's determination that the record is not persuasive in establishing that the beneficiary owns and controls the petitioner, counsel submitted evidence that, on March 12, 2008, the purported shareholders of the petitioner met and directed that new stock certificates and ledgers be issued "correcting" the October 2000 stock certificates which were both identified as certificate "number two." **Counsel**, however, did not offer an explanation addressing how, exactly, this "error" was made.

Furthermore, counsel addressed the lack of evidence establishing that the beneficiary actually paid \$36,000.00 for his 600 shares of stock in the petitioner as follows:

[The beneficiary] paid for his share of [the petitioner] with a personal check in late 2000. [citation omitted]. The source of the investment money was [the beneficiary's] own personal funds, from his ownership of AQSA Marbles [sic] and family money. [The beneficiary] **provided this investment to his cousin. A transaction between family members is characterized by a great deal of mutual trust and is one for which neither party would expect a paper receipt to be issued. [The beneficiary] no longer has records from his bank accounts dating back to 2000, and so cannot provide documentation of that transaction.**

Counsel did not address the discrepancy in the record pertaining to the valuation of the petitioner's common stock in the petitioner's corporate tax returns.

However, as the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, evidence pertaining to business activity occurring after the filing of the instant petition may not be considered. 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). If the petitioner wishes to have this additional evidence considered, it must file a new petition rather than seek approval of a petition that is not supported by the facts as they existed at the time the petition was filed.

Upon review, the AAO will affirm the director's decision and the approval of the petition will be revoked.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." "Affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(I).

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 employers for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm. 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. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As noted by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate bylaws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In this matter, the record is not persuasive in establishing that the petitioner and the foreign employer, AQSA Marble, an Indian partnership, are affiliated as qualifying organizations.

First, the record is not persuasive in establishing that the beneficiary owns and controls AQSA Marble as the owner of a 51% interest in the partnership. As correctly noted by the director, while the AQSA Marble's 1995 "partnership deed" purports that 51% of the partnership's "net profits or losses" shall be allocated to the beneficiary, subsequent financial statements indicate that profits were allocated to all three partners equally. These same financial statements also indicate that each partner's "capital account" is approximately equal in value to the other capital accounts. Accordingly, the director correctly determined that the record is not persuasive in

establishing that the beneficiary owns and controls AQSA Marble, an Indian partnership.

Furthermore, while counsel submits on certification a copy of the above-described April 1, 2001 "Memorandum of Understanding" which purports to memorialize the partners' agreement that the beneficiary will continue to own a 51% interest in the partnership but only receive distributions of 33.33% of the profits, this document is not persuasive in establishing that the beneficiary owns and controls AQSA Marble. While this document addresses why the beneficiary received 1/3 distributions of profit after 2001, the document fails to address the capital account balances listed in the 2001 and 2002 financial statements which both show the beneficiary owning less than a 50% equity interest in the partnership. It is the capital account balances, and not the profit distribution allocation, which is the most accurate measure of each partner's equity interest in the partnership. This discrepancy undermines the petitioner's claim that the beneficiary owns and controls the foreign employer. As the record fails to reconcile this fundamental inconsistency, the petition was correctly revoked by the director.

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). Given that the "Memorandum of Understanding," which is dated April 1, 2001 but which was submitted for the first time on certification, is inconsistent with the financial statements originally submitted by the petitioner, the late submission of this evidence raises doubt as to whether it is a bona fide business record. Consequently, the evidence is not credible and will not be given any weight in this proceeding. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Second, the record is not persuasive in establishing that the beneficiary owns and controls a majority interest in the petitioner. As noted above, the petitioner originally submitted two shares of stock as evidence of the beneficiary's ownership of 600 shares and a third party's ownership of 400 shares. However, both of these certificates are identified as being certificate "number two." As there cannot be two "number two" share certificates, and as the record is devoid of evidence that the beneficiary actually paid \$36,000.00 for the stock, the director correctly concluded that the record was not persuasive in establishing that the beneficiary owns and controls the petitioner. Once again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582.

It is noted that counsel argues on certification that the petitioner "corrected" the stock certificates and ledger on March 12, 2008. Counsel also asserts that the beneficiary "no longer has records from his bank accounts dating back to 2000" and that the \$36,000.00 was given "to his cousin" without receiving a receipt. However, these assertions are not persuasive. While the March 12, 2008 resolution purports to "correct" the errors in the stock certificates, this action taken over four years after the filing of the instant petition is not persuasive in addressing how the "error" in the numbering of the stock certificates in 2000 occurred in the first place. Rather, the petitioner must resolve this inconsistency, as well as the \$2,000.00 valuation assigned to the petitioner's common stock in the tax returns, by independent objective evidence. *See id.* As these inconsistencies are unresolved, the petition was properly revoked.

Likewise, the fact that the petitioner is unable to establish that the beneficiary paid \$36,000.00 for his interest in the petitioner because it no longer has the bank records is not a persuasive explanation. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). As noted above, as ownership and control are critical elements of this visa classification, CIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As the record does not establish that the beneficiary acquired his interest in the petitioner, the petitioner has failed to establish that the beneficiary owns and controls it. 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)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The burden of proof in revocation proceedings remains with the petitioner. See *Matter of Ho*, 19 I&N Dec. 582.

Accordingly, as the petitioner has failed to establish that it and the foreign employer are qualifying organizations, the approval of the petition was properly revoked and the director's decision is affirmed.

II. Managerial or Executive Capacity

The second substantive issue in this matter is whether approval of the petition involved gross error, or whether the petition contains facts which are not true and correct, in relation to whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an

assignment within an organization in which the employee primarily:

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

The petitioner described the beneficiary's duties in the United States as "president" of the petitioner's convenience store in an attachment to the Form I-129 as follows:

The Beneficiary will continue to be employed as the President of the Petitioner, and his duties will be the following: hiring and firing managers; supervising subordinate employees; overseeing preparation of sales and inventory reports; reviewing an[d] analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers.

The petitioner also claims to employ six workers, including the beneficiary.

On February 5, 2004, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the petitioner, a list of all employees and their duties and qualifications, a list of all of the beneficiary's duties, and a breakdown specifying how much time the beneficiary will devote to each of his ascribed duties.

In response, the petitioner submitted a letter dated February 23, 2004 and an organizational chart for the United States operation. The chart shows the beneficiary at the top of a four-tiered organization directly supervising an "operations store manager," who, in turn, is shown supervising an "assistant manager," who, in turn, is shown supervising three cashiers.

The beneficiary's duties were further described in the February 23, 2004 letter as follows:

Duties will include: Ten percent (10%) of his time hiring and firing managers, and supervising subordinate employees; Fifteen Percent (15%) overseeing preparation of sales and inventory reports; Fifteen Percent (15%) reviewing an[d] analyzing sales data; Twenty Percent (20%) establishing and implementing policies to manage and achieve marketing goals; Fifteen Percent (15%) reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees; Twenty Five (25%) managing the company and overseeing marketing campaign developed by subordinate managers.

The Beneficiary is responsible for seeking additional business locations. In the performance of his duties, the Beneficiary receives minimum supervision from the Board of Directors, and the Beneficiary exercises wide discretion and latitude in the performance of his duties.

The petitioner also described the duties of the "store operations manager" as follows:

Duties include: locating vendors; supervising subordinate employees who prepare inventory reports; resolving issues relating to defective or unacceptable goods with vendors; supervising purchase activities; maintain/order inventory; preparing employee work schedule; prepare sales report; preparing budget and expense reports; prepare marketing campaign; maintain records of underground petroleum storage tanks in accordance with state and federal environmental laws. Has over four years experience as manager.

Finally, the petitioner described the duties of the "assistant manager" as follows:

Duties Include: reconcile all accounts and prepare daily sales report; assist in preparing employee work schedule; preparing and maintaining inventory report; maintain/order inventory; assist in preparing budget and expense reports; maintain records of underground petroleum storage tanks in accordance with state and federal environmental laws; supervise subordinate employees; and operate cash register/credit card machine. Has over one year experience as assistant manager.

On January 20, 2005, the director issued a Notice of Intent to Revoke in which the director noted that the record is not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity. The director specifically noted the beneficiary's arrest for selling alcohol to a minor while operating the cash register in the convenience store, indicating that the beneficiary has not been performing qualifying duties. Finally, and as indicated above, the Notice of Intent to Revoke indicated that the director intended to revoke the petition because the facts therein are not true and correct and because the petition's approval was in error. The director gave the petitioner 30 days to submit evidence in opposition.

On June 22, 2005, the director revoked approval of the petition for the reasons set forth in the Notice of Intent to Revoke. Also, as noted above, the director made her decision to revoke the petition after concluding that the petitioner had not timely responded to the Notice of Intent to Revoke.

On July 13, 2005, the petitioner filed an appeal in which counsel asserts that a timely response to the Notice of Intent to Revoke was filed on February 22, 2005, and argues that the director erred in failing to consider its response. Counsel also enclosed a copy of the response. In the response, counsel argues that the beneficiary's operation of the cash register in the convenience store at the time he was arrested was a "coincidence" and that he was forced to "deal directly with a few customers" because an employee "called in sick." Counsel asserts that, other than this "coincidental" performance of non-qualifying tasks, the beneficiary is otherwise engaged in performing managerial or executive duties. Counsel, however, does not address why the cash register was not being covered by one of the two claimed subordinate supervisors, i.e., the "operations store manager" or the "assistant manager."

Counsel also submitted affidavits which repeat the job description attributed to the beneficiary in the initial petition.

As noted above, the AAO withdrew the director's decision on November 19, 2007, and remanded the matter to the Texas Service Center for further consideration and entry of a new decision.

On December 4, 2007, the director rendered a new decision revoking the petition and certified her decision to the AAO for review. The director concluded, *inter alia*, that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On certification to the AAO, counsel submitted a brief and additional evidence on March 26, 2008.³ In response to the director's determination that the record is not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity, counsel argues that the petitioner has established that the beneficiary will primarily perform qualifying duties in his "management" of the petitioner's convenience store. In support, counsel submits a letter from the petitioner dated March 24, 2008 which further describes the beneficiary's job duties.

Upon review, the AAO will affirm the director's decision, and the approval of the petition will be revoked.

As a threshold matter, it must be noted that the petitioner's attempt to expand upon the beneficiary's job duties on certification was inappropriate and will not be considered by the AAO. As noted above, the director specifically requested additional evidence addressing the beneficiary's duties, including a breakdown specifying how much time the beneficiary will devote to each of his ascribed duties. As the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, the petitioner may not submit such evidence on appeal or on certification. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Furthermore, on appeal or certification, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the AAO will not consider this evidence for any purpose.

In view of the above, when examining the executive or managerial capacity of the beneficiary, the AAO will

³Again, it is noted that most of the additional evidence submitted on appeal consists of business, employment, and tax records pertaining to activities occurring after the filing of the instant petition on January 26, 2004. However, as the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, evidence pertaining to the petitioner's staffing and the beneficiary's job duties arising after the filing of the instant petition may not be considered. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Accordingly, the AAO will only consider the beneficiary's job duties and the petitioner's staffing in place at the time the petition was filed.

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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will "oversee" the preparation of sales and inventory reports, "analyze" sales data, establish and implement "policies to manage and achieve marketing goals," "review" budgets and expense reports, "manage" the company, and "oversee" the marketing campaign. However, the petitioner does not specifically define these policies, goals, and campaigns. Also, the petitioner does not specifically explain what, exactly, the beneficiary will do in "overseeing," "analyzing," and "reviewing" reports and data. General managerial-sounding duties such as "managing the company" are not probative of the beneficiary performing qualifying duties. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Likewise, the petitioner has failed to establish that any of the duties ascribed to the beneficiary are truly managerial or executive in nature. To the contrary, due to the size and nature of the petitioner's business, i.e., the operation of a single-location convenience store, it appears that the beneficiary will more likely than not primarily perform non-qualifying administrative or operational tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

As noted by the director, the record indicates that the beneficiary was arrested in October 2002 for selling alcoholic beverages to a minor while operating the cash register in the convenience store, an action which is clearly not a qualifying managerial or executive duty. Neither the petitioner nor counsel contests the fact that the beneficiary was arrested. While counsel argues that this was a "coincidence" and that the beneficiary was merely filling in for an ill employee, this explanation is not credible. Substantial doubt is introduced into these proceedings by the fact that the beneficiary, as president of the petitioning corporation, has been operating the cash register or even serving as a substitute for the lowest-tier cashiers of the convenience store. The petitioner describes itself as a four-tiered organization in which the beneficiary is assisted in his "management" of the convenience store by two subordinate tiers of supervisory workers and a lower tier of

cashiers. It is not credible that, if the beneficiary were truly a worker primarily performing managerial or executive duties within this environment, he would be compelled to operate a cash register under these circumstances.

Additionally, the AAO notes that the petitioner never described the beneficiary's responsibilities as including cashier duties or any other basic store functions. Instead, the beneficiary's duties were described as including only higher-level managerial duties such as reviewing financial reports, budgets, and expense reports prepared by subordinate employees. The petitioner's failure to account for how much time is actually devoted to this previously undisclosed duty severely prejudices the beneficiary's claim as a managerial or executive employee. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the petitioner has submitted two affidavits from the purportedly sick employee and his replacement, the affidavits are not properly executed and lack any detail about the claimed event. Additionally, the AAO notes that the petitioner has not submitted any contemporaneous documentary evidence in support of the claim. The first affidavit was drafted for the signature of the purported substitute employee, but the document was never signed, dated, or notarized by the witness. (See petitioner's exhibit 17.) The second affidavit was signed by the purportedly sick employee, on February 17, 2005, more than two years after the event. His affidavit does not provide any supporting detail, such as the time of day, the name of the substitute employee, or any details about his illness. (See petitioner's exhibit 19.) Because the affidavits are vague and improperly executed, the AAO will accord these documents little weight in this proceeding.

The petitioner is obligated to clarify the inconsistent and conflicting facts by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the beneficiary's arrest while acting as a cashier was "coincidence," and submitting vague and improperly executed affidavits, will not qualify as independent and objective evidence. 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). Furthermore, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Accordingly, the AAO concludes that it is more likely than not that the beneficiary was primarily performing the non-qualifying tasks associated with the operation of a single-location, six-employee convenience store and gas station. *See Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory or managerial employees, or will manage an essential function of the organization.⁴ Section

⁴As counsel concedes on certification that the beneficiary will not supervise "professional" employees, the AAO will not address this issue.

101(a)(44)(A) of the Act. As asserted in the record, the beneficiary will directly supervise an "operations store manager," who, in turn, is shown supervising an "assistant manager," who, in turn, is shown supervising three cashiers. However, these employees are not credibly described as having supervisory or managerial responsibilities. Instead, it appears that these employees are performing the tasks necessary to the operation of the petitioner's convenience store and gasoline station. For example, the claimed supervisors are performing tasks such as working with vendors, maintaining and ordering inventory, preparing reports and marketing materials, and keeping records. The "assistant manager" is also described as operating the cash register. While the petitioner also claims that these workers will supervise the subordinate "cashiers," the record is not persuasive in establishing that the petitioner's business is of a size and character which will reasonably need the services of subordinate tiers of managers or supervisors who are ultimately managed by a primarily managerial or executive employee. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. In this matter, it is not credible that the beneficiary will supervise and control the work of other supervisory or managerial workers in his operation of a single-location, six-employee convenience store and gasoline station.

In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. A managerial 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.⁵

⁵While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary 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. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to establish that the beneficiary's duties will be primarily managerial. Also, as explained above, the record indicates that the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary fails to establish with any certainty what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears instead that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, as the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, the approval of the petition was properly revoked and the director's decision is affirmed.

III. Beyond the Decision of the Director

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii)-(iv).

The foreign employer described the beneficiary's duties abroad in an attachment to the Form I-129 as follows:

Prior to coming to the United States the Beneficiary was employed in India by the Petitioner's affiliate, for the past few years as its General Manager. The Beneficiary was responsible for the following duties: supervising sales activities; conferring with store manager; reviewing new products available in the market; coordinating activities involved with procurement of

inventory; forecasting sales and inventory requirements; reviewing acquisitions; conferring with wholesale buyers and negotiating prices, quantities, delivery schedules, and payment terms; establishing prices according to the market price and trends; reviewing purchase orders prepared by the store; and reviewing sales budget.

Also, as explained above, the record indicates that the foreign employer, AQSA Marble, is a partnership consisting of three partners, which includes the beneficiary.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties were 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, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad, if any. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Also, since the foreign employer is a "partnership" in which the beneficiary allegedly is a partner, the record is not persuasive in establishing that the beneficiary was "employed" abroad. According to Indian law, it appears that partnerships are not distinct legal entities and do not exist apart from the partners constituting it. *See Malabar Fisheries v. Comm'n of Income Tax* (Sup. Ct. 1979) 120 ITR 49. Therefore, as one cannot "employ" oneself, and the petitioner has not established that the foreign partnership is an "employer," it does not appear as if the beneficiary was truly "employed" abroad. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973).

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and the petition shall be revoked for this additional reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be primarily owned and controlled by the beneficiary. As a purported owner of the petitioner, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition shall be revoked for this additional reason.

Beyond the decision of the director, it is noted that the instant petition was filed to extend a previously approved petition. The previously approved petition was approved from Thursday, January 24, 2002 until Friday, January 23, 2004. The instant extension petition was filed on Monday, January 26, 2004. In that petition, the petitioner clearly indicates that its basis for the classification sought is the "continuation of previously approved employment without change." The petition also seeks to "extend the stay of [the beneficiary] since [he] now hold[s] this status." Title 8 C.F.R. § 214.2(l)(14)(i) clearly states that an extension petition may only be filed if the validity of the original petition has not expired. In this case, since the validity of the previous petition expired on Friday, January 23, 2004, the instant extension petition filed on Monday, January 26, 2004 should have been denied as untimely.

IV. Conclusion

Accordingly, the director's approval of the petition involved gross error, and the petition will be revoked pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A)(5). Moreover, as explained above, the petition contained facts regarding its organization which were untrue or incorrect, and the petition will be revoked pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A)(4).

It should be noted that the previous approval of an L-1A petition does not preclude CIS from denying an extension based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

An application or petition that fails to comply with the technical requirements of the law may be denied or revoked by the AAO even if the Service Center does not identify all of the grounds for denial or revocation 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 and/or revoked for the above stated reasons, with each considered as an independent and alternative basis for denial and/or revocation. When the AAO denies or revokes a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The decision of the director is affirmed.