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

U.S. Citizenship and Immigration Services

B4

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 10 2005

WAC 02 266 54969

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The director certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed.[1]

The petitioner is a corporation organized in the State of California in September 1994. The petitioning corporation conducts business as a casting and payroll agency for models, movie actors, actresses, and "extras." The petitioner further claims that it is the wholly-owned subsidiary of a sole-proprietorship run by the beneficiary's father in Kuwait. The petitioner seeks to permanently employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an immigrant multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

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[1] After the director denied the underlying immigrant visa petition, the petitioner filed a complaint for declaratory and injunctive relief in the United States District Court, Central District of California. *Al Wazzan (USA), Inc. v. Tom Ridge*, CV04-6575-NM (RZx) (filed August 9, 2004). The complaint remains pending.

The procedural history of this matter is complex and requires a brief recitation of past actions on the part of the petitioner and Citizenship and Immigration Services (CIS) to understand the director's certification of the matter to the AAO:

In 1994, the petitioner initially filed a Form I-129 nonimmigrant petition for the beneficiary as its president, pursuant to section 101(a)(15)(L) of the Act (L-1A). The petition (WAC 95 001 51845) was approved for a one-year period to allow the beneficiary to open the new office and commence doing business. A second Form I-129 petition (WAC 96 012 52702) was filed seeking an extension, and this petition was approved for an additional one-year period. A third Form I-129 petition (WAC 96 115 51309) was approved for a time period beginning March 28, 1996 to March 12, 1999. A fourth Form I-129 petition (WAC 99 110 50512) was denied by the director in June 1999, and the AAO dismissed the subsequently filed appeal in August 2000.

On or about September 16, 1998, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking an immigrant visa for the same beneficiary. The director denied the petition (WAC 98 245 51887) on February 20, 2000. The petitioner filed a timely appeal that the AAO dismissed on January 8, 2001. In August 2002, more than 19 months after the dismissal, the petitioner submitted a motion to reopen the AAO decision; the AAO rejected the motion as untimely filed.

In August 2002, in addition to the late-filed motion to reopen the Form I-140 petition, counsel for the petitioner submitted a fifth Form I-129 petition (WAC 02 268 50818), that was initially approved for a time period beginning September 4, 2002. The director subsequently revoked that approval on September 18, 2003.

In addition to the fifth Form I-129, the petitioner submitted a second Form I-140 immigrant visa petition (WAC 02 266 54969) based on the same position that was previously denied by CIS. The I-140 petition filed on August 23, 2002 is the subject of this certification. The director requested further evidence regarding the I-140 petition on October 29, 2002. The petitioner responded to the request on January 10, 2003. The director denied the petition on August 3, 2003, after determining that the petitioner had not established that: (1) the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity; (2) a qualifying relationship with the beneficiary's foreign employer; or (3) the foreign entity continued to do business, thus maintaining the multinational aspect of the petitioner.

New counsel for the petitioner notified the director on December 23, 2003 that neither the petitioner nor prior counsel had received a copy of the August 3, 2003 I-140 denial. The director, on his own motion, reopened the matter and issued a decision on October 6, 2004, after finding that the petitioner had not established that: (1) the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity; or (2) a

qualifying relationship with the beneficiary's foreign employer. On October 6, 2004, the director certified this matter to the AAO for review.[2]

The record of proceeding in this matter is lengthy, comprised of two large volumes. Because all of the discussed evidence is contained in the record of proceeding, the AAO decision will not analyze or recite every document contained in the record. In the interest of brevity, this decision will refer only to the critical documents in this matter.

The first issue to be considered in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner initially presented copies of the following documents, among others, as evidence in support of its claim that it is wholly-owned by the beneficiary's foreign employer, Ahmad Al-wazzan Est. d/b/a AMW:

> Blank sample stock certificate for [redacted] labeled "Exhibit A" in three places, with no series number, number of shares, date, or signature. The sample stock certificate also

[2] The director also certified for review the denial of the beneficiary's Form I-485 application for adjustment of status (WAC 02 282 54013). In a separate decision that will be incorporated into the record of proceeding, the AAO upheld the director's decision to deny the application.

has a hand-drawn diagonal line running from the upper left-hand corner to the lower right-hand corner.

Stock Certificate Number One (No. 1) for [redacted] (USA), Inc., issuing 10,000 shares to Ahmad Al-wazzan Est., d/b/a AMW. The stock certificate is signed by the beneficiary and dated September 13, 1994.

Petitioner's Certificate of Incorporation, Articles of Incorporation, and a document titled "Action by Written Consent of the Board of Directors in lieu of Organizational Meeting," which states that the petitioner issued 10,000 shares to Ahmad Al-wazzan Est. d/b/a AMW in exchange for $10,000 consideration.

Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003. Each IRS Form 1120, on Schedule L, Line 22(b), reflects the value of the petitioner's stock as $50,000.

The director requested further evidence regarding the I-140 petition on October 29, 2002, including wire transfers and other evidence of a qualifying relationship. After considering the response, the director determined that the petitioner had not submitted sufficient evidence to substantiate the foreign company's claimed ownership and denied the petition. The director noted that although the beneficiary's foreign employer claimed to have paid $10,000 for its stock, the petitioner's Forms 1120 from 1996 through 2003 showed the value of the petitioner's stock at $50,000. The director concluded that someone other than the foreign entity held an interest in the petitioner.

On certification, counsel for the petitioner contends that the request for proof of transfer of funds and payment of stock is improper, since it is not specifically required by the statute or regulations governing the employment-based multinational executive or manager immigrant visa classifications, but is required instead for the employment-creation fifth preference visa category. Counsel points to sections 203 and 204 of the Act, 8 USC §§ 1153(b)(5) and 1154(a)(H), and 8 C.F.R. § 204.6. Counsel also questions the director's use of the following three precedent decisions to support the proposition that ownership and control are the determinative factors establishing a qualifying relationship between the U.S. and the foreign entities: *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Counsel asserts that these three decisions do not specify the level of proof required to fulfill the burden of establishing the required parent-subsidiary relationship.

Counsel also explains that the director had not requested the petitioner's stock certificates in his October 29, 2002 request for evidence; thus the petitioner had not been provided an opportunity to provide copies of all stock certificates issued for its common stock. Counsel attaches a second stock certificate issued to Ahmad Al-wazzan Est., d/b/a AMW on October 13, 1994 for 40,000 shares. Counsel asserts that AMW is the holder of two stock certificates comprising all outstanding shares of the petitioner's stock.

Counsel's assertions are not persuasive. The regulations and applicable precedent decisions confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. 8 C.F.R. § 204.5(j)(2); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593 (Comm. 1988); *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362; *Matter of Hughes*, 18 I&N Dec. at 289 . 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.

Although the three precedent decisions cited by counsel do not specify the level of proof necessary to establish ownership and control, the regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. The purpose of the director's request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). 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. In this matter, the director's request for evidence of wire transfers was reasonable and proper, since the record contained conflicting evidence regarding the petitioner's ownership and control.

Further, regarding counsel's objection that the three precedent decisions do not specify the level of proof required to fulfill the burden of establishing the required parent-subsidiary relationship, the AAO notes that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Because the foreign entity's ownership of the petitioner's stock is a critical element that must be proven to show a parent-subsidiary relationship under 8 C.F.R. § 204.5(j)(2), the petitioner bears the burden of establishing eligibility once the director requests material evidence.

In the request for further evidence, the director raised the issue of the petitioner's qualifying relationship with the beneficiary's foreign employer. Although the director requested evidence of the claimed qualifying relationship, the AAO acknowledges that the director did not specifically request copies of the petitioner's stock certificates. However in the January 10, 2003 response to the request, petitioner's prior counsel referred the director to the "U.S. company's Articles of Incorporation and stock ownership certificates submitted with the I-140 as exhibit 63." As previously discussed, the record of proceeding contains the petitioner's exhibit 63, which includes the petitioner's Certificate of Incorporation, Articles of Incorporation, "Action by Written Consent of the Board of Directors," a blank sample stock certificate labeled as "Exhibit A," and Stock Certificate Number One (No. 1) issued to the beneficiary's foreign employer. The petitioner did not include Stock Certificate Number Two (No. 2) in exhibit 63 in support of the petition.

As provided above, the director denied the petition, noting that while the petitioner claims the purported parent entity paid $10,000 for the issued stock, the petitioner's Forms 1120 tax returns valued the petitioner's

stock at $50,000. On this basis, the director determined that the petitioner had not submitted sufficient evidence to support its claim of a qualifying relationship.

On certification, counsel directs the AAO to newly submitted evidence and asserts:

> As the enclosed documents confirm, [redacted] is the holder of two stock certificates for [the petitioner's] stock, one in the amount of 10,000 shares, and the other in the amount of 40,000 shares, comprising all of the outstanding shares of [the petitioner's] stock. Therefore, AMW is the sole owner of [the petitioner] and, as such, has complete ownership and control of the U.S. entity.

For the first time, the petitioner now submits through counsel a copy of a document purported to be Stock Certificate Number Two (No. 2), issued by Alwazzan (USA), Inc. This stock certificate reflects that the petitioner issued 40,000 shares of stock to Ahmad A1-wazzan Est., d/b/a AMW. The stock certificate is dated October 13, 1994, and is signed by the beneficiary as president. Remarkably, the submitted stock certificate also has a hand-drawn diagonal line running from the upper left-hand corner to the lower right-hand corner. In the upper right-hand corner, this line runs through the letters "RA" in the word "INCORPORATED" and continues to pass through the letter "W" in the petitioner's name, [redacted]." Close examination of the previously submitted sample stock certificate reveals that the hand-drawn line is identical and runs through the exact same letters. In addition, both Stock Certificate Number Two (No. 2) and the blank sample stock certificate are labeled "Exhibit A," although one "Exhibit A" notation on Number Two appears to have been covered up with correction tape and typed over with the name of the claimed parent entity, [redacted] Except for the names, series number, number of shares, date, and signature, the newly submitted stock certificate is *identical* to the previously submitted blank sample stock certificate.

Upon review, it is apparent that the petitioner altered the previously submitted blank sample stock certificate and backdated the document to 1994 in order to produce evidence of the foreign company's ownership of the 40,000 shares in question. Such evidence raises serious concerns regarding the validity and sufficiency of the remaining evidence. That the petitioner would manufacture evidence of its ownership necessarily undermines the credibility of the remaining evidence in the record of proceeding. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Thus, the AAO questions the validity of the stock certificate submitted on certification. By itself, the submission of a stock certificate for the first time on certification, more than ten years after the claimed transaction, raises serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the diminished evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

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. at 591-92.

The ease with which stock certificates can be created and manipulated emphasizes the necessity of the petitioner to establish by alternate means the qualifying relationship between the petitioner and the foreign entity. In this matter, the director requested evidence to show that the foreign entity paid for the stock issued. The petitioner provided conflicting evidence of the number and value of the shares issued. When the director pointed out the conflicting evidence, the petitioner's explanation, through its counsel, was to provide a second stock certificate that appears to have been materially altered to support the petitioner's claims. The submission of the stock certificate without further explanation does not resolve the inconsistency observed by the director.

In general, the petitioner's assertion that it issued the second stock certificate to the claimed parent, Ahmad [redacted] not persuasive. In addition, the AAO does not believe the petitioner's explanation for the $40,000 discrepancy between stock certificate number one and the petitioner's tax returns. 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).

Regarding the issue of the petitioner's claimed qualifying relationship, the petitioner has not overcome the director's denial. For this reason, the petition may not be approved and the director's decision must be affirmed.[3]

The second issue to be reviewed in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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;

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[3] As discussed, based on the striking similarity of the two stock certificates, the AAO finds the credibility and probative value of the evidence to be severely diminished. To resolve the questions surrounding the newly-submitted Stock Certificate Number Two, the AAO recommends that the director allow the petitioner the opportunity to provide an explanation, contemporaneous documentation of the claimed transaction, and all three *original* documents: the blank sample stock certificate, Stock Certificate Number One (No. 1), and Stock Certificate Number Two (No. 2). *See* 8 C.F.R. § 103.2(b)(5). The director may refer the original documents to the Department of Homeland Security's Forensic Document Laboratory (FDL) for an expert opinion on this matter. After the opinion of the FDL is entered into the record, the director may take appropriate action: if the opinion is unfavorable to the petitioner, the director may choose to enter a finding of fraud or pursue other civil or criminal penalties; or, if the opinion is favorable, the director may certify the case to the AAO for a new decision.

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.

(Emphasis added.)

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.

(Emphasis added.)

In an August 5, 2002 letter appended to the petition, the petitioner provided a general statement of the beneficiary's current position as president:

> [The beneficiary] oversees the company's activities, negotiates contracts and handles any and all accounting or legal issues. He is responsible for all contracts such as the lease agreement, contracts to provide payroll services for the company, and the web designing company that

> manages the Prime Casting website. [The beneficiary] also handles matters with the insurance companies (both worker's compensation and liability insurance) and with the banks. He represents the company in any industry function such as meetings at the Alliance for Motion Picture and Television Producers. Hiring of staff including the accountant and lawyers are included in his responsibilities. He also approves major office purchases. His duties also include working with both Federal and State governmental agencies. [The beneficiary] is also unique in his personal interest in promoting the use of disabled actors in the entertainment industry. His efforts in this regard include engaging the services of actors in wheelchairs, little people, blind actors, and other such disabled performers. In furtherance of his personal commitment to this purpose, he works with many organizations such as the state-sponsored [redacted] to keep production companies aware of the availability of such actors.

In the same letter, on page five, the petitioner added that the beneficiary as president:

> Has been responsible for setting up, supervising, organizing and directing the creation, growth and operation of [redacted] Since setting up the company, [the beneficiary] has established the United States office and operations, overseen and managed Prime Casting's day-to-day operations, and he has been in charge of new business development.

The petitioner added on page six that the beneficiary as president:

> Will interface with accountants and manage [redacted] financial affairs. He will utilize his discretionary decision making power to oversee and direct [redacted] with the following specific responsibilities: establish long- and near-term goals for the continuing success of [redacted] meet those goals through the provision of guidance, leadership and direction of the entire organization; ensure that the management of the organization complies with the business goals and expectations of [the foreign company]; train Prime Casting's staff; and secure new clients in the film industry.

The petitioner also provided an undated organizational chart showing the beneficiary as president and chief executive officer, [redacted] as office manager, and [redacted] employed in the administration department. The chart also indicated that the firm employed film "extras" and that the number could range from 30 to 150 workers in any payroll period. A second undated organizational chart indicated that the beneficiary was employed as president, and [redacted] was employed as the office manager/head casting director, an[redacted] was employed as a casting director. The second organizational chart added an accounting subcontracto[redacted] and "calling services" contractors.

The petitioner briefly described the duties of the listed employees and described its operations. The petitioner stated further that it employed set coordinators and assistants when jobs were very large and subcontracted with calling services when booking over 50 people for one job. The petitioner noted that it is legally considered the employer of the booked talent.

On October 29, 2002, the director requested a more detailed description of the beneficiary's duties including the approximate percentage of time the beneficiary spent in each of the listed duties as well as whom the beneficiary directed, their job duties, educational level, date of employment, number of hours worked per week and annual salary.

In its January 10, 2003 response, the petitioner stated that the beneficiary split his time between business development, dealing with legal/accounting issues, and overseeing the business and its employees. The petitioner observed that the beneficiary also updated the foreign entity with its development in the United States.

The petitioner noted the beneficiary spent 50 percent of his time on duties concerning business development, focusing on expanding the business, and that his duties included:

1. Promotes [redacted] new casting facility for rental to other companies, and handles all negotiations that are related to it. This is mostly done by informing his contacts in the business of the space's availability. [The beneficiary] also decides if a discount will be given for a particular client.
2. Handles the marketing plan for the company, and ensures that the company has as much public exposure as possible. [redacted] services are listed in almost all industry directories and websites, and are advertised in major Hollywood resource publications for producers such as the [redacted] Directory. [The beneficiary] is currently planning the advertising for the company's casting facility.
3. Deals with [redacted] freelance web design and maintenance programmer to keep the website up to date and cutting edge. [The beneficiary] negotiates the contract and discusses the different technological options available for the company. The company is currently discussing the option of including all the talents' pictures in the website. That way, a producer can do his/her own search for talent directly without the office spending time on emailing the pictures.
4. Maintains old and creates new relationships within the industry for further business prospects. [The beneficiary] is very active in the Hollywood community, and tries to promote the company whenever possible.
5. Is working to make [redacted] lients use the company's comprehensive services in order to maximize revenue from each client. Whatever services they request, whether it be extras casting, principal casting, casting facility rental, or payroll, he works to get them to use more than one, if not all, of Prime Casting's services.
6. Represents the company at different social and formal events to create more client contacts.

The petitioner noted that the beneficiary handled all legal issues and financial transactions between the petitioner and the claimed parent company. The petitioner indicated that the beneficiary spent 30 percent of his time dealing with payroll and legal issues. The petitioner observed that it had "over 4,000 part-time employees and that many state/federal/payroll/monetary, and legal issues come about," and that the

beneficiary handled problems and large issues as they arose. The petitioner listed examples of the beneficiary's activities as:

1. Working closely with [redacted] subcontracted accountants. Before making any financial decisions, [the beneficiary] discusses with the firm any issues or ideas [redacted] has. Regular meetings are also held on a quarterly basis.
2. Managing the administrative issues concerning [redacted] subcontracted payroll service. Most of [the beneficiary's] work is related to the maintenance of this contract.
3. Managing Worker's Compensation and liability insurance issues. This includes negotiating rates and discussing coverage.
4. Handling bank issues, including setup and maintenance of office accounts.
5. Finding legal help, if and when necessary.
6. Interacting and working with government related agencies, such as the California Employment Department (EDD), State Offices of Welfare and/or Social Services, Child Support Services Departments, Social Security Administration, etc. If the issue is major, [the beneficiary] deals with the organization directly. [The office manager] and her staff handle most of the minor issues.
7. Attending meetings where unions are involved. [The beneficiary] has recently attended meetings with representatives from the Screen Actors Guild, American Federation of Television and Radio Artists, the Little People's Association of America, and other such organizations.

The petitioner indicated the beneficiary spent 20 percent of this time overseeing the business and its employees. The petitioner indicated the beneficiary spent 10 to 15 minutes each morning with the office manager regarding the status of projects where the beneficiary is informed of problems the staff cannot solve or that require his attention. The petitioner provided examples such as, not finding the correct talent requested by a production company, not having enough extras for a particular job, having a major client unhappy or requesting the impossible, or having a production break union rules or state or federal laws.

The director determined that the petitioner's job description of the beneficiary's duties did not establish that the beneficiary would primarily direct the management of the organization, establish the company's policies and goals, exercise wide latitude in discretionary decision-making, and maintain autonomy over the petitioner's operations. The director, quoting *Matter of Church Scientology International*, 19 I&N Dec. at 604, observed that a beneficiary 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. The director determined that it was reasonable to believe that with the petitioner's organizational structure and type of business, the beneficiary would assist with the petitioner's day-to-day non-supervisory duties and that the performance of those menial tasks precluded the beneficiary from consideration as an executive. The director also determined that the beneficiary "is only a first-line manager who is not supervising professional employees." The director further determined that the petitioner had not shown that the beneficiary manages or directs the management of a department, subdivision, function, or component of the petitioning organization, but instead, is involved in the performance of routine operational activities of the entity.

On certification, counsel for the petitioner asserts that CIS erred in its denial by relying on superceded case law rather than the current applicable statutory and regulatory provisions and includes requirements not authorized by current statutes and regulations. Counsel specifically refers to the Immigration Act of 1990 (IMMACT 90). Counsel contends: that IMMACT 90 broadened the statute to include the currently applicable definition for "function manager;" that a manager can manage supervisory, professional, or managerial employees, or an essential function within the organization; and, that if staffing levels are used as a factor in determining managerial capacity, the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function shall be taken into account. Counsel also references legacy INS policies that the definitions of "executive" and "manager" were not intended to discriminate against small or medium-sized businesses.

Counsel specifically takes issue with the director's reliance on *Matter of Church Scientology Int'l.*, 19 I&N Dec. at 593, which the director cited to for the proposition that an employee who performs the tasks necessary to provide a product or services is not considered to be functioning in a managerial or executive capacity. Counsel notes that this matter was decided prior to the changes to the Act by IMMACT 90. Counsel argues that *Matter of Church Scientology Int'l.* provided for only two classifications, executive and manager, and did not include an application of the definition to the term "function manager." Counsel also asserts that the Board of Immigration Appeals (BIA) decided *Matter of Church Scientology Int'l.* on the issue of the petitioner's qualifying relationship with the foreign entity, and that the BIA's reference to a "prohibition against performance of a function" was *obiter dictum* and not the precedential holding in the matter.[4]

Counsel also references several unpublished decisions and asserts that the AAO has disagreed with the proposition that performance of an essential function precludes a finding of managerial or executive capacity. Counsel claims that CIS improperly required that the petitioner in this matter employ subordinate personnel to perform services at the direction of the function manager.

Counsel summarizes the previous descriptions of the beneficiary's duties and asserts that the petitioner has satisfied all the requirements of the applicable immigration statutes and regulations for the beneficiary's qualification as a multinational executive or manager. Counsel claims that the beneficiary "manages an essential function of the organization in that he is charged with new business development, and is responsible for establishing corporate policies and developing business plans to ensure the continued viability and prosperity of [the petitioner]." Counsel avers that, in addition to the function manager basis of eligibility, the beneficiary satisfies the alternative basis for immigrant visa classification as a supervisor of professionals and of two tiers of subordinate staff.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner initially provided a general statement of the beneficiary's duties and did not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section

[4] Counsel mistakenly attributes the BIA with the *Matter of Church Scientology* decision. This decision was issued by the INS Administrative Appeals Unit, now the AAO, in accordance with its authority to engage in adjudicatory rulemaking through the issuance of precedent decisions. *See* 8 C.F.R. § 103.3(c).

101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager.

The petitioner did elaborate on the beneficiary's duties in response to the director's request for evidence although the petitioner still did not identify whether the beneficiary was claiming to perform primarily executive duties or primarily managerial duties, or both managerial and 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).

The petitioner's second iteration of the beneficiary's duties in response to the director's request for further evidence does not establish that the beneficiary's tasks for the petitioner are primarily executive or managerial tasks. For example, the petitioner states that the beneficiary spends 50 percent of his time: (1) promoting the petitioner's new casting facility, maintaining old and creating new relationships within the entertainment industry, and representing the petitioner at social and formal events; and (2) handling the petitioner's marketing plan by listing the company in various publications, creating a website, and ensuring the company has as much public exposure as possible. The petitioner has not delineated how promoting, marketing, and "selling" the petitioner's services is elevated to primarily a managerial or executive role; the duties appear to be more akin to those of a salesperson.

The petitioner indicates that the beneficiary spends 30 percent of his time dealing with payroll and legal issues, including managing the administrative issues concerning the petitioner's subcontracted accountants, maintaining the payroll service contract, managing worker's compensation and liability insurance issues, interacting with government related agencies on major issues, handling bank issues, finding legal help, and attending union meetings. The petitioner does not provide sufficient comprehensive details regarding these tasks to enable CIS to conclude that these duties comprise primarily managerial or executive duties rather than the performance of the necessary administrative functions of an organization involved in processing payroll for a number of individuals.

The petitioner further states that the beneficiary spends 20 percent of his time overseeing the business and its employees. The petitioner appears to restrict the beneficiary's direct interaction with the office manager and casting director to a limited time and to troubleshooting problems and placating clients. Again the petitioner has not provided detail regarding the beneficiary's oversight of problems or staff that is sufficient to conclude that the beneficiary's actual duties comprise primarily managerial or executive duties. Not only has the petitioner limited the beneficiary's time in this area, the petitioner's description of the beneficiary's duties is more indicative of his involvement in the company's public relations and taking care of potential problems rather than providing direct supervision to subordinate employees.

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). The petitioner's description of the beneficiary's actual daily duties indicates that they primarily involve marketing, payroll functions, and public relations. 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. The petitioner's job descriptions do not establish that the beneficiary performs primarily managerial or executive duties.

Counsel's specific objection to the director's reliance on *Matter of Church Scientology Int'l.* is misplaced. 19 I&N Dec. at 593. As it relates to this petition and the requested visa classification, the *Matter of Church Scientology Int'l.* decision remains a valid precedent decision that is binding on all CIS officers in the enforcement of the Act. *See* 8 C.F.R. § 103.3(c).

Specifically, in *Matter of Church Scientology*, the AAO examined the claimed managerial capacity of a member of the Church of Scientology. After citing to the regulations and noting that the beneficiary's duties must be "primarily at the managerial or executive level," the AAO stated: "An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity." *Matter of Church Scientology Int'l.*, 19 I&N Dec. at 604. The AAO continued to examine the specific job duties and concluded that the beneficiary appeared to function as a staff officer or specialist and not as a manager or executive.

Counsel asserts that this decision was superceded by IMMACT 90, specifically by the creation of the function manager concept. As noted by counsel, 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) of the Act, 8 U.S.C. § 1101(a)(44)(A). 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, 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. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary primarily manages the function rather than performs the duties related to the function. Regardless of the changes made by IMMACT 90, the statutory definition of managerial capacity still requires that "the employee *primarily* . . . manage[] an essential function." Section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii)(emphasis added).

In effect, counsel has blurred two distinct concepts relating to eligibility for this visa classification: the concept of "function manager" created by IMMACT 90 and the surviving statutory requirement that the beneficiary "primarily" manage an essential function. The AAO acknowledges that IMMACT 90 added the concept of a "function manager," thereby eliminating the requirement that a beneficiary directly supervise subordinate employees to establish managerial capacity. However, in *Matter of Church Scientology Int'l*, the AAO observed that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity, focusing on the statutory requirement that a beneficiary "primarily" perform in a managerial or executive capacity. Thus,

IMMACT 90 and the addition of the function manager concept does not preclude the use of a preexisting precedent decision that discussed individuals that are engaged in the production of a product or service.

Despite the changes made by IMMACT 90, 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.

Moreover, federal courts continue to give deference to CIS's interpretation of IMMACT 90 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. *See Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at *5 (9th Cir. 1995 (unpublished))(citing to *Matter of Church Scientology Int'l.* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); *see also IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel's assertion that the beneficiary "manages an essential function of the organization in that he is charged with new business development, and is responsible for establishing corporate policies and developing business plans to ensure the continued viability and prosperity of [the petitioner]," is not persuasive. To clearly describe the duties of a function manager, the petitioner should at least identify the function with specificity, articulate the essential nature of the function, and demonstrate that the beneficiary's duty is to primarily manage the function, and not perform the tasks associated with the function. The AAO acknowledges that bringing in new business may be an integral part of the petitioner's organization. However in this matter, the petitioner's overly-broad description of the essential function, as well as the beneficiary's actual duties, indicates that he is the individual promoting, marketing, and selling the petitioner's services. The petitioner has not explained how conducting the petitioner's actual operational task of obtaining new clients is primarily managerial or executive.

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. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp.*, 153 F. Supp. 2d at 15. In this matter, the petitioner has not provided evidence that the beneficiary will be relieved from primarily performing the petitioner's promotion, sales, and marketing tasks, as well as providing guidance regarding payroll functions, public relations, and problem solving. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel correctly notes that 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. Moreover, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not established the basic eligibility requirement in this matter, that the beneficiary is primarily performing managerial or executive duties. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Counsel's references to an unpublished decision involving an employee of the Irish Dairy Board and other unpublished decisions are not probative. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for the visa classification even though he was the sole employee. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. The assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel's claim on certification that the beneficiary can alternatively be classified as a supervisor of professionals and of two tiers of subordinate staff is also not persuasive. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner has not established that the office manager/head casting director, casting director, or assistant casting director hold professional positions. The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The descriptions of the duties for the positions of office manager and casting director do not incorporate tasks that require a prolonged course of specialized instruction or study. Further, the petitioner's description of the duties of the office manager/head casting director does not establish that the office manager/head casting director is primarily a supervisor rather than the most experienced and senior of the petitioner's team of casting directors. Finally, as observed above, the petitioner has limited the beneficiary's "supervisory" role to 20 percent of the time the beneficiary spends on all his duties. Thus, the record does not establish that the beneficiary primarily supervises a subordinate staff.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner comprise primarily executive or managerial duties. For this additional reason, the petition must be denied. Accordingly, as it relates to this issue, the decision of the director will be affirmed.

The final issue in this decision is whether the director's decision violates established CIS policy. Upon review, the AAO concludes that it does not.

On certification, counsel asserts that the denial of this employment-based petition constitutes an unlawful denial and violates long-standing policies of the legacy INS and CIS, requiring that they not overturn prior decisions without a finding of gross or material error. Counsel cites two memoranda in support of this claim: Memorandum of James A. Puleo, Assistant Commissioner for Adjudications, INS, CO214L-P, (January 13, 1989) ("Puleo Memo"); and Memorandum of William R. Yates, Associate Director for Operations, USCIS, HQOPRD 72/111.3 (April 23, 2004) ("Yates Memo").

Counsel's assertion in this regard is not persuasive. Counsel asserts that the approvals of the previous nonimmigrant petitions were based, "[i]n all material respects," on the same eligibility criteria as the current immigrant petition. Counsel asserts that the director erred in denying the petition because he did not articulate any "material error," as discussed in the Yates Memo, or "gross error," as discussed in the Puleo Memo, that would justify a departure from the previous approvals. It is noted that the "gross error" standard has been incorporated into the regulations as a basis for the revocation of a nonimmigrant L-1A petition. *See* 8 C.F.R. § 214.2(l)(9)(iii)(*5*). It is also noted that the "material error" standard discussed in the Yates Memo does not have a basis in the regulations and applies strictly to nonimmigrant extensions. As the present matter involves the statutory denial of an immigrant visa petition, neither standard applies to this case.

With regard to the similarity of the eligibility criteria, the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1A petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd.*, 724 F. Supp. at 1103. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc.*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

It is also noted that, although counsel mentions the previous nonimmigrant approvals, counsel neglects to discuss the petitioner's previous denials and revocation. Counsel observes that the applicant first entered the United States as a nonimmigrant intracompany transferee (L-1A) in 1995, as the president of Prime Casting, after the INS approved his initial nonimmigrant petition. Counsel claims that the INS extended the applicant's nonimmigrant stay on four occasions. Counsel fails to mention that the INS denied the petitioner's third request for an extension. Nor does counsel mention that on September 18, 2003, the director revoked the approval of the nonimmigrant petition that counsel points to as "confirming [the beneficiary's] lawful intracompany transferee classification until September 3, 2005." Most significantly, counsel fails to note that, prior to filing the current Form I-140, the beneficiary's employer filed an initial Form I-140 immigrant visa petition (WAC 98 245 51887) which was denied by the director. The AAO dismissed the employer's appeal and affirmed the director's decision to deny.

Although counsel claims that the denial of the current petition is inconsistent with the previous approvals, the record reveals that CIS consistently denied both I-140 immigrant visa petitions, one I-129 nonimmigrant visa petition, revoked the approval of the most recently filed I-129, and that the AAO has dismissed two of the petitioner's appeals and rejected a motion. While counsel points to the denial of the current petition as inconsistent with the approval of four nonimmigrant petitions, the record indicates that the four initial approvals were simply inconsistent with the seven total adverse decisions that the petitioner received relating to the beneficiary's claims.

Furthermore, the AAO is not bound or estopped by the previous decisions of the service center director. 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).

Finally, each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Because the approved nonimmigrant petitions are not part of the current immigrant visa record of proceeding, the AAO cannot determine whether the previous L-1A petitions were approved in error, or whether the beneficiary was originally eligible but the facts changed before the I-140 immigrant petition was filed.

Regardless, 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). 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. at 597.

Beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity were primarily managerial or executive prior to entering the United States as a nonimmigrant. The petitioner states that the beneficiary was employed by his father's sole proprietorship from 1992 to 1995.

In an August 4, 2002 letter appended to the petition, the foreign entity's commercial manager describes the beneficiary's activities for the foreign entity as:

> In Kuwait and other countries, [the beneficiary] met regularly with manufacturers and buyers of the products tha[redacted]old. He searched for new companies with new products for [redacted] clientele. In this regard, he traveled to various conventions and shows in Europe and the United States to review their products and determine whether their products would further develop[redacted]s business. In these cases, [the beneficiary] negotiated the contracts for sale. Specifically, [the beneficiary's] clients included [redacted]Washington, and [redacted]California. In furtherance of his duties in developing[redacted] business opportunities, [the beneficiary] directed our marketing efforts. He hired a Marketing Manager and an assistant to carry out the plans he developed for marketing[redacted] line of products and potential products. [The beneficiary's] accomplishments and high level of responsibility included:
>
> - Overseeing new business development;
> - Overseeing development of our marketing programs;
> - Overseeing expansion of products for our market;
> - Overseeing plans for increase in sales to our market; and,
> - Supervising marketing staff.

The petitioner concluded that the beneficiary's primary role as the foreign entity's vice-president was to obtain new customers and oversee the distribution of products.

The beneficiary's job duties for the foreign entity comprised the duties of a buyer of new products, promoter of the foreign entity as a distributor, and general duties as a potential successor to his father's sole proprietorship. [redacted] in his April 2002 sworn statement, indicates that in Kuwaiti society, the son of the owner of a business would serve in a managerial capacity at the company. However for immigration purposes, an individual who is learning the family business, buying products for the family business, and promoting the family business as a distributor is not necessarily a manager or an executive as defined by United States immigration law. The description of the beneficiary's actual duties for the foreign entity does not substantiate the managerial or executive capacity of the beneficiary's foreign position. 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.*, 724 F. Supp. at 1103, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the foreign entity does not provide evidence of the beneficiary's authority within his father's organization. Although [redacted] assumes that the son of the owner of a business would have managerial authority, the record does not contain evidence substantiating the beneficiary's authority as a vice-president. Titles alone do not establish the parameters of a position. The foreign entity does indicate that the beneficiary hired a marketing manager and supervised the marketing staff. However, the record does not contain evidence demonstrating when the beneficiary hired a marketing manager or the duties of the marketing

manager or staff. As a result it is not possible to determine if the beneficiary's purported supervisory duties were more than the duties of a first-line supervisor of non-professional employee(s).

The petitioner has not provided adequate evidence to establish the beneficiary's foreign position prior to entering the United States as a nonimmigrant was a managerial or executive position. For this additional reason the petition must be denied.

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).

For all of the reasons discussed in this decision, considered both in aggregate and as independent grounds for denial, this petition may not be approved. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The decision of the director is affirmed. The petition is denied.