U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 2 6 2006

WAC 05 152 51580

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:

SELF-REPRESENTED

INSTRUCTIONS:

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

Erica Haldo

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Nevada in March 2000. It operates a mailbox and gift gallery. It seeks to employ the beneficiary as its director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established: (1) that it had a qualifying relationship with the beneficiary's foreign employer; or (2) that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

On appeal, the petitioner submits a brief and documentation in support of the appeal.

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).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and 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.

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.

In an April 29, 2005 letter submitted in support of the petition, counsel for the petitioner indicated that the Internal Revenue Service (IRS) had conducted a tax audit of the petitioner and upon examination of the petitioner's books of accounts, share certificates, share ledger, and minutes of corporate meetings had concluded that the petitioner was a subsidiary of [redacted] of New Delhi, India. The petitioner also submitted an April 27, 2005 letter allegedly signed by the foreign entity's authorized signatory who stated that the petitioner had issued 3,257 shares of stock worth $10,423, all in the name of [redacted] New Delhi, India, establishing that the foreign entity was the 100 percent owner of the petitioner.

The petitioner submitted its stock certificates 3, 4, and 5 issued to the foreign entity in October 2003 and January 2004 for the total number of 3,257 shares. The petitioner also provided a copy of an agreement dated March 13, 2000 that stated among other things: (1) "Initially, [redacted] [sic] Exports, India will contribute $5000.00 through [the beneficiary], and $5000.00 will be loaned by the second director, [redacted] and (2) [redacted] agrees to provide capital to [the petitioner] as per their needs and also agrees to manufacture and provide goods to [the petitioner] on 'soft credit' terms for its expansion and growth in business in the United States." The petitioner also provided copies of minutes of meetings of shareholders beginning in March 2000 referencing the shareholders as [redacted] and listing the number of shares issued in October 2003 and January 2004.

On June 16, 2005, the director requested evidence that the foreign entity, had in fact, paid for its interest in the petitioner. In a September 7, 2005 response, the beneficiary on behalf of the petitioner acknowledged that the petitioner had not been capitalized with monies from a wire transfer, but that the petitioner's initial startup expenses had been noted on the foreign entity's profit and loss account for the 1999 and 2000 years as "Foreign Office Expenses." The petitioner indicated that the profit and loss account statements had previously been submitted to Citizenship and Immigration Services (CIS).

The petitioner further explained that: the petitioner's account was opened with $8,000 and a personal account was opened for the beneficiary with $2,000; and the foreign entity sent another $8,000 through individuals known to the foreign entity and that $4,500 of the $8,000 was deposited in the petitioner's bank account and $3,500 was used to repay a loan.

On October 19, 2005, the director denied the petition, determining that the petitioner had not provided explanations or evidence to establish that the foreign entity had paid for its claimed interest in the petitioner. The director observed several inconsistencies between the petitioner's IRS Forms 1120 and the claimed value of the petitioner's stock and the funds used to allegedly purchase the stock. The director also determined that the IRS audit of the petitioner's tax returns did not establish a parent-subsidiary relationship between the U.S. entity and the foreign entity for the purpose of proceedings before CIS.

On appeal, the beneficiary on behalf of the petitioner repeats the circumstances of the petitioner's incorporation and the difficulty of opening a bank account without the beneficiary's social security number as explanation for the petitioner's initial capitalization with traveler's checks from the beneficiary and other individuals. The petitioner also provides documents identified as the foreign entity's 2000 year tax return attached as Exhibit 6. However, the document labeled exhibit 6 is illegible for the most part, contains type in different fonts; and the line listing "Foreign Office Expenses" is not styled in the same grammatical manner as other lines on the section of the page. The petitioner further provides an undated statement from a foreign advocate and income tax advisor who certifies that an examination of the foreign entity's books confirms that the petitioner is a subsidiary of the foreign entity, as well as a July 31, 2005 statement from the foreign entity's purported managing partner stating that the foreign entity owns 100 percent of the petitioner. The petitioner also notes that the foreign entity supplies the petitioner with the foreign entity's products and that the foreign entity and the petitioner continue to engage in correspondence. The petitioner asserts that the plethora of evidence in the record establishes a qualifying parent-subsidiary relationship between the petitioner and the foreign entity.

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

The petitioner in this matter has provided its minutes of shareholder meetings beginning in March 2000 that reference the foreign entity's ownership of stock that was not issued until October 2003, and January 2004. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner has also offered convoluted explanations to describe the petitioner's relationship with the foreign entity, all it appears in an effort to conform the petitioner's ownership to one that could establish a qualifying relationship with the foreign entity. However, 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). The petitioner has not provided adequate credible evidence to establish that the foreign entity purchased an ownership interest in the petitioner. [1]

In addition, the initial March 13, 2000 agreement between the beneficiary and one other individual on behalf of the petitioner and the foreign entity is more indicative of a contractual relationship not one of ownership with resulting control of the petitioner. Further, the AAO questions the credibility of the foreign entity's claimed control of the petitioner. The AAO questions the validity of the document submitted as exhibit 6 to the petitioner's appeal.[2] 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

---

[1] The AAO observes that the record of proceeding contains the petitioner's initial Form I-140, Immigrant Petition for Alien Worker (WAC 02 183 50461) filed on behalf of this beneficiary and the petitioner's representations regarding its ownership and control. In particular, the record contains the petitioner's response to the director's August 19, 2002, request for the foreign entity's list of owners and the stock ownership of the petitioner. In an undated response, the beneficiary on behalf of the petitioner stated that [redacted] the foreign entity and that the beneficiary owned all of petitioner's outstanding stock. The petitioner also provided two stock certificates showing that it had issued 1,000 shares to the beneficiary in December 2000 and 1,000 shares to the beneficiary in January 2001. The stock certificates did not indicate that the beneficiary held the shares in trust. The petitioner's minutes of meeting dated December 21, 2000 shows that the petitioner issued 1,000 shares to the beneficiary. The petitioner's minutes of meeting dated January 31, 2001 shows that the total number of shares issued is 2,000 and that the beneficiary held the 2,000 shares. The beneficiary submitted a declaration stating that he is the petitioner's sole stockholder and that he had no ownership interest in [redacted] hat the stocks had been purchased with funds provided by [redacted] The AAO upon review of the evidence submitted affirmed the director's initial decision that the petitioner had not established a qualifying relationship with the beneficiary's claimed foreign employer. The petitioner's manipulation of documents in this matter in an attempt to conform the documents to evidence that would demonstrate a qualifying relationship suggests that the beneficiary may be making material misrepresentations to CIS in order to obtain an immigration benefit. Pursuant to section 212(a)(6)(C)(i) of the Act, any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

[2] Although the document is for the most part illegible, the director may refer the document to the Department of Homeland Security's Forensic Document Laboratory (FDL) for an expert opinion on the matter of its legitimacy.

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).

Upon review of the totality of the record, the inconsistencies observed by the director in his decision, and the inconsistencies observed by the AAO in a decision on the petitioner's initial Form I-140 (WAC 02 183 50461) submitted on behalf of the beneficiary, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer. For this reason, the petition will not be approved.

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

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

> The term "executive capacity" means an assignment within an organization in which the employee primarily
>
> i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an April 29, 2005 letter appended to the petition, counsel for the petitioner stated that:

> As Director of Operations, [the beneficiary] is the key person in charge of overseeing and directing the activities of [the petitioner] for parent company [redacted] [The beneficiary] will continue to develop and direct future sales and marketing campaigns, office systems, and oversee the activities of the frontline sales representatives. He will monitor the company's profit projections and attainments, as well as direct company policies towards increasing sales and revenue.

In an April 27, 2005 letter also appended to the petition, the claimed foreign entity indicated that the beneficiary would be employed as a director in a managerial and executive capacity. The beneficiary's job description listed the following duties:

- Overall functioning of [the petitioner], setting policies, negotiating and administering plans, and overseeing all aspects of the entire operation.
- Exercise authority to hire, train & delegate responsibilities to staff, and engage agents to promote sales\business.
- Supervise and control the work of other staff, other agents and independent contractors, and promote the staff.
- Exercise discretion over the functioning of [the petitioner], execution of assets and assets leasing, signing of all contracts whatsoever for sale\orders or services whenever and wherever necessary in its managerial capacity which is legally binding on [the petitioner].
- Function autonomously, without direct control as per agreement with [the claimed foreign entity]. He is required to report all progress and developments to parent company.

The claimed foreign entity added that:

> [The beneficiary] devotes the majority of his time in duties that are executive and managerial in nature. In brief, looking at the functioning of [the petitioner], various contracts and deals by [the beneficiary], a list of directors submitted to the secretary of state every year, execution of wide discretionary powers, signing of tax papers and legal powers in the capacity of the person responsible for [the petitioner], directors meeting records, etc. show that [the beneficiary] is working an [sic] executive or managerial capacity.

The petitioner indicated that it employed four people, the beneficiary, a selling agent, and two independent consignment outlets and that the beneficiary directed the activities of two custom clearing agents. The petitioner's organizational chart showed the beneficiary as director, and listed three unfilled positions subordinate to the beneficiary's position, as well as a selling agent and unidentified independent outlets. The petitioner noted that employees are sufficiently trained for the petitioner's day-to-day operations. The petitioner indicated further that the beneficiary has autonomy to enter into contracts, hire and fire personnel, advertise, and promote the U.S. company and that losing the beneficiary would require the petitioner's closure.

On June 16, 2005, the director requested, among other things, the petitioner's organizational chart as of the date of filing, listing all employees under the beneficiary's supervision by name, job title, brief job description, and their source of remuneration and a more detailed description of the beneficiary's duties. The director cited the statutory definitions for both executive and managerial capacity and requested that the petitioner provide a list of the specific goals and policies the beneficiary had established over the last six months, a list of the discretionary decisions the beneficiary had exercised, and a specific day-to-day description of the beneficiary's duties the previous six months. In addition, the director requested copies of the petitioner's quarterly IRS Forms 941, Quarterly Wage Reports and copies of the petitioner's payroll summaries for 2003 and 2004.

In a September 7, 2005 response, the petitioner submitted a revised organizational chart depicting the beneficiary as director with a supervisor and a selling agent immediately subordinate to his position, and an office clerk, a secretary, and third individual subordinate to the supervisory position. The petitioner also referenced three consignment outlets and custom clearing agents engaged on a contract basis.

The petitioner noted that CIS continued to consider that the beneficiary was a functional manager but that the beneficiary functioned in an executive capacity and that a supervisor could not do his job. The petitioner indicated that the beneficiary monitored the employees through the supervisor. The petitioner provided the same description of the beneficiary's duties as initially provided and stressed that the beneficiary: (1) guided the company's policies and made all pertinent business decisions of the organization; (2) received no supervision or direction from the foreign company in regards to day-to-day decision making; (3) had complete authority and control of the petitioner; and (4) directed the activities of the company in compliance with objectives determined by the foreign company.

The petitioner added that the beneficiary's duties are considered to be managerial. The petitioner indicated that the beneficiary entered into contracts, solicited the services of buying agents, and "is always vigilant for business opportunities," and performs at the highest level of responsibility. The petitioner noted that if the petitioner lost the beneficiary as its sole director it would be forced to close down.

The petitioner provided its IRS Form 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2005, the quarter in which the petition was filed. The IRS Form 941 showed that the petitioner had paid $12,866.25 in wages. The petitioner did not identify the employees who received wages for the quarter. The petitioner provided earnings statements for the December 16, 2004 to December 31, 2004 pay period. The earnings statement for this pay period showed that the individual in the position of supervisor received $220

for the pay period and had received $6,143.50 to date; an individual not identified on the organizational chart received $385 for the pay period and had received $2,810.50 to date; and the beneficiary had received $1750 for the pay period and had received $38,000 to date. The petitioner also provided its 2004 IRS Forms W-2, Wage and Tax Statement, issued to these three individuals for $6,143.50, $2,810.50, and $38,000. Finally, petitioner provided an earnings statement for the pay period beginning August 16, 2005 through August 31, 2005, showing the individual in the position of supervisor earning $357.50 for the pay period and receiving $1,833.75 to date; the individual in the position of office clerk earning $230 for the pay period and receiving $1,150 to date; and a second individual earning $299 for the pay period and receiving $1,965.50 to date.

The director denied the petition on October 19, 2005, determining that the record showed that the beneficiary was the only individual employed full-time and that it appeared that the beneficiary was a "frontline supervisor" involved in the day-to-day functions of the company. The director determined that the petitioner's indication that the beneficiary monitored and directed employees through a supervisor was unlikely based on the record. The director observed that the beneficiary's subordinate staff was not composed of supervisory, professional, or managerial employees and that the description of the beneficiary's duties was too vague to convey a clear understanding of what the beneficiary would be doing on a daily basis. The director concluded that the preponderance of the beneficiary's duties would include providing the services of the business and that the record was insufficient to establish that the beneficiary would be employed in a managerial or executive capacity.

On appeal, the petitioner indicates: that the beneficiary directed his staff to study the market and based on their report, the beneficiary shifted the petitioner's type of products; that the beneficiary signs all trade and business agreements; that the beneficiary approves sample products before they go into production in India; and the beneficiary has the crucial job of heading the company. The petitioner indicates that the beneficiary has authority to hire staff; to appoint selling agents on commission or profit sharing basis; appoint custom clearing agents and freight forwarders; determines when to shelve or liquidate inventory; and acquires equipment. The petitioner notes that the beneficiary is the only director of the company and fulfills the petitioner's legal obligations. The petitioner asserts that a supervisor cannot perform these executive functions.

The petitioner contends that the director failed to consider that the petitioner "solicits the services of a selling agency" and that it "also has been in regular business with two consignment outlets that carry a lot of our products." The petitioner claims that most of its business involves managing wholesale clients and that the petitioner only needs to staff its showroom with part-time employees. The petitioner argues that when considering the reasonable needs of the company, the petitioner's four employees at the showroom, in conjunction with the wholesale agency and the two consignment outlets, the petitioner's manpower needs have been fulfilled. The petitioner asserts that the beneficiary "devotes a super-majority of his time (80-90%)" to executive duties.

The petitioner's assertions are not persuasive. The petitioner has not provided a description of the beneficiary's duties sufficient to establish that the beneficiary primarily manages or directs the petitioner's operations rather than performing the necessary tasks to operate a "mailbox" outlet that is also a retail gift store. An employee who "primarily" performs the tasks necessary to produce a product or to provide services

is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The AAO observes further that the petitioner's vague references to the petitioner's use of consignment stores and a selling agent do not contribute to an understanding of the petitioner's business operations.

The petitioner also continues to borrow liberally from elements contained in the definitions of managerial and executive capacity rather than providing an actual description of the beneficiary's duties. The AAO observes that the petitioner has listed the beneficiary's duties as: "develop and direct future sales and marketing campaigns, office systems, and oversee the activities of the frontline sales representatives; "monitor the company's profit projections and attainments, as well as direct company policies towards increasing sales and revenue; and executes various contracts, submits the petitioner's list of directors to the secretary of state, signs tax papers and exercises legal powers in the capacity of the petitioner's director. The petitioner argues that these duties comprise executive duties and that the beneficiary spends the majority of his time performing these duties. However, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, the petitioner the petitioner's reference to its staff is not substantiated in the record. As the director pointed out and the petitioner has acknowledged, it employs individuals intermittently or part-time to staff its retail operations. Furthermore, the beneficiary's responsibilities of executing contracts and signing tax papers and corporate documentation are the necessary operational tasks for the petitioner's business operation. The petitioner in this matter has not attained the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the beneficiary's duties performed on a day-to-day basis. Rather, the petitioner's description of the beneficiary's duties and the petitioner's organizational structure confirm that the beneficiary is the employee operating the petitioner's mailbox and gift gallery business on a daily basis. Operating a store, although it may contain some elements of an executive nature, does not comprise primarily executive duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-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 petitioner has not provided sufficient credible evidence that the beneficiary's day-to-day tasks comprise primarily executive tasks.

The petitioner has not provided evidence that the beneficiary's subordinates perform in a managerial capacity rather than perform the part-time work of salespeople and office help. The AAO does not accept the

petitioner's explanation that the limited employment of three employees can relieve the beneficiary from full-time involvement in the daily operational and administrative tasks associated with running a retail shop. Moreover, the petitioner's statement that the petitioner's business must close if the beneficiary is denied this visa classification serves only to underscore the petitioner's lack of organizational complexity and the beneficiary's required performance of the routine and mundane tasks associated with operating a retail store.

The petitioner has not provided documentary evidence that it employs a full-time supervisor to relieve the beneficiary from performing the duties of a first-line supervisor. A petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. In this matter, the petitioner acknowledges that the claimed supervisor is employed part-time and fails to describe this individual's daily duties, apparently because he is not employed on a daily basis. The AAO believes that the petitioner's proposed organizational chart, its number of part-time employees and the duties ascribed to them, and the beneficiary's position on the chart are not credible and were created to exaggerate the beneficiary's actual role in the organization.

The AAO affirms the director's determination that the beneficiary in this matter performs the duties of a first-line supervisor and that the beneficiary's subordinates are not professional employees. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

As observed above, the petitioner in this matter refers to consignment shops and a selling agent but does not provide documentary evidence of how these companies and shops play into the petitioner's daily operations. Likewise the petitioner does not explain how these individuals or businesses relieve the beneficiary from performing the petitioner's day-to-day tasks of selling, marketing, promoting, researching new opportunities, or other operational services.

The petitioner references Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C) and contends that the petitioner employs sufficient personnel to carry out the petitioner's operations without the beneficiary's daily involvement in non-qualifying duties. The AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Instead, an executive's duties must be the critical factor. However, if CIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this matter, the petitioner's assertions are not substantiated by credible evidence in the record. 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)).

Although the petitioner apparently does not claim that the beneficiary is performing in a managerial capacity. The AAO observes that the petitioner has not established that the beneficiary supervises subordinate employees who perform in supervisory, professional, or managerial positions. *See* § 101(a)(44)(A)(ii) of the Act. In addition, the petitioner has not established that the beneficiary *manages* a function rather than *performs* duties related to a function. Again an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity for the petitioner. For this additional reason, the petition will not be approved.

Beyond the decision of the director, the record is insufficient to establish that the beneficiary was employed in a primarily managerial or executive capacity for the foreign entity for one year prior to his entry into the United States as a nonimmigrant. The petitioner indicated that the beneficiary's duties as the senior manager of the sales and client relations department for the foreign entity included the following:

> He used to handle placement and negotiations of all orders, pricing of product, examination of samples before they were sent to potential buyers, monitoring and reporting the sales of the company to the owner. Quite often, he would take part in trade shows or exhibits usually held in hotels or conferences halls as an express representative of Yamni Exports. Therefore, all company correspondence with the potential buyers was handled by [the beneficiary].

The duties described are the duties of an individual selling and placing orders for the sale of the claimed foreign entity's product. These duties are not the duties of a manager or an executive as defined in the statute. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The AAO acknowledges that CIS approved L-1A nonimmigrant transferee petitions that had been previously filed on behalf of the beneficiary. The AAO also observes that it affirmed the director's decision to deny the petitioner's initial Form I-140 (WAC 02 183 50461), and to deny the most recent request for an extension of the beneficiary's L-1A status (WAC 04 132 52538). However, the AAO once again reiterates that with regard to the similarity of the eligibility criteria, 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.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 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). The AAO observes that in this matter, the petitioner's initial immigrant petition submitted on behalf of the beneficiary was denied December 7, 2003 and the AAO affirmed the director's decision on February 1, 2005.

Moreover each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same information contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Further, 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). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

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

ORDER: The appeal is dismissed.