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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 01 2008

LIN 06 263 51967

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Florida corporation, alleges to be in the "import and export" business and to have a qualifying relationship with the beneficiary's claimed employer in Venezuela. 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 denied the petition concluding that the petitioner failed to establish (1) that it has a qualifying relationship with the foreign employer; (2) that the beneficiary was employed abroad in a primarily managerial or executive capacity; (3) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (4) that the petitioner has the ability to pay the proffered wage to the beneficiary.

On appeal, counsel disputes the director's findings, asserts that the record establishes that both the petitioner and the foreign employer are owned and controlled by the same individual, asserts that the beneficiary will perform, and has performed, primarily qualifying duties, and asserts that the record establishes that the petitioner has the ability to pay the proffered wage. In support, counsel submits a brief and additional evidence in support of his arguments.

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 a firm, corporation or other legal entity*, or an affiliate or subsidiary of that entity, and who 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 which 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.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) must be accompanied by a statement from an authorized official of the "petitioning United States employer" which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The first issue in this proceeding is whether the petitioner has established that it "is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(C).

A "subsidiary" is defined at 8 C.F.R. § 204.5(j)(2) as:

> [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.

Likewise, an "affiliate" is defined in pertinent part at 8 C.F.R. § 204.5(j)(2) as:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual; [or]

(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[.]

The regulations 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 Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). In the context of this 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 at 595.

In this matter, the petitioner submitted evidence that it is 100% owned and controlled by [redacted]. However, as the petitioner did not submit translated organizational documents pertaining to the foreign employer's ownership and control, the director requested additional evidence on July 23, 2007. The director requested evidence establishing "common ownership and/or control between the foreign entity and the United States entity."

In response, counsel submitted a letter dated August 30, 2007 in which he claims that [redacted] "is the owner of 102 of the issued and outstanding shares (or 51% of all shares)" of the foreign employer in Venezuela. In support, counsel submits the Venezuelan articles of incorporation of the foreign employer. While the translated "abstract" of the foreign employer's purported articles of incorporation indicate that [redacted] and [redacted] are members of the board of the directors, the abstract does not address the ownership and control of the business entity. The remaining organizational documents are not translated into the English language, and are, therefore, not of any evidentiary value. *See* 8 C.F.R. § 103.2(b)(3).

On October 30, 2007, the director denied the petition. The director determined that the petitioner failed to establish that the foreign employer and the petitioner are owned and controlled by the same individual.

On appeal, counsel argues that the record contains evidence establishing that [redacted] owns and controls 51% of the stock of the foreign employer. In support, counsel submits, for the first time, an English translation of a Spanish language document which indicates that [redacted] owns 102 of 200 shares of the foreign employer's issued stock.

Upon review, counsel's assertions are not persuasive.

As correctly noted by the director, the record is devoid of evidence pertaining to the ownership and control of the foreign employer. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). While the petitioner submitted evidence pertaining to the organization and management of the foreign employer in response to the Request for Evidence, this evidence does not address its ownership and control. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, and as noted above, the remaining organizational documents submitted for the record were not translated. Because the petitioner failed to submit certified translations of these documents, the AAO cannot determine whether the evidence supports the petitioner's claim that the foreign employer is owned and controlled by [redacted]. *See* 8 C.F.R. § 103.2(b)(3).

Moreover, it is noted that, on appeal, counsel submits for the first time a translation of one of the Spanish language organizational documents submitted in response to the Request for Evidence. However, the petitioner was put on notice of required evidence in the director's Request for Evidence and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As the petitioner failed to submit the requested translated evidence, the AAO will not consider this evidence submitted on appeal for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Regardless, it appears that this translation pertains to the ownership and control of the foreign employer in 1999. The record in its entirety is devoid of evidence addressing the present ownership and control of the foreign employer. Accordingly, even if the translation submitted on appeal were considered by the AAO, it would not be persuasive in establishing that the petitioner and the foreign employer shared common ownership and control at the time the instant petition was filed on August 24, 2006.

Therefore, as the petitioner failed to establish that it "is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas," the petition may not be approved for that reason.

The second issue in this proceeding is whether the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

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

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify in the initial petition whether the beneficiary primarily performed managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary was employed in either a managerial *or* an executive capacity and will consider both classifications.

The foreign employer described the beneficiary's duties abroad as "office manager" in a letter dated May 15, 2006 as follows:

> [The beneficiary] was in charge to control and supervise all general office activities[, s]uch as the supervision of [t]he personnel, the development and the implementation of the policies of human resources. Simultaneously in coordination with the assistant of purchases, she supervised the purchases of the office in general. Also she established norms and procedures to be in constant communication with the clients and to give answers to their problems, improving the offered service obtaining the satisfaction of such.

The petitioner also submitted an organizational chart for the foreign employer. The chart identifies the beneficiary as the "office manager." However, the chart does not clearly portray the beneficiary as directly supervising subordinate workers. It is unclear whether the beneficiary is alleged to have supervised, directly or indirectly, the other positions listed on the chart such as "sales manager," "deliverman collector," "sup.-collector," "collector," "accountant," "sup.-salesman," and "salesman."

On July 23, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's duties abroad, including a breakdown of the amount of time devoted to each ascribed duty, and descriptions of the duties of the beneficiary's subordinates.

In response, the foreign employer submitted a letter dated August 24, 2007 in which it further described the beneficiary's duties abroad as "sales manager" as follows:

1. Selling of products (educational books and related items).
2. Formulating merchandising policies and coordinating merchandising activities in the establishment.
3. Determining percentage necessary to ensure profit, based on estimated budget, profit goals and average rates of sales.
4. Determining the amount of merchandise to be stocked.
5. Directing buyers in the purchase of books for resale.
6. Consulting with other personnel to plan sales promotion programs and coordinates the employment activities of the sales force.

Counsel further claims in a letter dated August 30, 2007 that the beneficiary "was directly in charge of supervising...two secretaries, four salespersons, and four buyers." Counsel describes the beneficiary's duties, and duties of her purported subordinates, as follows:

> The sellers were in charge of offering [the foreign employer's] product, opening new accounts, auditing commercial sales, developing and launch new products, and identifying new marketing opportunities. The buyers were in charge of buying supplies, contacting suppliers, negotiating prices and reducing safety stocks. As Sales Manager in [the foreign employer], [the beneficiary] gained all the experience and knowledge necessary to be a Sales Manager in [the petitioner].
>
> As Sales Manager, [the beneficiary] was responsible for training sellers and buyers, designing and updating the training programs, supervise training quality standards, develop and

implement new training projects, prepare cost analysis for the project, project management, implementation and control, prepare and manage the Sales Department Budget, and recruit, supervise and execute disciplinary actions of supervisors, sellers and buyers.

As Sales Manager, [the beneficiary] was able to make managerial decisions regarding the recruitment and disciplinary procedures of personnel and enjoyed wide discretion to make tactical decisions.

As Sales Manager, [the beneficiary] gained technical abilities, like: specific knowledge of the unique standards of [the petitioning organization], studies of books behavior in the market, market tendencies, market events, among others.

On a weekly basis [the beneficiary's] hours are dedicated to each job duty in the following manner:

1. Training sellers and buyers – approximately [20%] of her weekly working time is dedicated to perform this task.
2. Supervise training quality standards and comply with the quality standards established by [the foreign employer] – approximately [25%] of her weekly working time is dedicated to performing this task.
3. Design and update the training program – approximately [15%] of her weekly working time is dedicated to perform[ing] this task.
4. Develop, implement and control of new projects and prepare cost analysis for the projects – approximately [20%] of her weekly working time is dedicated to perform[ing] this task.
5. Prepare and manage the Sale[s] Department's Budget – approximately [10%] of her weekly working time is dedicated to perform[ing] this task.
6. Recruit, supervise and execute disciplinary actions of supervisors, sellers and buyers – approximately [5%] of her weekly working time is dedicated to performing this task.

On October 30, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary primarily performed qualifying duties abroad.

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual

duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary acted in a "managerial" or "executive" capacity. To the contrary, it appears that the beneficiary primarily performed non-qualifying administrative, operational, and first-line supervisory tasks which do not rise to the level of being managerial or executive in nature. For example, the foreign employer describes the beneficiary as selling products and administering the buying, stocking, and selling of products through subordinate workers. Counsel describes the beneficiary as devoting most of her time to training and supervising buyers and sellers of merchandise. Accordingly, it appears that the beneficiary devoted virtually all of her time as "sales manager" to supervising approximately 10 buyers, salespersons, and secretaries and performing essential operational and administrative tasks pertaining to sales and inventory. However, none of these ascribed tasks constitutes a qualifying duty. The fact that the petitioner has given the beneficiary a managerial or executive title does not establish that the beneficiary actually performed managerial or executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide a service is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. It appears that the beneficiary was, at most, a first-line supervisor of non-professional workers. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Likewise, the petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As noted above, the petitioner claims that the beneficiary supervised buyers, sellers, and secretaries who are described as performing the tasks necessary to the provision of a service or the production of a product. However, as none of these subordinate employees have been described as having supervisory or managerial responsibilities over other workers, it has not been established that the beneficiary supervised and controlled the work of supervisory or managerial workers. To the contrary, it is more likely than not that the beneficiary was the first-line supervisor of these workers. Although the petitioner alludes to the beneficiary managing "supervisors," the petitioner fails to specifically identify or describe these purported subordinate supervisors or managers. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Moreover, as the petitioner failed to establish the skills or educational backgrounds required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary managed professional employees.[1] Accordingly, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.[2]

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[1]In evaluating whether the beneficiary managed professional employees, the AAO must evaluate whether the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary

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

In reviewing the relevance of the number of employees an employer has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C.

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schools, colleges, academies, or seminaries." 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).

[2]While the petitioner does not specifically claim that the beneficiary managed an essential function of the organization, the record nevertheless would not support this position if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary managed an essential function, the petitioner must furnish a written job offer that clearly describes the duties performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. §§ 204.5(j)(2) and (5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary managed the function rather than performed the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. As explained above, the record indicates that the beneficiary more likely than not primarily performed non-qualifying tasks and served as a first-line supervisor. Accordingly, it cannot be concluded that she managed an essential function. *See generally IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the record contains unresolved inconsistencies pertaining to the beneficiary's job title and duties abroad. For example, the petitioner originally described the beneficiary's foreign position as "office manager" and submitted a vague job description which failed to list any sales duties. However, in response to the Request for Evidence, the petitioner described the beneficiary's foreign position as "sales manager" and claimed that she mostly performed duties pertaining to selling the foreign employer's products. The petitioner does not address this inconsistency in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

Accordingly, the petitioner has failed to establish that the beneficiary primarily performed managerial or executive duties, and the petition may not be approved for that reason.[3]

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[3]Counsel contends that the director's prior review of this matter in the context of the petitioner's nonimmigrant petitions has resulted in approval of the beneficiary's managerial and executive capacity. Counsel cites on appeal to *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990), in support for the proposition that denial of a third preference classification on the same record upon which an L-1 visa petition was approved is an abuse of discretion without specific elucidation stating why the previous approval was in error. However, counsel fails to note that the court in *Omni Packaging* revisited the issue and later determined that the Immigration and Naturalization Service had properly denied the immigrant petition and that it was not estopped from finding that the alien was not a manager or executive after having determined that he was a manager or executive for purposes of issuing an L-1 visa. *See Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

Moreover, it is noted that 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. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data*

The third issue in this proceeding is whether the petitioner provided sufficient evidence to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner claims in the Form I-140 to employ three workers and describes the beneficiary's proposed duties in the United States as "general manager" in a letter dated June 15, 2006 as follows:

- Represent [the petitioner] at Business meetings.
- Establish the company strategy with other senior personnel and create a plan with clear annual objectives.
- Challenge Managers to explore alternative avenues to achieve team and company results.
- Analyze complex issues/information at a strategic level; translating long term goals into clear and practicable working plans.
- Identify and evaluate commercial opportunities by focusing on the bottom line, adding value and achieving desired results.
- Manage, coach and develop employee capability in a systematic manner, motivate staff to achieve and surpass goals.
- Write, review contract and/or agreements[.]
- Supervise subordinate personnel including: hiring, determining workload and delegating assignments, training, monitoring and evaluating, performance, and initialing corrective or disciplinary actions.
- Report directly to president.

The petitioner also submitted an organizational chart and letter dated June 15, 2006 in which it claims that the beneficiary will supervise a "sales manager," a "collection manager," a "salesperson," and a "collectorperson."

Consulting, Inc. v. INS, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are 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. at 597. 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).

Finally, 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 also claims that the "sales manager" and the "collection manager" will each supervise salespersons and "collectorpersons."

On July 23, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's duties, including a breakdown of the amount of time to be devoted to each ascribed duty, and detailed descriptions of the duties of the beneficiary's proposed subordinates.

In response, the foreign employer submitted a letter dated August 24, 2007 in which it further describes the beneficiary's duties as "sales manager" as follows:

1. Developing, elaboration and implementation of [the petitioner's] business plans and policies in the State of Florida.
2. Analyzing and controlling the expenditures of the sales team so as to conform to budgetary requirements.
3. Preparing periodic sales report to show sales volume and potential sales.
4. Selling and promoting of products (educational books and related items).
5. Formulating merchandising policies and coordinating merchandising activities in the establishment.
6. Determining percentage necessary to ensure profit, based on estimated budget, profit goals and average rates of sales.
7. Determining the amount of merchandise to be stocked.
8. Directing buyers in the purchase of books for resale.
9. Consulting with other personnel to plan sales promotion programs and coordinates the employment activities of the sales force.

As Sales Manager in [the petitioner], [the beneficiary] will manage the Sales Department, she will supervise and control the work of the buyers and seller, and she has authority to hire and fire personnel for the Sales Department and has a high level of discretion over the day to day operations of the Sales Department.

The petitioner also submitted four 2006 Forms 1099-MISC which indicate that the petitioner compensated the beneficiary and three other individuals for services rendered as independent contractors in 2006. However, the petitioner did not specifically describe the positions or duties of any of these claimed contractors other than the beneficiary.

On October 30, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary will primarily perform qualifying duties in the United States.

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity.

As explained above, in examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. At 1108, *aff'd*, 905 F.2d 41.

In this matter, and similar to the beneficiary's position abroad, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will primarily act in a "managerial" or "executive" capacity. To the contrary, it appears that the beneficiary will primarily perform non-qualifying administrative, operational, and first-line supervisory tasks which will not rise to the level of being managerial or executive in nature. For example, the beneficiary is described as primarily selling the petitioner's products and as supervising independent contractors who are also engaged in selling the petitioner's products. Accordingly, it appears that the beneficiary will devote virtually all of her time to supervising two or three independent sales contractors and performing other essential operational and administrative tasks pertaining to sales. However, none of these ascribed tasks constitutes a qualifying duty. The fact that the petitioner has given the beneficiary a managerial or executive title does not establish that the beneficiary will actually perform managerial or executive duties. Once again, 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. It appears that the beneficiary will be, at most, a first-line supervisor of non-professional workers. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.[4]

Likewise, the petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As noted above, the petitioner claims that the beneficiary will supervise "buyers" and "sellers." However, as none of these subordinate workers have been described as having supervisory or managerial responsibilities over other workers, it has not been established that the beneficiary will supervise and control the work of supervisory or managerial workers. To the contrary, it is more likely than not that the beneficiary will be the first-line supervisor of these workers. Although the petitioner alludes to the beneficiary managing "supervisors," the petitioner fails to specifically identify or describe these purported subordinate supervisors or managers, even though this evidence was requested by the director. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

[4]It is noted that the petitioner failed to submit a breakdown of the number of hours the beneficiary will devote to each of her ascribed duties, even though this evidence was specifically requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, as the petitioner failed to establish the skills or educational backgrounds required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees. Finally, even if the subordinate workers were established to be managerial, supervisory, or professional in nature, the beneficiary's supervision of them would not be a qualifying managerial duty as a matter of law. The Act is quite clear that only the management of employees may be considered a qualifying managerial duty for purposes of this visa classification. Section 101(a)(44)(A)(ii) of the Act.[5]

Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.[6]

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. As explained above, it appears more likely than not that the beneficiary will primarily perform the sales tasks necessary to produce a product or to provide a service and will act as a first-line supervisor of non-professional independent sales contractors. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Once again, in reviewing the relevance of the number of employees an employer has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and*

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[5]It is also noted that counsel cites the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of his contention that the beneficiary can be classified as an executive or managerial worker because of her supervision of "contractors." However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, 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. Third, as explained above, the petitioner has not established that the beneficiary will primarily be employed in an executive or managerial capacity. This is paramount to the analysis, and a beneficiary may not be classified as a manager or an executive if he or she will not primarily perform managerial or executive duties regardless of the number of people employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if binding or analogous.

[6]While counsel does not clearly argue that the beneficiary will manage an essential function of the organization, the record would not support this position even if taken. As explained above, the record indicates that the beneficiary will more likely than not primarily perform non-qualifying tasks and serve as a first-line supervisor. As the beneficiary will more likely than not primarily perform non-qualifying, first-line supervisory tasks in the administration of the sale of the petitioner's products, it cannot be concluded that she will be managing an essential function. *See generally IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

Immigration Services, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d at 178; *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d at 15. The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the record again contains unresolved inconsistencies pertaining to the beneficiary's job title and duties in the United States. For example, the petitioner originally described the beneficiary's proffered position as "general manager" and submitted a vague job description which fails to list any sales duties. However, in response to the Request for Evidence, the petitioner described the beneficiary's United States position as "sales manager" and claimed that she will mostly perform duties pertaining to selling the petitioner's products. The petitioner does not address this inconsistency in the record. 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. 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. *Id.* at 591.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties in the United States, and the petition may not be approved for that reason.

The fourth issue in the present matter is whether the petitioner has established that it has the ability to pay the proffered wage to the beneficiary. 8 C.F.R. § 204.5(g)(2).

Title 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary.

In this matter, the petitioner offered the beneficiary, who was employed at the time the petition was filed on August 24, 2006, a salary of $21,600.00 "plus bonus and health insurance" in a letter dated June 15, 2006. However, the beneficiary's 2005 Form 1099-MISC indicates that she received $14,282.55 in compensation. Likewise, the beneficiary's 2006 Form 1099-MISC, which was submitted in response to the director's Request for Evidence, indicates that she received $16,225.00 in compensation during that year. This is the same amount which the beneficiary reported on her personal 2006 Form 1040, Schedule C. Therefore, the beneficiary's salary at the time the Form I-140 was filed cannot be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's proffered annual salary of $21,600 plus health insurance.

On appeal, counsel argues that the petitioner can pay the beneficiary the proffered wage and submits bank statements purportedly establishing the payment of additional sums to the beneficiary. However, as noted above, the Forms 1099-MISC and the beneficiary's own tax return clearly indicate that she received wages which were far less than the proffered annual salary of $21,600.00. The petitioner fails to address this inconsistency or to explain how, exactly, the beneficiary received additional wages from the petitioner with these appearing on the necessary United States tax forms. Once again, 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. 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. *Id.* at 591.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on August 24, 2006, the AAO must examine the petitioner's tax return for 2005. The petitioner's IRS Form 1120 for calendar year 2005 presents a net taxable income of -$26,387. Furthermore, the petitioner's Form 1120 for 2006 presents a net taxable income of -$1,200.00. Accordingly, the petitioner's tax returns do not establish that it has the ability to pay the beneficiary's proffered wage.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets

and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the year in question, however, were -$56,905.00. The petitioner's net current assets as shown on the petitioner's 2006 Form 1120 are -$87,359.00. Accordingly, the tax returns do not establish that the petitioner has the ability to pay the proffered wage to the beneficiary.

It is noted that, on appeal, counsel argues that the petitioner has a line of credit with a lending institution which can be used to pay the beneficiary the proffered wage. However, the methods used to determine whether a petitioner has the ability to pay a proffered wage are listed above, and the availability of debt to finance a beneficiary's salary is not considered evidence of a petitioner's ability to pay a wage. While a petitioner may certainly use a line of credit to pay salaries to workers, including to a beneficiary of an immigrant petition, this business decision does not obviate the need to establish its ability to ultimately pay this wage.

Despite the petitioner's claim that the foreign entity would continue paying the beneficiary's salary pending approval of the instant petition, the petitioner must establish its ability to pay the proffered wage at the time it filed its Form I-140. In the present matter, the petitioner has failed to meet this burden. As such, the AAO cannot conclude that the petitioner has established the ability to pay the beneficiary's proffered wage, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that "the prospective employer in the United States [has] furnish[ed] a job offer in the form of a statement which indicates that the alien is to be employed in the United States." 8 C.F.R. § 204.5(j)(5).

As noted above, it appears that the beneficiary has been, and is being, compensated by the petitioner as an independent contractor and not as an employee. The beneficiary was issued a Form 1099-MISC in both 2005 and 2006, the year in which the instant petition was filed. The record is devoid of evidence establishing that the beneficiary's employment relationship with the petitioner will more likely than not change in the future to that of an "employee." As the regulations clearly require that the petitioner offer to "employ" the beneficiary, it has not been established that the beneficiary is eligible for the benefit sought. Offering to engage the beneficiary as an independent contractor does not meet the requirements set forth in the regulations. *See id.*

Accordingly, the petitioner failed to establish that the prospective employer in the United States has furnished a job offer in the form of a statement which indicates that the alien is to be employed in the United States, the petition may not be approved for this additional reason.

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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility as discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd,* 345 F.3d 683.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.