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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 19 2008

LIN 06 215 51386

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reopen and reconsider. The director granted the motion but affirmed his denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Texas corporation, alleges to operate a gasoline station and convenience store and to have a qualifying relationship with the beneficiary's claimed employer in Qatar. 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; or (3) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director affirmed his denial of the petition on these same grounds in considering the petitioner's motion to reopen and reconsider.

On appeal, counsel disputes the director's findings, asserts that the record establishes that the petitioner is owned and controlled by the foreign employer, and asserts that the beneficiary will perform, and has performed, primarily qualifying duties.

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):
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> * * *
>
> > (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
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> (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;
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> (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 failed to submit any evidence of its ownership and control or to allege any qualifying relationship with the beneficiary's previous employer abroad. Accordingly, on October 4, 2006, the director issued a Notice of Intent to Deny in which the director noted the following:

> Your petition was not accompanied by any documentary evidence to establish that the foreign entity and the United States entity had, and continue to have, shared ownership and/or control. In your previous petition [EAC 04 039 51035], you submitted a copy of a stock certificate which indicates that the foreign entity, [redacted] W.L.L., owns all the shares of the petitioning corporation. However, each of your tax returns from 2000 through 2005 list[s] the beneficiary as owner of 100% of the shares of the corporation. Although the [AAO] identified this issue in [its] dismissal of the appeal you filed on the denial of your previous petition for the beneficiary, you have submitted no credible evidence with the instant petition to establish the qualifying relationship between the foreign and U.S. organizations.

Consequently, the director requested, *inter alia*, an explanation of the discrepancy between the stock certificate and the petitioner's various tax returns.

In response, the petitioner submitted a copy of a translation of a power-of-attorney, signed by the foreign employer, purportedly granting the beneficiary the authority to operate the United States operation. The petitioner also submitted evidence that money was wired from abroad to the United States operation.

On March 20, 2007, the director denied the petition. The director concluded that the power-of-attorney, associated correspondence, and wire transfer documents fail to establish that the foreign employer owns and controls the petitioner or to resolve the inconsistency between the stock certificate and the various tax returns.

On motion, the petitioner submitted a copy of a stock certificate purportedly representing the issuance of 100% of its shares to the foreign employer. The petitioner also submitted a letter dated April 18, 2007 in which the petitioner claims that its corporate tax returns have been amended to indicate that it is 100% owned by the foreign employer and not 100% owned by the beneficiary. The petitioner also asserts that its

accountant "had a confusion because of General Power of Attorney given to [the beneficiary]." Counsel also argues in its motion as follows:

> [The stock certificate] is the controlling instrument as to the ownership of the corporation – not what may be mistakenly indicated on his bookkeeping. [The beneficiary] has been given full authority to act on behalf of the foreign entity [citation omitted] and his bookkeeper, apparently, mistakenly put him down in the bookkeeping as the owner. It was a simple clerical error which his bookkeeper has now corrected.

On December 27, 2007, the director affirmed his denial of the petition. The director noted that counsel's explanation was "hardly credible, given that this 'error' was repeated on each of the petitioner's [tax] returns from 2000 through 2005."

On appeal, counsel reiterates his argument that the stock certificate, and not a "mistaken entry" on the corporation's tax returns, should be used to establish the petitioner's ownership and control.

Upon review, counsel's arguments are not persuasive.

As noted above, the petitioner claims that it is 100% owned by the foreign employer. In support, it submitted a copy of a stock certificate dated July 28, 2000 purporting to represent the issuance of 100,000 shares of stock to the foreign employer in Qatar. However, the petitioner also submitted its 2005 Form 1120, U.S. Corporation Income Tax Return, in which the petitioner claims in Schedule E that the beneficiary owns 100% of the petitioner's stock. As noted by the director in the Notice of Intent to Deny, the petitioner made similar averments in its 2001, 2002, and 2003 income tax returns, which were submitted with a previous Form I-140 petition (EAC 04 039 51035). Therefore, the record contains a pattern of inconsistencies pertaining to the true ownership and control of the petitioner, which undermine the petitioner's eligibility for the benefit sought.

Accordingly, the director issued a Notice of Intent to Deny and requested that the petitioner explain this pattern of inconsistencies and establish that it has a qualifying relationship with the foreign employer. However, the petitioner failed to submit any evidence resolving the inconsistencies. The petitioner's submission of a power-of-attorney, associated correspondence, and wire transfer documents do not bolster the petitioner's claim to be owned and controlled by the foreign employer. Furthermore, counsel's claim that the multiple averments in the tax returns regarding its ownership by the beneficiary were "clerical errors" is, as noted by the director, hardly credible. Not only were these averments made multiple times over a five-year period, the record is devoid of evidence explaining how, exactly, these errors were made or establishing that any of the tax returns have actually been amended. Moreover, as also noted by the director, the AAO specifically pointed out this pattern of inconsistencies in its denial of a previously filed Form I-140 in a decision dated September 30, 2005. Therefore, the petitioner was put on notice of this deficiency in its organizational and financial records by the AAO and apparently chose to ignore it in filing its second Form I-140. Finally, the petitioner's self-serving letter dated April 18, 2007 in which the petitioner claims that its corporate tax returns have been amended is not sufficient to establish this fact. The record is devoid of any evidence of these alleged amendments. 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)). 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, as the record is not persuasive in establishing that the petitioner "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.

In this matter, the petitioner failed to submit any evidence pertaining to the beneficiary's foreign employment. Accordingly, on October 4, 2006, the director issued a Notice of Intent to Deny in which he requested, *inter alia*, evidence of the beneficiary's employment abroad by Altadamon Rent-A-Car and a detailed description of the beneficiary's employment abroad, including a breakdown of the "approximate percentage of time spent on the various duties on a weekly basis."

In response, the petitioner submitted a document titled "Detailed descriptions of [the beneficiary's] job at Altadamon Rent A Car" that described the beneficiary's job duties abroad as follows:

> [The beneficiary] started working with [the foreign employer] from Feb 1990. That time [the foreign employer] was a local car rental company with the fleet of 8 cars serving very limited areas. Upon his arrival he started concentrating on marketing field in order to enhance the requirements. He approached all of the major business suppliers in the market like [various corporations], All Hotels & tourism organizations and lot more. He was daily meeting their CEO's one by one and briefing them about his company goals and capability of handling requirements what so ever.
>
> In early stages he felt the lack of fleet and locations like Airport Counter and Major Hotels locations. He approached the authorities at Doha International Airport and started requesting them for an Arrival lounge counter and within 3 months of time he was able to convince the authorities to secure a place for their car rental at Arrival Airport lounge, so Altadamon was lined up with all major car rental companies Avis, Budget, Hertz and Alamo.

During all this fleet was increased from 8 to 18 different types of vehicles were purchased. And as soon as Airport counter was ready to operate another 20 cars were purchased for this branch only.

Soon [a]fter another branch was opened at Sofitel Hotel and th[e]n within 6 months at Sheraton Hotel. Fleet increased accordingly to 100 vehicles. Within next one year [the beneficiary] was able to introduce his local company's name in front of all major business partners. He filled all the tenders personally in order to make sure his efforts are fully recognized. [The foreign employer] started growing tremendously and within short span of time fleet went up to 150 cars and that was a time when [the beneficiary] realized he can approach for international name which he always felt a requirement of many business suppliers. During his daily schedules he started researching all the possibilities and after having conversation to many international companies he succeeded to have a serious deal with Thrifty Car Rental Management at Tulsa Oklahoma.

Soon all the requirements completed [two Thrifty representatives] visited [the beneficiary] and [redacted] and after viewing the company's progress and familiarity without International name at local markets they were very impressed and Thrifty Car rental franchise was awarded to [foreign employer].

The petitioner also submitted a document titled "Daily Activities" in which the beneficiary's duties abroad were further described as follows:

[The beneficiary] worked from Saturday to Wednesday and occasionally on Thursdays according to any International guest's arrival.
His daily Saturday schedule started from 7:30 AM with full of meetings with companies delegates, domestic and International and by lunch break he reviewed all the meetings[']objectives with different individuals according to the subject. After lunch he checked all the incoming international letters and accordingly prepared the reply through secretary and 4[:]00 PM he Reviewed Staff hiring applications, Managers reports from both branches and any local mail until 6:00 PM closing time.

Sunday started usually at 7:30 AM and during day time up to lunch break he always had out of office meetings and normally he visited different company's location with our marketing manager [redacted] to concrete the relation with them.
Evening's time was always folded with the morning updates and actions according to meeting requirements.

Monday normally starts early in the morning Staff meeting discussing all the market requirement and related problems at all 4 locations normally branches were represented by their Managers. Airport Branch [redacted] Sofitel Branch [redacted] Sheraton Branch [redacted] up to lunch break all the issues are discussed and finalized.

> After Lunch break he met with [redacted] and discussed with him all the issues raised by branch managers. And in the evening he normally met with marketing agents of different news papers [sic] and advertising agencies about company's image and standard advertisements and he was assisted by marketing manager.
> Participating in local sports events as co[-]sponsor or a main sponsor always Discussed [sic] and finalized during this time with Marketing manager.
>
> Tuesday [the beneficiary] met with governments officials at their offices in order to [sic]
> Review legal matters of daily basis issues and after lunch break he met with car dealers and reviewed their vehicles specifications and their prices of products and possible availability of sudden requirements.
> Thursday always starts with operation manager [redacted] meeting and follow up of all reservations requirements for the weekend. Mechanical issues of vehicles discussed and work orders authorized during this meeting.
> Later meeting with [redacted] and [sic]
> Discussions on all week long activities and enhancements of business opportunities.
> Evening always spent to prepare for International regional and global meetings and follow up their agenda.

The petitioner did not describe the organizational structure of the foreign employer or the duties of any of the other workers employed abroad.

On March 20, 2007, the director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On motion, the petitioner submitted a nearly identical job description for the beneficiary. The petitioner also submitted a list of current employees abroad.

On December 27, 2007, the director affirmed his denial of the petition.

On appeal, counsel claims that the beneficiary 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, U.S. Citizenship and Immigration Services (USCIS) 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. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary did abroad on

a day-to-day basis. For example, the petitioner states that the beneficiary attended various "meetings" with other staff members, reviewed correspondence and reports, visited other office locations, and met with advertising representatives, government representatives, and car vendors. The petitioner also describes the beneficiary as "concentrating on marketing," working on the expansion of the foreign enterprise, and on securing a franchise relationship with Thrifty Car Rental. However, the petitioner does not explain what, exactly, the beneficiary did with regard to any of these "meetings" or establish that any of the beneficiary's vaguely described duties pertaining to marketing, administration, and operations were bona fide qualifying duties. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary actually performed managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Consequently, the record is not persuasive in establishing that the beneficiary primarily performed qualifying duties while employed abroad. Not only are the beneficiary's duties so vaguely described that it cannot be discerned whether the beneficiary performed any qualifying managerial or executive duties, the record also does not establish that the beneficiary was relieved of the need to perform non-qualifying tasks inherent to his vaguely ascribed duties by a subordinate staff. The petitioner failed to describe the duties of any of the staff members allegedly employed at the time the beneficiary worked abroad. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* Absent descriptions of the foreign employer's organization and subordinate personnel, it cannot be concluded that it is more likely than not that the beneficiary primarily performed qualifying duties abroad. Accordingly, it appears more likely than not that the beneficiary primarily performed non-qualifying administrative or operational tasks in his employment abroad. An employee who "primarily" performed the tasks necessary to produce a product or to provide services is not considered to have been "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.

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 record is devoid of evidence identifying the beneficiary's subordinates abroad, if any. Although the petitioner implies that the beneficiary routinely met with other managers or supervisors in the job description submitted in response to the Notice of Intent to Deny, the petitioner does not clearly aver, or establish, that the beneficiary actually "supervised" or "controlled" any of these subordinate workers. Furthermore, as the petitioner failed to describe the duties of any of these subordinate workers, the petitioner has failed to establish that any of these workers was truly a supervisory, managerial, or professional worker. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Therefore, it cannot be concluded that any of these subordinate workers was truly a managerial or supervisory employee, and 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. Finally, as the petitioner failed to establish the skills and education 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 abroad primarily in a managerial capacity.[2]

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

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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 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 has not argued that the beneficiary managed an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary 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. §§ 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. The petitioner's vague job description fails to document that the beneficiary's duties were primarily managerial. Also, as explained above, the record indicates that the beneficiary was, at most, a first-line supervisor of non-professional employees and primarily a performer of non-qualifying tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties were managerial, nor can it deduce whether the beneficiary was primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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, the beneficiary's job description is so vague that it cannot be discerned what, exactly, he did on a day-to-day basis. Therefore, it appears more likely than not that the beneficiary was primarily employed, at most, as a first-line supervisor and that he primarily performed the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

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.

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 20 people. However, the documents submitted with the petition indicate that the petitioner is actually claiming to employ 8 workers. The other 12 claimed workers are employed by two other businesses in which the petitioner claims to have an ownership interest. The petitioner, the entity that will employ the beneficiary, allegedly operates a gasoline station and convenience store called "[redacted]"

The petitioner submitted an organizational chart in support of its petition. The chart shows the beneficiary at the top of the organization supervising a vice president who supervises the three "presidents" of the three separate businesses, including the president of [redacted] who is also the beneficiary. The beneficiary, as president of [redacted] is portrayed as supervising a general manager ([redacted] who, in turn, supervises an assistant manager ([redacted], who, in turn, supervises cashiers and mechanics. The duties of the general manager are described as follows:

> Carry out daily shift works and check cashiers shifts and report them to management. Perform employees schedules. Check inventory and order vendors for required items. Report daily jobs & sales to management.

The petitioner did not describe the duties of the assistant manager.

On October 4, 2006, the director issued a Notice of Intent to Deny in which he requested, *inter alia*, a detailed description of the beneficiary's duties in the United States, including a breakdown of "the approximate percentage of time spent on the various duties on a weekly basis," and a detailed description of the specific duties performed by each employee of the petitioner, including a "copy of the usual weekly work schedule."

In response, the petitioner submitted a job description for the beneficiary as follows:

1. Viewing of daily business detailed reports & employees performance reports presented by managers. Reports include daily gross sales status, daily tiers reports, individual department reports etc.
2. Counseling and advises to managers on subjects like Daily Sales, Business enhancements tools, Image and standards, Staff activities, Employees schedules, Inventory requirement lists.
3. Negotiating with all those small businesses who are trying to sell their businesses because of the lack of management and supervision but very potential targets.
4. Meeting and talking to the partners and reviewing their problems and enhancement plans and than [sic] follow up timely basis on any discussed subject.
5. Approvals of emergency and periodic leaves of employees and reviewing their eligibilities of such requests.
6. Reviewing of promotions proposals presented by Managers according to daily performance reports.
7. Out of office meetings and attending of annual meetings & Award Ceremonies.
8. Discussing and consulting recent activities with Board of Directors.
9. Enhancements plans and their potential research through market study[.]
10. Finalizing hiring and firing applicants through manager's reports and physical meetings.
11. Reviewing daily reports with Accountant and issue follow up to managers accordingly.
12. Vendors representative meetings and studying of their products specifications and reviewing with managers about their requirements and acceptance in daily sale.
13. Reviewing all daily documents like mail and faxes related to management and earlier sorted out by station managers.
14. Follow up advises according to local authorities requirements.
15. Physical visits of business in order to make sure they are in compliance according to Image & standard specifications as assured by managers.
16. Monitoring business activities through vendor's issued reports.
17. Monitoring financial activities.
18. Discussions with lawyers on legal matters.

The petitioner also submitted its quarterly wage report for the quarter immediately preceding the filing of the petition. This report indicates that the petitioner employed six people, including the beneficiary, in that quarter.

The petitioner also submitted a more detailed job description for the "manager in charge," [redacted] as follows:

1. Carry out all daily routine shift works.
2. Prepare daily sales report and check accordingly all activities carried out.

3. Check cashier's shifts and prepare report for any discrepancy.
4. Employees schedules and reporting of their activities, leaves, absences and promotions.
5. Check daily inventory and accordingly place orders through different vendors.
6. Schedules meeting with business partners and service providers.
7. [Pre]pare hiring & firing recommendation report to management.
8. Follow incoming faxes and forward to concerned department.
9. Follow deliveries and post paid invoices to system and then prepare report for management.
10. Keep strict policy on Image related matters.

The petitioner further indicates that [redacted] works four days per week (Monday, Wednesday, Thursday, and Friday) from 8:30 a.m. until 4:00 p.m.

The petitioner also submitted schedules for its remaining four employees. One cashier, works from 5:30 a.m. until 1:30 p.m. on Monday, Tuesday, Thursday, Friday, and Sunday. The other cashier, [redacted], works Monday through Friday from 1:00 p.m until 8:30 p.m. The two automobile mechanics work together on Monday, Wednesday, Thursday, and Friday. One mechanic works alone on Tuesday, and the other works alone on Saturday. It is noted that the individual identified as an "assistant manager" in the organizational chart attached to the original petition is identified in the documents submitted in response to the Notice of Intent to Deny as an automobile mechanic.

On March 20, 2007, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. On April 23, 2007, the petitioner filed a motion to reopen and reconsider, and, on December 27, 2007, the director affirmed his denial of the petition.

On appeal, counsel claims that the beneficiary will perform qualifying duties in the United States.

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

As explained above, in examining the executive or managerial capacity of the beneficiary, USCIS 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.

As a threshold matter, it is noted that the petitioner's claim that its enterprise employs 20 workers who are supervised, directly or indirectly, by the beneficiary is not supported by the record, and the AAO will only consider the *petitioner's* employment of the five additional workers described in the record in determining whether the beneficiary will be employed in a primarily managerial or executive capacity. The AAO will not consider the claimed employment of approximately 12 workers by [redacted]. Not only are these workers not employed by the petitioner, the record is devoid of evidence establishing that the beneficiary will have any direct, or indirect, control over the employment of these workers. The beneficiary is not an employee of either of these purportedly related

corporations, and the beneficiary's job description fails to specifically address his provision of services to these businesses. Accordingly, the employment of workers by these other businesses, absent some evidentiary nexus connecting the beneficiary's ascribed duties to these operations, is irrelevant to the instant petition. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

In this matter, 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. Once again, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis in his administration of the '[redacted]' For example, the petitioner states that the beneficiary will review reports regarding sales, employee performance, and other personnel matters; advise managers; work on "enhancement plans;" meet with vendors; and review correspondence. However, the petitioner does not explain what, exactly, the beneficiary will do to "advise" subordinates or otherwise "manage" the gasoline station other than to act as a first-line supervisor of cashiers and mechanics. The petitioner has failed to establish that any of the ascribed duties is a bona fide managerial or executive duty. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. At 1108, *aff'd*, 905 F.2d 41. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Moreover, as the petitioner failed to submit a breakdown of "the approximate percentage of time spent on the various duties on a weekly basis," even though this was specifically requested by the director in the Notice of Intent to Deny, the petitioner failed to establish that the beneficiary will "primarily" perform qualifying 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. 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).

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 a "manager in charge" who, in turn, will supervise a number of subordinate cashiers and mechanics.[3] However, the petitioner has not credibly established that the "manager in charge" will be a bona fide supervisory or managerial employee.

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[3]Although the petitioner claims in the original organizational chart that the manager in charge will supervise an assistant manager who, in turn, will supervise cashiers and mechanics, this assertion appears to have been abandoned as the individual identified as the assistant manager in the organizational chart is described as a mechanic in the response to the director's Notice of Intent to Deny.

The "manager in charge" is not described as having supervisory or managerial control over subordinate workers in her job description. Moreover, the "manager in charge" appears to staff the gasoline station along with no more than one additional employee at any one time. It is not credible that the petitioner, a single location, six-employee gasoline station, would employ a subordinate supervisor or manager to supervise two part-time cashiers. An employee will not be deemed to be a supervisory or managerial worker simply because he or she is arbitrarily placed on an organizational chart in a position superior to other employees. Rather, it must be established that the employee exercises some degree of control over the employment of subordinates and that the reasonable needs of the organization compel the employment of a subordinate tier of supervisors or managers ultimately supervised and controlled by a primarily managerial or executive employee. In this matter, it appears more likely than not that the "manager in charge" and the other workers are all primarily performing the tasks necessary to the operation of the gasoline station, and the beneficiary will be, at most, the first-line supervisor of these workers. Once again, 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. Finally, 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.

Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.[4]

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 tasks necessary to produce a product or to provide a service and will act as a first-line supervisor of non-professional gasoline station workers. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "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. 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 USCIS 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

[4]While counsel does not 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 his administration of the operation, it cannot be concluded that he will manage an essential function. *See generally IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, 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.

As a final note, USCIS records indicate that the beneficiary has previously been approved for L-1 employment with the instant petitioner. However, with regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and USCIS normally accords the petitions a less substantial review. *See* 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). Because USCIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that USCIS approves some petitions in error).

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. The prior nonimmigrant approvals do not preclude USCIS 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 USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data 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 petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals 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 USCIS 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).

In addition, 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).

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.