U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 19 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Texas Service Center Director denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a Florida corporation that claims to operate as a retail liquor store. The petitioner seeks to employ the beneficiary as its executive. The petitioner seeks 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.

I. The Law

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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> * * *
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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.

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--

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[1] The record shows that the petitioner previously filed two other Form I-140 petitions with receipt numbers Both petitions were denied and the petitioner's appeals from those denials were dismissed by this office on April 2, 2009 and June 12, 2013, respectively. The petitioner filed three motions on the June 12, 2013 decision, which were all dismissed.

(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.

II. Procedural History

The record shows that the instant petition was filed on June 14, 2010. The petitioner indicated that it had a staff ranging from six to eight employees and submitted two supporting statements, one statement from counsel, dated June 10, 2010, and an undated statement, which was from an unknown source and contained an illegible signature of someone who was identified as an "authorized representative" of the petitioner. The petitioner also provided corporate documents, tax returns, an organizational chart, payroll documents, and bank statements with regard to the U.S. entity, as well as corporate and business documents, tax and financial statements, and an organizational chart pertaining to the foreign entity during its operations in 2009.

After reviewing the petitioner's submissions, the director issued a notice of his intent to deny (NOID), dated November 7, 2011, informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. In addition, looking to the common law definition of the term "employee," the director determined that the record lacked evidence to show

that the beneficiary has an employer-employee relationship with his U.S. employer or that he had such a relationship with his former employer abroad.

In response, counsel provided a statement, dated December 1, 2011, claiming, and submitting evidence to show, that the beneficiary transferred a portion of his ownership in the foreign entity in 2004, thus resulting in a change in the majority ownership in the foreign and petitioning entities. The petitioner also provided a statement regarding the beneficiary's former job duties with the foreign entity and the foreign entity's updated organizational chart.

On September 7, 2012, the director issued a denial of the petitioner's Form I-140, concluding that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. The director also catalogued a list of discrepancies pertaining to the ownership of the foreign entity, indicating that the evidence did not establish that the alleged change in the foreign entity's ownership from that of a sole proprietorship to that of partnership took place in October 2004. The director found that the numerous inconsistencies he described gave rise to doubt as to the petitioner's credibility and the reliability of its claims. Lastly, the director again referred to the common law definition of the term "employee," as a basis for denial, concluding that the beneficiary did not have an employer-employee relationship with his foreign employer and does not have an employer-employee relationship with the petitioning entity.

In his statement, counsel credited the beneficiary with the success of the foreign entity, which he described as "well-managed and well-staffed" with a current staff of 14 employees. Counsel did not address the foreign entity's staffing or the beneficiary's job duties during his period of employment abroad. Counsel asserted that U.S. Citizenship and Immigration Services (USCIS) "misused and misapplied case law" and failed to apply its own precedent decisions with regard to the employer-employee issue. Counsel further asserted that the petitioner had and continues to have the requisite qualifying relationship with the beneficiary's former employer abroad and disputed the director's adverse findings with regard to the beneficiary's managerial or executive employment capacity in his former and proposed positions with the foreign entity and the petitioner, respectively.

Based upon a comprehensive review of the record, and for the reasons stated below, we find that the petitioner has failed to provide credible supporting evidence to establish that the beneficiary was employed abroad and that he would be employed in the United States in a primarily managerial or an executive capacity. Given our finding that the petitioner is statutory ineligible for the immigration benefit sought herein, we decline to address the common law basis that contributed to the director's adverse decision.

III. Issues on Appeal

We will address whether the petitioner has established that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity and whether a qualifying relationship exists between the U.S. and foreign entities.

A. The Beneficiary's Employment Abroad

The first issue to be addressed is whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial or executive capacity. In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's job duties with the entity in question. Published case has determined that the duties themselves will reveal the true nature of the beneficiary's 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). Beyond the required description of the job duties, USCIS reviews the given entity's organizational structure, the beneficiary's position therein, the presence of subordinate employees and their respective roles in relieving the beneficiary from having to performing operational duties, the nature of the business conducted by the entity in question, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the entity.

In the present matter, the petitioner failed to expressly discuss the beneficiary's job duties during his employment abroad. Rather, in support of the petition, the petitioner provided an undated letter with the signature of an individual who indicated that he or she was signing the statement in his or her capacity as the petitioner's authorized representative. Given the lack of evidence establishing the identity of the individual who signed the beneficiary's letter of foreign employment, it is unclear whether that individual had either the authority or the requisite knowledge to provide the necessary information and thus, the probative value of the employment letter is questionable at best. Notwithstanding this deficiency, we will address the information provided, noting first that the statement from the unknown source did not specifically address the beneficiary's former position with the foreign entity. Instead, it listed the responsibilities assigned to the beneficiary in his proposed position, claiming that these are the same as responsibilities that comprised the beneficiary's position abroad. The responsibilities listed were as follows:

- Planning and direction of the overall functioning of the corporation, including preparation and monitoring budgets, handling and monitoring of finances, general administration of [the] company: 15 hours per week.

- Directing and supervising subordinate managers, supervising overall personnel matters: 5 hours per week.

- Advertising, marketing and public relations activities, including promoting the business to the public: 5-10 hours per week.

- Developing and sustaining relationships with vendors, suppliers, and other businesses: 5 hours per week.

- Researching, developing and managing new business enterprises: 5-10 hours per week.

Next, in a NOID response statement, dated December 1, 2011, counsel indicated that the beneficiary's employment abroad involved authorization to operate the foreign entity's bank account as well as being responsible for "the VAT account," paying taxes, and representing the business to the public and other businesses. Counsel also offered the foreign entity's financial statements and tax returns from 2002-2006 as

evidence of the beneficiary's executive capacity during his former employment. Although the petitioner also provided an organizational chart reflecting the foreign entity's staffing hierarchy, the chart addressed a time period that that followed the beneficiary's departure and thus did not reflect the time period during which the beneficiary was employed by the foreign entity. Lastly, the petitioner offered an undated statement from its own account manager, who repeated the prior claim that the job duties the beneficiary performs and will perform as part of his employment with the petitioning entity "have mirrored those he performed in Tanzania." The statement included the following list of job duties:

- Planning and direction of the overall functioning of the U.S. [c]orporation. Must analyze financial policies involving income and investments to define and implement methods of funding, maximizing returns in investments, and sustaining operations. Analyze performance including balance sheets, income statements, p/l statements, cash and cost flow statements. Duties include: preparation and monitoring budgets, handling and monitoring of finances, cost control policies, general administration of company activities. 20 hours per week.
- Directing and supervising subordinate managers. Interview, hire and develop training systems. Analyze operations, job duties and responsibilities to eliminate unproductive processes, increase productivity, sustain employee morale, and streamline staff efficiency. 10 hours per week.
- Advertising, marketing, and public relations activities, including promoting the business to the public. Utilize trade publications, industry contacts, websites, other relevant data to formulate policies and activities to place the business in the public eye. 5-10 hours per week.
- Developing and sustaining relationships with vendors, suppliers, and other businesses. 5 hours per week.
- Researching, developing and managing new business enterprises. Investigate new franchise opportunities, analyze financial opportunities, [and] investigate real estate locations. 5 hours per week.

As indicated previously in this discussion, neither counsel's statements nor those offered by the petitioner specifically addressed the beneficiary's position with the foreign entity such that would enable USCIS to determine whether the beneficiary was employed abroad within a qualifying managerial or executive capacity as claimed. Although counsel acknowledged the regulatory requirement pertaining to the beneficiary's employment abroad, the record contains only general statements with regard to such employment and does not specifically list the beneficiary's job duties. Furthermore, despite the petitioner's repeated claims that the beneficiary's job duties abroad "mirrored" those he performs and will perform in his position with the petitioning entity, we cannot overlook the vast differences between the foreign and U.S. businesses when contemplating the reliability of the information being offered. To clarify, the petitioner has failed to explain how the beneficiary's job duties while working within the hierarchy of a restaurant could have been identical to the job duties he performs within the context of a liquor retail store, whose staffing composition is considerably smaller than that of the foreign entity. Although the petitioner indicated that the beneficiary's foreign and proposed positions are similarly placed at the top of each entity's respective organizational hierarchy, the organizational chart provided with regard to the foreign entity does not support this assertion as it does not depict the beneficiary anywhere in the organization during his period of employment abroad. As such, the foreign entity's organizational chart does not constitute probative evidence as it does not support the claim made

in the above job description, which indicates that the beneficiary allocated approximately ten hours per week to the direction and supervision of subordinate managers.

Furthermore, it is unclear how the beneficiary's job duties for two such vastly distinct organizations can be deemed identical to one another, particularly when the petitioner provided no explanation that is geared specifically to the beneficiary's employment abroad. Merely claiming that the beneficiary's job duties abroad were the same as those he performs for the U.S. entity is not sufficient without a comprehensive description of the beneficiary's daily job duties with each entity. In fact, even if, arguendo, the beneficiary's employment abroad was comprised of the above job duties as claimed, it is unclear how advertising, marketing, public relations activities, developing relationships with vendors and suppliers, or conducting research in search can be deemed as qualifying tasks performed within a managerial or executive capacity. The petitioner's vague job description fails to clarify the beneficiary's specific role with regard to these operational tasks or explain what role, if any, other employees within the entity played in relieving the beneficiary from having to allocate his time primarily to non-qualifying job duties.

Given the overall lack of evidence pertaining specifically to the beneficiary's position with the foreign entity and the lack of detail delineating the beneficiary's specific daily job duties during his employment abroad, we are unable to determine where the beneficiary was placed within the foreign entity's organizational hierarchy, which employees, if any, the beneficiary supervised, or how the foreign entity's organizational composition worked to effectively support the beneficiary in a primarily managerial or executive capacity such that he was relieved from having to primarily perform tasks of a non-qualifying nature. Therefore, based on the petitioner's failure to provide sufficient probative evidence with regard to the beneficiary's position abroad, we cannot conclude that the beneficiary was employed by the foreign entity in a managerial or executive capacity for one year during the relevant three-year time period and on the basis of this initial conclusion the instant petition cannot be approved.

B. The Beneficiary's Proposed Employment

The next issue to be addressed in this proceeding is the beneficiary's prospective position with the petitioning U.S. employer. Specifically, we will review the record to determine whether the petitioner provided relevant, probative, and credible evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

As with the analysis pertaining to the beneficiary's employment abroad, we similarly commence our discussion of the beneficiary's proposed employment by first reviewing the description of the beneficiary's proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5). We will then proceed to review the totality of the record, considering the petitioner's organizational structure, the beneficiary's position therein, the presence of other employees and their respective roles in performing the petitioner's operational tasks, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the petitioning entity.

In addition to the list of job duties, counsel also provided the following hourly breakdown in his statement, dated June 10, 2010, which was initially submitted in support of the petition:

- Formulate corporate direction, long and short-term goals, objectives and policies. This includes the review and direction of the financial position of the company, such as monitoring budgeting, money management, inventory management, payroll and purchasing supervision, as well as record keeping and asset maintenance: 15 hours per week.

- Develop business contacts, establish professional relationships: 5 hours per week.

- Plan and supervise marketing, sales and promotional activities: 5-10 hours per week.

- General personnel matters: 5 hours per week.

Counsel stressed the beneficiary's authority over daily operations, company management, personnel, and its goals and policies with little involvement from other executives. Counsel also provided the following list of duties he claimed the beneficiary would perform during a typical work week:

- Liaise with suppliers regarding issues including pricing, availability, shipping: 15 hours per week.

- Supervise office activities including personnel, financial, [and] legal: 10 hours per week.

- Explore new business opportunities; visit previous business site with frequency to consider operational options: 10-12 hours per week.

In a separate supporting statement, the petitioner discussed the beneficiary's decision to embark on two other business ventures, which included the petitioner's purchases of ownership interests in two additional businesses.

In response to the NOID, the petitioner provided its employee records for 2010 and 2011, including an employee quarterly report for the second quarter in 2010, which indicated that the petitioner had a total of five employees at the time the petition was filed. It is noted that this number is inconsistent with both the petitioner's organizational chart, which named seven employees, and the petitioner's claim in the Form I-140, Part 5, Item 2, where the petitioner indicated that its staff varies from six to eight employees. In fact, based on the 2010 quarterly tax returns, the petitioner did not achieve a staff of six employees until the fourth quarter, at least four months after the petition was filed. We further observe that the staffing size decreased down to five employees during the first quarter of 2011, according to the petitioner's quarterly tax return, and did not attain a staff above six employees during the rest of 2011. Thus, it is unclear when, if at all, the petitioner employed more than six employees. 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).

Furthermore, looking to the petitioner's quarterly employer's report for the 2010 second quarter during which the Form I-140 was filed, it appears that the petitioner's staff consisted of only two full-time employees (one of whom was the beneficiary himself) and three part-time employees. While the petitioner's staff is clearly not the sole factor we consider when determining eligibility, this factor can and should be considered as a means of determining the petitioner's ability to relieve the beneficiary from having to allocate his time primarily to the

performance of non-qualifying tasks. Even in instances where the petitioner provides a list of clearly defined job duties, which in the present matter the petitioner has not done, a job description alone is not sufficient without a proper discussion explaining who performs the petitioner's daily operational tasks and how, within the context of the petitioner's specific business operation, the petitioner's organizational composition is sufficient to support the beneficiary in a primarily managerial or 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 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).

Moreover, as briefly indicated in the paragraph above, the petitioner did not provide an adequate job description that accurately portrays the beneficiary's managerial or executive role within the petitioner's organization. Rather, the job description, when considered in light of the petitioner's limited staffing composition and nature of the petitioner's business, indicates that the beneficiary would likely allocate his time primarily to non-qualifying operational tasks, regardless of his discretionary authority and top placement within the petitioner's organizational hierarchy. The petitioner failed to establish that communicating with suppliers to resolve pricing, availability, and shipping issues are qualifying managerial or executive tasks. Further, while counsel indicated that the beneficiary's role with regard to office activities would be merely supervisory, the record is unclear as to whether the petitioner's limited staff is sufficient to establish that the nature of the beneficiary's role with regard to the petitioner's office activities would only be supervisory rather than participatory. Based on the petitioner's organizational chart, whose reliability has been undermined by the petitioner's quarterly tax return and quarterly report for the 2010 second quarter, the petitioner's staff consisted primarily of employees who take inventory, stock, and clean the liquor store and serve the liquor store's customers. It is unclear who, if not the beneficiary, would actually carry out the operational administrative tasks. 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)).

While the law does not require the beneficiary to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner maintains the burden of establishing that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel adds little to our understanding of the beneficiary's proposed job duties. While counsel objects to the director's consideration of the petitioner's small size as a factor in determining eligibility, he fails to establish how the petitioner's staffing composition at the time of filing was actually sufficient to relieve the

beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Moreover, despite counsel's objection, we do not rely solely on a company's personnel size in establishing a petitioner's eligibility. Rather, the petitioner's organizational composition is among several factors we consider in determining the likelihood of the petitioner being able to employ the beneficiary in a primarily managerial or executive capacity. Here, considering the retail nature of the petitioner's business and given the petitioner's overall failure to delineate the beneficiary's specific job duties or provide an explanation as to how the petitioner functioned to relieve the beneficiary from having to primarily engage in the performance of non-qualifying operational tasks at the time of filing, we cannot affirmatively conclude that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity when the petition was filed. Despite any projected growth or any growth the petitioner may have undergone subsequent to the date the petition was filed, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the present matter, the petitioner has failed to provide sufficient evidence to establish that it had reached a level of organizational complexity such that the petitioner would require or be able to support the beneficiary in a position that would be comprised primarily of tasks in a managerial or executive capacity and on the basis of this second adverse conclusion the instant petition cannot be approved.

C. Qualifying Relationship

Next, we will address the petitioner's assertion regarding the alleged 2004 change in ownership of the foreign entity and the effects of the new claim on the petitioner's qualifying relationship with the beneficiary's employer abroad.

A review of the record shows that at the time of filing, the petitioner and counsel both named the beneficiary as the sole owner of the foreign entity, which purportedly owns the majority of the petitioner's issued stock. Given that the beneficiary was identified as the owner of the petitioner's remaining shares, he was deemed as owner of both the U.S. and foreign entities, whose qualifying relationship was that of parent-subsidiary with the petitioner assuming the role of the foreign entity's subsidiary. The petitioner's initial supporting evidence included its corporate tax returns from 2005-2008. With the exception of the petitioner's 2006 tax return, which did not include any schedules or additional statements establishing the petitioner's ownership, the petitioner's three remaining tax returns consistently identified the beneficiary as owner of 100% of the petitioning entity's stock. While not specifically in line with counsel's statement, which explained that the beneficiary's majority ownership of the petitioner was indirect, by virtue of his ownership of the foreign entity, the information provided in the tax returns remained consistent with counsel's assertions.

However, in response to the director's November 7, 2011 NOID, in which the director raised the question of the beneficiary's employer-employee relationships with its respective employers based on the common law definition of the term "employee," the petitioner altered its prior claim regarding the foreign entity's and the petitioner's respective ownerships in an attempt to determine that the beneficiary did not own and control the foreign entity at the time of his employment abroad and therefore does not own and control the U.S. entity. Rather, in his statement, dated December 1, 2011, counsel claimed that the beneficiary sold the majority of his ownership interest in the foreign entity and retained only a minority 49% interest. Based on this change in ownership, counsel claimed that not only was the beneficiary only a minority owner of the foreign entity, but also that he now owns, indirectly, only a minority of the shares in the petitioning entity as well.

The petitioner's NOID response was accompanied, in part, by the following documentation that pertains directly to the ownership of the beneficiary's foreign employer:

1. The foreign entity's accounts and balance sheet for the one-year period ending March 31, 2002, showing a division of profits between two partners – and the beneficiary.

2. The foreign entity's account and balance sheets for one-year periods ending March 31, 2003 through 2005 and a partial balance sheet for 2006. All four balance sheets identified the beneficiary as sole proprietor of the foreign entity.

3. A diagram chart depicting the ownership breakdown of the foreign employer and the petitioning entity showing that owns 51% of the foreign entity, while the beneficiary owns the remaining 49%. The chart also shows that the foreign entity owns 51% of the petitioning entity with the beneficiary directly owning the remaining 49%. This breakdown indicates that, in addition to the beneficiary's direct ownership of 49%, the beneficiary also indirectly owns 25% of the petitioner (through his 49% ownership of the foreign entity) for a total of 74% ownership interest in the petitioning entity.

4. A change registration certificate, dated March 2005 (with the specific date not given) indicating that joined the foreign entity as a partner on October 18, 2004. The document was accompanied by a foreign business name ordinance certificate, dated March 31, 2005, naming the beneficiary and as partners of the foreign entity.

5. The foreign entity's partnership deed stating that an agreement was made on October 27, 2004 between the beneficiary and to enter into a partnership regarding the foreign entity wherein the beneficiary would relinquish 51% of his ownership interest to while retaining the remaining 49% interest.

6. An undated letter from stating that the foreign entity has been a partnership, rather than a sole proprietorship, since 2004.

7. The petitioner's corporate tax return for 2010. Schedule G of the same tax return shows that the foreign entity owns 51% of the petitioner's voting stock while the beneficiary owns the remaining 49%. Schedule K restates the same information.

Despite the petitioner's earlier claim indicating that the beneficiary was the sole owner of the petitioning entity, the petitioner altered its claim following the issuance of the NOID. In contrast with the original claim, the petitioner submitted evidence in an attempt to establish that the beneficiary is not the sole owner of the foreign entity where he was previously employed. However, as indicated by the information provided in the documents above, the petitioner has failed to provide consistent reliable evidence to support its claim. First, while the information provided in No. 1 above names as the partner with the majority ownership interest in the foreign entity, the information described in Nos. 3-5 indicates that was the partner with the majority ownership. The petitioner neither acknowledged that two different names were used to identify the foreign

entity's majority owner, nor is there any evidence to establish that represent the same individual.

Second, the account balance sheet described in No. 1 above, showing that the foreign entity was a partnership as far back as 2002, is not consistent with the petitioner's claim and documents in Nos. 2 and 4-6, which indicate that the foreign entity did not change from a sole proprietorship to a partnership until 2004. In addition, despite the fact that all documents described in Nos. 4 and 5 consistently indicate that the foreign entity became a partnership in 2004, the certificate that registered the change in ownership, described in No. 4 above, states that the foreign entity became a partnership on October 18, 2004 when became a partner, while the foreign entity's partnership deed was executed on October 27, 2004, thus indicating that the recording of the partnership preceded the creation of such partnership. 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). Moreover, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In the present matter, counsel offers an appellate brief in which he objects to the director's adverse findings pertaining to the petitioner's credibility. Counsel contends that "[t]he petitioner and the beneficiary maintain [that] there have been no misrepresentations made to the Service," and further asserts that the inconsistencies cited in the director's decision do not "undermine the basic premise of the qualifying relationship." Specifically, counsel states that a qualifying relationship between the petitioner and the beneficiary's employer abroad existed at the time the instant Form I-140 was filed, claiming that the accountant "has endeavored . . . to lawfully correct any errors." However, 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). Moreover, merely indicating that the information provided in the inconsistent documents was accounting error is not sufficient to overcome the numerous serious anomalies described above. In particular, it is unclear why, if the foreign entity did not become a partnership until late 2004, the petitioner submitted a profit and loss statement from 2002 that specifically named as the beneficiary's partner during a time when the beneficiary was purportedly the foreign entity's sole owner.

We further note that the petitioner has failed to remain consistent in identifying who owns the petitioning entity. Specifically, while the petitioner identified the beneficiary as owner of 100% of its stock in its 2005, 2007, and 2008 tax returns (remaining silent on this issue in the 2006 tax return), the petitioner's stock certificate nos. 1 and 2 indicated that the foreign entity and the beneficiary, respectively, owned the petitioner with the foreign entity owning 51% and the beneficiary owning the remaining 49%. While counsel contends that the distinction between the two types of ownership schemes is irrelevant for the purpose of establishing the existence of a qualifying relationship, relevant regulatory provisions indicate that counsel's assertion is incorrect and that the information provided in response to the NOID with regard to the changed circumstances surrounding the ownership of the foreign entity, if true, would entirely negate the existence of the qualifying relationship that the petitioner claims it had at the time the petition was filed.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or that the two entities are related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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

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

In the matter at hand, the petitioner's original claim of a qualifying relationship was premised on the understanding that the beneficiary solely owned the foreign entity, which in turn owned the petitioner, thus making the beneficiary, albeit indirectly, the owner of both entities. The petitioner could then be deemed an affiliate and, more specifically, a subsidiary of the foreign entity. The petitioner's altered claim, if true, while remaining consistent with regard to the foreign entity directly owning the majority of the petitioner's stock, would significantly alter the degree of common ownership between the two entities. More simply put, despite the foreign entity remaining the petitioner's direct majority shareholder, the altered claim indicates that the beneficiary maintains ownership of 49% of the foreign entity, thus making him indirect owner of 25% of the petitioner's stock. When the 25% ownership interest is added to the 49% that the petitioner claims the beneficiary owns directly, the beneficiary then becomes owner of 74%, i.e., the majority holder, of the petitioner's stock while either allegedly maintains majority ownership of the foreign entity. Thus, the altered claim would indicate that while either maintains majority ownership of the foreign entity, the beneficiary actually has controlling interest in the petitioning entity through his combined direct and indirect ownership of its shares.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect

legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As discussed above, the petitioner has provided inconsistent and unreliable evidence to support the claims made at the time of, and subsequent to, the filing of the instant petition. We are therefore unable to verify who owns the majority interest in either of the beneficiary's employers. Given that the petitioner has the burden of establishing that it shares a certain degree of common ownership with the beneficiary's former employer abroad, the petitioner's submission of inconsistent and unreliable evidence considerably undermines the petitioner's credibility and contravenes USCIS's efforts to verify facts that are directly relevant to issues concerning the petitioner's eligibility. Therefore, while the director did not expressly conclude that the petitioner failed to establish the existence of a qualifying relationship, the director specifically described the numerous inconsistencies with regard to the ownership of the beneficiary's employer abroad and thus gave the petitioner ample notice of the adverse evidence that came to impact the petitioner's eligibility. Furthermore, 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, in light of our additional finding of ineligibility based on the petitioner's failure to establish the existence of a qualifying relationship between itself and the beneficiary's former employer abroad, this petition cannot be approved.

D. Prior Nonimmigrant Petitions and the AFM Manual

Lastly, we will address counsel's contention that the director should have explained why the instant petition was denied after the petitioner's L-1A petitions, which were filed on behalf of the same beneficiary, were approved. First and foremost, it is crucial to understand 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 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. *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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

We also find that counsel's reliance on the Adjudicator's Field Manual (AFM) is misplaced, as this document is an internal tool that is intended for use by USCIS employees in the course of their reviews of petitioners' respective records. The AFM is not a substitute for statutory or regulatory provisions nor does it have the effect of binding case law precedent. It is noted that an agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Therefore, neither counsel's reliance on the petitioner's previously approved nonimmigrant petitions nor his references to the AFM will help to overcome the considerable deficiencies described in the discussion above.

IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.