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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: WAC 04 255 50994 Office: CALIFORNIA SERVICE CENTER Date: SEP 0 6 2006

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its general manager/president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of California and is engaged in the construction business. The petitioner also claims a qualifying relationship with [redacted] located in Paranaque City, the Philippines. The beneficiary was granted two one-year periods of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner (1) did not establish that the beneficiary is employed in the United States in a primarily managerial or executive capacity; and (2) did not establish that the U.S. and the foreign entities are qualifying organizations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred in denying the petition and that the evidence on record establishes both that the beneficiary will be employed in a managerial or executive capacity and that the foreign and United States entities are qualifying organizations. In support of its appeal, the petitioner submits a brief specifically identifying those errors allegedly made by the director in denying the petition.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. While the petitioner implies in its petition and supporting materials that the beneficiary is acting as both, petitioner's Form I-290B and appellate brief emphasize the managerial aspects of the beneficiary's role. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one *or* the other capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the ambiguity, the AAO will analyze the appeal as if the petitioner is arguing that the beneficiary is acting either in a managerial or executive capacity.

In the support letter dated September 17, 2004 appended to the initial petition, the petitioner describes the beneficiary's job duties as follows:

1. Act as Chief Administrative Officer to plan, develop and establish policies and objectives of the company.
2. Coordinate functions and operations between divisions and departments, to establish responsibilities and procedures to attain objectives.
3. Review activity reports and financial statements to determine progress towards goals.
4. Revise objectives and plans in accordance with current conditions.

5. Plan and develop construction deals, schedules, needed labor, and public relations/promotional policies designed to improve company image and relations with customers and employees.
6. Direct and coordinate all activities involved with construction, promotion, and sales of services offered.
7. Determine projects to be undertaken based on demand and industry reaction to past construction projects and current market conditions.
8. Negotiate for equipment, labor and other needed products for production.
9. Through subordinate managerial personnel, establish policies to utilize human resources, equipment and materials productively.
10. Coordinate, handle, and manage all construction activities.
11. Prepare/review labor and materials estimates.
12. Prepare/review construction permits and biddings.
13. Review and approve all projects, construction and architectural plans, schedules, and other materials developed by staff prior to final implementation.

In addition, the business plan attached to the initial petition indicates that the U.S. entity will employ three people including the beneficiary.

On November 16, 2004, the director requested additional evidence. The director requested, *inter alia*, evidence that the beneficiary has been or will be performing the duties of a manager or executive with the United States entity. Specifically, the director requested details about the other employees of the petitioner, an organizational chart, California Quarterly Wage Reports for the past three quarters, a payroll summary, and Forms W-2 and W-3. The director also requested federal and state income tax returns for the petitioner and bank account information.

On February 7, 2005, the petitioner responded to the director's request for additional evidence. Counsel confirmed in her cover letter that the petitioner employs three people including the beneficiary. Counsel also included the following materials: (1) an organizational chart for the petitioner showing the beneficiary at the top of the organization acting as president and supervising the two other employees (a corporate secretary and corporate treasurer) as well as all subcontractors. The two other employees and the unnamed subcontractors are not portrayed as having supervisory or managerial functions; (2) a copy of a selected page from the bylaws for the petitioner describing the duties of the two employees, the corporate secretary[1] and the treasurer[2]; (3) a copy of a 2003 Form 1120 showing gross receipts of $64,620.00, compensation of $7,500.00 being paid to the beneficiary as officer compensation, and no deductions for labor costs, salaries, or wages; (4) state tax returns; and (5) bank account information. Counsel to the petitioner also explained in her

[1] The duties of the corporate secretary as listed in the bylaws are to attend meetings of the Board of Directors, committees, and shareholders, and record the minutes and votes. The secretary shall be the custodian of the share register.

[2] The duties of the treasurer as listed in the bylaws are to have custody of the corporate funds and to keep accounts of the corporation's properties and business transactions, to disburse funds as appropriate, and to account to the Board of Directors.

February 7, 2005 letter that the petitioner has not filed Quarterly Wage Reports and does not have payroll summaries or Forms W-2 or W-3 since the petitioner has not yet paid its employees. The petitioner did not provide any information regarding the subcontractors or attempt to explain why the tax returns indicate that no money was paid for labor during the reporting period.

On March 28, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director concluded that the job description for the beneficiary was so broad and nonspecific that it was impossible to understand what the beneficiary would actually do on a day-to-day basis. The director further concluded that even the vague job description demonstrated that many of the duties of the beneficiary, *i.e.*, marketing, would be non-managerial or non-executive in nature. Finally, the director concluded that the petitioner failed to prove that the beneficiary managed an essential function of the organization, and that the vague or nonexistent descriptions of the duties of the supervised employees and subcontractors failed to prove that they are managerial or professional employees who relieve the beneficiary from performing non-qualifying functions.

On appeal, the petitioner asserts that the beneficiary's duties are managerial or executive in nature. Counsel to the petitioner argues in her brief:

> The [b]eneficiary conducts his managing by overseeing, reviewing, coordinating, planning, negotiating, establishing plans, and preparing initial documents to expand U.S. operations. These duties describe high level managing activities, not "marketing and production-oriented duties" as described by the [sic] USCIS in its denial. The [b]eneficiary does not handle placing advertisements or executing any other market[ing] strategies, he only decides to advertise and then the Corporate Secretary executes the strategy by handling of all the paperwork. Also, he plans, negotiates and prepares initial documents, but he does not produce the project, subcontractors handle the production.

Counsel further argues:

> While the [b]eneficiary is managing the US operations expansion, the day-to-day tasks of the company are handled by sub-contractors, who the [b]eneficiary delegates projects to. Most construction companies utilize sub-contractors to complete construction jobs for which they have contracted, and it is common practice in the industry.
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> * * *
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> The Petitioner submits W-9's [sic] to evidence his [sic] employment of sub-contractors.
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> The Beneficiary must oversee the sub-contractors to insure they are fulfilling the construction contracts, to insure the projects are completed in a timely fashion and are of the agreed upon quality; otherwise, US operations will not successfully expand. However, the sub-contractors decide which supplies are needed and only involve the Beneficiary for final approval of the costs. Also, the sub-contractors purchase the

> supplies and then use them to build the structures that the Beneficiary has negotiated a contract to build. The labor is performed by the sub-contractors, not by the Beneficiary; however, the [sic] USCIS found that the day-to-day operations are performed by the Beneficiary. This is not true, he oversees the projects to insure the construction is accordingly completed by the sub-contractors. The [sic] USCIS found the descriptions of the Beneficiary's duties to be unspecific. To be more specific, the Beneficiary is not purchasing supplies or providing physical labor at the sites, he negotiates construction contracts, delegates work to subcontractors, oversees the work, paying frequent visits to the construction sites for a few hours a week, and reviews cost reports provided to him by the subcontractors. The Beneficiary does not directly supervise the sub-contractors, he simply oversees their work to insure they are working in a timely manner and to insure their product quality.
>
> Further, the Petitioner has two other full-time employees at the US branch, the Corporate Secretary and Treasurer/Finance Manager, which the Beneficiary supervises. The [sic] USCIS found in its decision that "staffing levels are a relevant factor in determining managerial and/or executive capacity[."] These positions were listed on the organizational chart, that was submitted with the [request for evidence], below the Beneficiary. The Corporate Secretary's name is [redacted] and the Treasurer/Finance Manager's name is [redacted]. Mr. [redacted] handles all of the paperwork of the US branch, drafting, organizing, filing and maintaining every contract and document. Mrs. [redacted] performs all of the billing, accounting and anything related to money.

Upon review, petitioner's assertions are not persuasive.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity by managing a department, subdivision, function, or component of the organization. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. The 13-point job description states collectively that he is primarily engaged in running a small construction business. As correctly explained by the director, while every business has a manager in a general sense, "section 101(a)(15)(L) does not include every type of manager, such as self-employed persons who perform the management activities involved in practicing their profession or trade." 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Therefore, the record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization.

As itemized above, the 13-point job description lists duties such as establishing policies and objectives, coordinating construction activities, and planning, directing, and developing public relations and promotional policies. However, the petitioner did not define any of the policies, objectives, or other functions. The only evidence provided by the petitioner was an organizational chart showing the beneficiary at the top and vague job descriptions for his subordinates taken directly out of the petitioner's bylaws. The petitioner failed to provide any coherent information regarding its purported team of subcontractors including what they do, when they work, and how much they are paid. In fact, the information that was provided regarding payroll consistently reveals that the petitioner does not pay, and has never paid, any of the employees or subcontractors other than a $7,500.00 payment to the beneficiary as officer compensation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner also failed to prove that the beneficiary "supervises and controls the work of other supervisory, professional, or managerial employees." According to the petition, the beneficiary is directly supervising two other uncompensated corporate officers. However, the job descriptions for these employees were too vague to ascertain what they do on a day-to-day basis. While the petitioner and its counsel repeatedly assert that most of the work is performed by subcontractors, the director correctly concluded that the petitioner failed to provide any evidence to substantiate this claim. Moreover, in reviewing the tax documents provided, it appears that no subcontractors were ever compensated by the petitioner.[3] Finally, while counsel to the petitioner attempts to explain on appeal that the subordinate corporate officers and subcontractors perform certain duties as directed by the beneficiary, no evidence is submitted to substantiate these claims. While contractors may be hired to relieve a beneficiary of performing day-to-day functions, the petitioner must provide evidence indicating that the contractors are performing the duties. *See Chang v. INS*, 940 F.2d 1533, 1535 (9th Cir. 1991). Without documentary evidence to support these claims, 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). Therefore, the petitioner has failed to prove that there are other managerial employees who relieve the beneficiary from performing non-qualifying duties.

In view of the above, the beneficiary would appear to be a first line supervisor and/or the provider of actual services. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level

[3] On appeal, counsel to the petitioner submits four Forms W-9 in an attempt to prove the existence of subcontractors. These forms, which are either undated or dated after the date of the petition, prove only that four individuals signed W-9 Forms. They do not prove that any compensation was paid to these individuals as such compensation would be proven through the submission of different forms, *i.e.*, Forms 1099.

normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

In view of the above, the petitioner has also failed to prove that the employees supervised by the beneficiary are "professional" employees. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degrees held by the subordinate employees. The possession of a bachelor's, or even a master's, degree by a subordinate employee does not automatically lead to the conclusion that the employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not provided any information regarding the level of education or skills needed by the corporate officers to perform their functions. Therefore, it is impossible to determine whether or not these employees are professionals within the meaning of Section 101(a)(32). The petitioner has not proven that the beneficiary is managing professional employees.

Furthermore, the petitioner has not proven that the beneficiary will manage an "essential function" of the organization. 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 is managing an essential function, the petitioner must furnish a written job description that clearly describes the duties to be 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. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995) (citing *Matter of Church Scientology International*, 19 I&N Dec. at 604).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to define them with enough specificity to determine which functions are being managed and which functions are being performed directly by the beneficiary. This failure of documentation is important because several of the beneficiary's daily tasks, such as negotiating for equipment,

preparing materials estimates, and preparing construction permits and bids, do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties with more specificity, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is 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). 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. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41.

Similarly, the petitioner has failed to prove that the beneficiary has been or will act 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 managerial employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The 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.* As indicated above, while the petitioner may have provided a vague job description, the petitioner has failed to prove that the beneficiary, who is apparently acting as a first-line supervisor or provider of actual services, will be acting primarily in an executive capacity.

It is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3).[4]

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[4] While the petitioner asserts that it intends to grow its business and add more employees, the petitioner must establish eligibility for the benefit sought at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). While the petitioner in this matter was granted a second one-year period to open the new office, 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS

The second issue is whether there is a qualifying relationship between the petitioner and the foreign entity, [redacted] of the Philippines.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." A "subsidiary" is defined, in part, 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." A branch is defined as "an operating division or office of the same organization housed in a different location." If a business organization becomes incorporated in the United States, that office cannot be considered a branch since it is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958); *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Commr. 1980).

The petitioner indicated in its Form I-129 that it is a "branch" of the foreign entity, [redacted]. The petitioner explained, however, in its response to the query "Do the companies currently have the same qualifying relationship as they did during the one-year period of the alien's employment with the company abroad?" that it does not have the same qualifying relationship because the petitioner was incorporated in August 2002. The petitioner also provided articles of incorporation for the petitioner dated August 7, 2002 authorizing 250,000 shares of stock, and a copy of an undated stock certificate evidencing the issuance of 5,000 shares of stock to [redacted]

However, the petitioner supplied copies of federal and state tax returns which depart materially from the allegations in the petition. The petitioner's 2003 Form 1120 indicates that the petitioner has issued $10,000 worth of stock, that the petitioner is not a subsidiary of another corporation, and that the petitioner is 100% owned by one person or entity which is not a "foreign person." The instructions to Form 1120 indicate that the definition of a "foreign person" includes a "foreign corporation." Also, the petitioner did not include a copy of the schedule which should have been attached to Form 1120 identifying the owner of 100% of the petitioner's stock as required by Schedule K, Question 5. Likewise, the 2003 and 2002 California Forms 100 indicate that the "same interests" did not own or control more than 50% of the voting stock of the petitioner and one or more other corporations. Moreover, the 2002 California Form 100 indicates that the "single

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regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

interest" who owns the petitioner is located in the United States. Finally, the petitioner's balance sheet, dated April 12, 2004, indicates that 10,000 shares were issued in consideration for $10,000.00.

On March 28, 2005, the director denied the petition. The director determined that the petitioner failed to prove that it is a branch of a foreign entity indicating that numerous discrepancies encountered in the evidence call into question the petitioner's ability to document the requirements under the statute and regulations.

On appeal, the petitioner asserts that if it is not a "branch" because it is now separately incorporated in the United States, then it wishes to be characterized as a "subsidiary." The petitioner implies that the director erred in not determining that the petitioner is, in the alternative, a subsidiary since the evidence presented allegedly proves that the foreign entity wholly owns the petitioner.

Upon review, petitioner's assertions are not persuasive.

The petitioner correctly asserts that, in order to prove a qualifying relationship between the petitioner and the foreign entity, the petitioner must submit evidence proving that it meets one of the definitions listed in 8 C.F.R. § 214.2(l)(1)(ii)(G), namely parent, branch, affiliate, or subsidiary. While a petitioner may erroneously describes itself as a branch in its petition, this does not disqualify the beneficiary from L-1A classification if the evidence should prove that the qualifying relationship is actually one of parent/subsidiary or affiliate. That being said, the evidence presented by the petitioner is this case and as correctly noted by the director, is so full of discrepancies and so sufficiently incomplete that it is impossible to determine who owns or controls the United States entity.

While the petitioner submitted articles of incorporation and a stock certificate for the petitioner claiming that the foreign entity owns all of the issued shares of stock, the petitioner failed to provide stock ledgers or other materials. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Moreover, the petitioner provided numerous tax documents and its balance sheet from 2004 which directly contradict its claim that the foreign entity wholly owns the petitioner. The Form 1120 and the California Forms 100 collectively indicate that a U.S.-based individual owns the petitioner, not a foreign corporation. Also, the petitioner's balance sheet indicates that the petitioner has issued 10,000 shares of stock, not 5,000. The petitioner makes no attempt to address or explain these serious inconsistencies. 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).

While the petitioner argues on appeal that its two prior petitions for this beneficiary were approved without providing any additional documentation regarding the qualifying relationship between the United States and the foreign entities, it is now clear that the prior approvals were material and gross error and CIS may correctly deny the petition. Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361. The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Therefore, even though the petitioner was successful in the past in petitioning for the beneficiary, the director properly denied the petition in this case.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record or on the erroneous belief that the petitioner was a branch of the foreign entity, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve an application or petition where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

Finally, based on the reasons for the denial of the instant petition, a review of the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary is warranted to determine if they were also approved in error. Therefore, the director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9).

ORDER: The appeal is dismissed.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9).