U.S. Department of Homeland Security
20 Massachusetts. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

b7

PUBLIC COPY

[redacted]

File: SRC 06 126 51805 Office: TEXAS SERVICE CENTER Date: JUN 04 2007

IN RE: Petitioner: [redacted]
Beneficiary:

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)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 petition seeking to extend the employment of its 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, a Texas corporation, states that it provides technical direction for concerts, shows, and events, and other services. The petitioner claims that it is the subsidiary of Harvest Advertising and Marketing, located in Mumbai, India. The petitioner has employed the beneficiary in L-1A status since March 19, 2002 and now seeks to extend his status for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

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, counsel for the petitioner asserts that the director's decision lacks legal and factual support, and applies an inappropriate standard of proof that goes beyond the required preponderance of the evidence standard. Counsel contends that the director further placed undue emphasis on the size of the staffing of the U.S. company as the basis for the denial. Counsel asserts that the beneficiary is employed in a primarily managerial or executive capacity and relies upon contracted staff as necessary to relieve him from providing the services of the business. Counsel submits a brief in support of the appeal.

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 sole issue addressed by the director is whether the petitioner established that 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 filed the nonimmigrant petition on March 15, 2006, noting its intention to extend the beneficiary's employment as president of the three-person U.S. company.

In an attached statement, the petitioner described the beneficiary's proposed duties as follows:

- Confer with M/S Expressions Unlimited, the parent company in Mumbai, India and develop long-range goals and objectives of [the petitioner] in Houston, Texas, U.S.A. [10%]
- Direct and coordinate activities of the organization and formulate and administer company policies. [10%]
- Oversee the entire management, delivery and business development of the "technical direction" services provided by the parent and subsidiary corporations. [10%]
- Direct and coordinate activities of managers, employees and contractors in the production, operations, purchasing and marketing areas for which responsibility is delegated to further attainment of goals and objectives. [10%]
- Oversee the entire production of South Asian concerts. Manage and provide the entire delivery of technical services by focusing on the areas of lighting, sound, stage management and direction, security, use of proper music and sound equipment, organizational management, budgeting, market research, allocation of personnel and training. [5%]
- Provide high-level support to local promoters for South Asian concerts held in the United States. [5%]
- Manage the overall coordination of the technical requirements between the promoters and the equipment suppliers or companies. [5%]
- Negotiate contracts for services with equipment suppliers who provide the stage, lights and sound supports for the concerts. [5%]
- Negotiate contracts with artistes in South Asia to be their Techncal Advisors for their tours in the United States. [5%]
- Promote concerts of select artists (e.g. Pankaj Udhas-renowned Ghazal singer) in the United States and Canada. [5%]
- Oversee the providing of advertising and marketing consultancy services to domestic product manufacturers and service providers for the sale and distribution of their products and services to the South Asian market in the United States. [5%]
- Dialogue with clients and customers to ascertain and define needs or problem areas and determine scope of requirements. [5%]
- Determine solutions, such as installation of alternate methods and procedures, changes in methods and practices, modification of machines or equipment, or redesign of products or services. [5%]
- Advise clients and employees on alternate methods of solving needs or problem areas, or recommend specific solutions. [5%]
- Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. [5%]

- Review achievements with management and discuss required changes in goals or objectives of the company. [5%]

The petitioner submitted an organizational chart for the U.S. company which identifies the beneficiary as president, reporting to "international/local promoters" and supervising an office manager. The chart shows that the beneficiary, through the office manager, supervises lighting companies, sound companies and staging companies. The petitioner attached a description of the services these companies provide, and a list of vendors used by the company. The petitioner submitted a copy of its Texas Form C-3, Employer's Quarterly Report for the third and fourth quarters of 2005 which confirms the part-time employment of the individual identified as the petitioner's office manager. The petitioner also submitted invoices from various vendors as evidence of services provided by advertisers, sound, staging and lighting companies, and venues. The most recent invoices were dated in 2004.

In addition to describing its technical direction and marketing consulting services, the petitioner submitted a "Master Reseller Agreement" between the U.S. company and DBS Communications, Inc., in which the petitioner agrees to "use its best efforts [to] sell DBS Services through and to Retail Stores" in the Houston metropolitan area, provide training to retail stores, and provide customer information to DBS, in exchange for commission payments. Appendix C to the agreement indicates that the beneficiary will be the manager of these activities, during opening hours of 11:00 to 7:00, Monday through Saturday, and the petitioner submitted a sales and use tax permit which is presumably related to the sales activities mentioned in the reseller agreement. The AAO notes that the term of the agreement was for one year commencing in January 2003, but it is unclear whether the petitioner currently operates this business.

The director issued a request for evidence on April 19, 2006, in part, instructing the petitioner to submit: (1) an organizational chart for the U.S. entity, including the names, job titles, job descriptions and educational background for all employees; (2) a copy of the petitioner's state quarterly wage report and IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2006; and a copy of the beneficiary's IRS Form W-2, Wage and Tax Statement, for 2005. On July 11, 2006, the petitioner requested an additional 30 days to submit the requested evidence, noting that due to heavy monsoons in India, documents from the foreign entity were unavailable. The director subsequently issued a notice of intent to deny requesting the same items on July 26, 2006, allowing the petitioner 30 days to respond.

In a response dated August 24, 2006, counsel for the petitioner emphasized that the petitioner's business is "intermittent and labor intensive," and relies on the use of independent contractors to participate in specific concert events. The petitioner indicated that as president the beneficiary "directly deals with [redacted], who is the Executive Secretary. [redacted] in turn liaises with different labor contract workers which varies according to the event organized and the requirements of the organizers and sponsors." Counsel noted that the petitioner organized nine concerts during 2005. In an accompanying letter, the petitioner further explained the petitioner's staffing and business as follows:

> When we give out contracts for any event or concert the equipment is charged separately and the LABOR is charged separately. We end up paying CONTRACT LABOR for each event that we undertake and therefore avoid the necessity of having full time employees.

The petitioner submitted an organizational chart listing the events and concerts organized by the U.S. company in 2005, and indicated the number of lighting, sound, video, and stage staff assigned to each event. The petitioner also submitted the requested state and federal quarterly reports for 2006, which confirm the ongoing employment of the office manager/executive secretary at a monthly salary of $500.

The director denied the petition on September 20, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the petitioner had not demonstrated employees working under the beneficiary in a managerial or professional capacity, or staff to relieve the beneficiary from performing "non-managerial or non-essential duties." The director found that the petitioner had not documented the employment of subordinate personnel, and determined that the beneficiary would be engaged in the performance of the various functions of the company, rather than managing such functions.

On appeal, counsel for the petitioner asserts that "the Service lacks legal and factual support for its Decision." Counsel asserts that the director ignores the applicable standard of proof to be used in adjudicating applications and petitions. Counsel notes that the definitions of "executive and manager" were liberalized by the Immigration Act of 1990 (IMMACT90), and asserts that an individual who does not have supervisory responsibilities but who manages or directs the management of a major function of the organization qualifies as a manager. Counsel further states that the director erred by using the staffing of the company as the sole basis for adjudication. Counsel cites several unpublished decisions in which the beneficiary was found to be employed in a managerial capacity even when he or she did not directly supervise employees, or only supervised independent contractors.

In addition, counsel asserts that the beneficiary is not required to supervise a large staff, or even any staff, in order to qualify as an intracompany transferee in a managerial or executive capacity, noting that the AAO has previously approved petitions for "essentially one-man operations." Counsel claims that all non-essential and non-executive work is performed by contractors who work on a short-term basis, while the beneficiary "exercises great executive and managerial control over the direction of the business by negotiating the deals and making the choices he makes." Counsel emphasizes that "the company does well despite its lack of employees" and the beneficiary is responsible for its success and exercises "plenty of managerial and executive control."

Counsel's assertions are not persuasive. Upon review of the petition and the evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. 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.* The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Here, while the AAO does not dispute that the beneficiary exercises authority over the U.S. company as its sole full-time employee and is perhaps critical to the success of the company due to his professional background, the record does not establish that he performs primarily managerial or executive duties as contemplated by the statutory definitions.

The petitioner's description of the beneficiary's position, while lengthy, provides only a generic overview of the beneficiary's duties. For example, statements such as "direct and coordinate activities of the organization," "formulate and administer company policies"; "oversee the entire management, delivery and business development of the 'technical direction' services"; "manage the overall coordination of the technical requirements"; "review and analyze activities, costs, operations"; and "review achievements with management" are insufficient to convey an understanding of what the beneficiary does on a daily basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, the beneficiary's responsibilities for meeting with clients and customers, promoting concerts, contracting with equipment suppliers, advising clients, providing "high-level" support to local promoters, meeting with clients and customers to ascertain their requirements, and determining solutions suggest that the beneficiary is the individual marketing and selling the petitioner's services, as well as providing consulting services. Although counsel emphasizes the beneficiary's responsibility for acquiring projects for the petitioner to manage, acquiring clients and projects to manage is an operational task, necessary to establish and continue the petitioner's business. Similarly, the beneficiary's responsibility for determining clients' needs and developing solutions or plans to ensure the successful performance of their events are operational tasks intrinsic to providing the petitioner's event management consulting services and have therefore not been shown to be managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l,* 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, some of the beneficiary's duties suggest that he oversees staff who are not in fact employed by the petitioning entity on a permanent or contract basis. For example, the petitioner states that the beneficiary directs and coordinates the activities of "managers, employees and contractors in the production, operations, purchasing and marketing areas." While the AAO is satisfied that the petitioner utilizes contractors to perform the technical aspects of staging concerts, the petitioner concedes that it does not employ any direct managers or employees, and does not claim to have any personnel on its staff to perform operations, purchasing or marketing tasks with respect to the petitioner's business. Similarly, the petitioner states that the beneficiary "oversees" the provision of advertising and marketing consultancy services to domestic clients seeking to sell their products and services to the South Asian market in the United States. Again, the petitioner does not clarify exactly who conceptualizes and designs advertising and marketing services for the company's clients, or who markets the petitioner's services in this regard, if not the beneficiary. 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)).

Again, while the AAO is satisfied that the beneficiary is not performing the technical duties associated with providing staging, lighting, audio and video production for the concert events undertaken by the petitioning company, there are many other non-managerial functions to be performed in operating the petitioner's business, including sales, marketing, day-to-day financial matters, provision of marketing and advertising consulting services to clients, coordination and promotion of events, purchasing, booking of venues for concerts, and making other arrangements for visiting performers and their accompanying staff, musicians, etc. The coordination of all of these various functions is the basic purpose of the petitioning organization and constitutes the main service it provides. Therefore, if the beneficiary is in fact personally performing all of these duties, he is performing the duties required to provide the petitioner's services. The record simply does not substantiate that the beneficiary has a support staff to assist him with the day-to-day administrative, financial and other operational tasks of the company, which have not been shown to be managerial or executive in nature. A review of the totality of the record indicates that the beneficiary himself is responsible for essentially all functions associated with operating the business, many of which are not at the managerial or executive level.

The petitioner in this matter has not provided a description of the beneficiary's duties sufficient to establish the beneficiary's eligibility for this visa classification. Conclusory and unsubstantiated assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Although the petitioner provided a lengthy list of ambiguously worded duties and assigned a percentage of time allocated to each duty, the duties are too vague and include non-qualifying tasks. The AAO is unable to determine what proportion of the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not credibly or meaningfully establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel nevertheless claims that the beneficiary will be employed as both a manager and an executive under the extended petition. The AAO notes that the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-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.*

In this matter the petitioner has not demonstrated that the beneficiary will primarily direct the management or establish the goals and policies of the organization. As of March 2006, the petitioner had not attained the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the beneficiary's duties performed on a day-to-day basis. Instead the record shows that the beneficiary was focused on the necessity of establishing the petitioner's business by providing the petitioner's market research, proposing that prospective clients use its services, performing operational tasks to coordinate sponsored events, as well as carrying out the administrative tasks of operating its office, and even directly providing business consulting services related to the petitioner's marketing and advertising consulting business.

The petitioner has not provided evidence that the beneficiary performs or will perform primarily in a managerial capacity. As the director determined, the record does not contain evidence that the beneficiary manages a subordinate staff of employees who would relieve him from performing non-qualifying duties associated with the day-to-day operation of the business. Again, other than the technical duties associated with the staging, lighting, audio and video services required for specific concert events, the beneficiary appears to be responsible for essentially all other administrative and operational tasks of the company, as well as providing consulting services, and these duties have not been shown to be incidental to any managerial duties he performs. While it appears that the beneficiary's spouse works for the company on a part-time basis as an administrative or secretarial employee, the petitioner opted not to provide a description of the duties she performs, although this information was requested by the director. Any 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).

The record does not contain sufficient evidence to establish that the beneficiary will direct or manage the petitioner's essential function. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the duties to be performed that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 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. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d at 305. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the

beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages. Even if the beneficiary does not directly supervise employees, it is the petitioner's obligation to establish that someone other than the beneficiary performs the day-to-day non-managerial tasks of the function managed. As discussed above, the petitioner has not met this burden.

The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish managerial capacity. Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service or other non-managerial, non-executive duties, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

Moreover, federal courts continue to give deference to CIS's interpretation of the Immigration Act of 1990 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. *See Boyang Ltd. v. INS*, 67 F.3d 305(Table), 1995 WL 576839 at *5 (9th Cir. 1995 (unpublished)(*citing to Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); *see also, IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the petitioner states that it is engaged in providing technical support for concert performances and other entertainment events, direct sponsorship of such events, performing marketing and advertising work for select clients, and providing advertising and marketing consultancy services to service providers and manufacturers who seek to target the South Asian market in the United States. Accordingly, it has a reasonable need for employees to market and promote the various services it provides, to prepare proposals and contracts for specific events, to research and select outside service providers and coordinate their duties,

to work with clients to determine their specific needs and define strategies for specific projects, to provide the advertising and marketing consultancy services, to provide customer service, to make arrangements for performers and their staffs, such as cars, lodging, catering, etc., and to perform the day-to-day administrative and financial tasks associated with operating any business. There is also evidence in the record that suggests that the petitioner may also operate as a reseller of communications equipment and services. While the petitioner has established that it utilizes contractors to perform the technical aspects related to concert performances, the petitioner has not established that the beneficiary as president, who is supported by one part-time employee, is relieved from performing all or most of the administrative, financial, marketing, creative and operational tasks associated with developing the petitioner's business. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a single full-time employee who performs primarily managerial or executive duties.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO acknowledges that a sole employee, in some circumstances, may provide primarily managerial or executive services for a petitioner. However upon review of the record in this matter, the petitioner has not provided substantiating evidence that the petitioner employed or would employ individuals to carry out the marketing and sale of the petitioner's services to its prospective clients. Further, the record does not contain substantiating evidence that the petitioner utilized the services of outside contractors to carry out many of the petitioner's basic operational tasks. The petitioner has not established that the beneficiary's duties and those of his claimed outside service providers elevate the beneficiary's position to a primarily managerial or executive position. Again, the petitioner's increase in business activities and use of independent contractors subsequent to the filing of the petition are not relevant to this proceeding. Again, 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. at 49.

Finally, the AAO acknowledges counsel's contention that the director applied an inappropriate standard of proof. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Upon review of the totality of the record, the director had proper reason to question the petitioner's claims, appropriately requested additional evidence that should have been available for submission in support of those claims, gave proper weight to the evidence submitted in response to the request for evidence, and properly determined that the petitioner had not met its burden to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the AAO finds that the evidence of record is insufficient to establish the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer. 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 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). Furthermore, in order to be considered qualifying organizations under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that the U.S. company and the foreign entity are engaged in the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

On the Form I-129, the petitioner stated that the beneficiary was employed by Harvest Advertising and Marketing in India from 1998 until 2000. The petitioner indicated that this company owns 100 percent of the U.S. company, thereby creating a parent-subsidiary relationship. In a letter submitted in support of the petition, dated March 13, 2006, the petitioner stated that the petitioner is a subsidiary of "M/S Expressions Unlimited." In the same letter, the petitioner stated the following: "Harvest Advertising & Marketing, our

parent company, was established in 1993 and specializes in advertising and marketing. In February 2000, Harvest merged with Expressions Unlimited a Sole proprietorship of [the beneficiary]. "

As evidence of the foreign entity's operations, the petitioner submitted: "Computation of Income" statements for M/S Expressions Unlimited listing the beneficiary as the proprietor, for the accounting years ended on March 31, 2001, 2002 and 2003; (2) the beneficiary's Indian income tax returns for 2001-2002 and 2002-2003, identifying the name of his business as M/S Expressions Unlimited; (3) Bank statements for M/S Expressions Unlimited for the months of January 2004, February 2004 and August 2005; and (4) reference letters dated between 1997 and 2000. With respect to the U.S. company, the petitioner submitted its Texas articles of incorporation, dated October 17, 2001, which indicate the company is authorized to issue 1,000,000 shares with a par value of $1.00. The articles of incorporation indicate at article nine that the company is a wholly-owned subsidiary of "Harvest Advertising and Marketing Ltd., India." The petitioner also submitted the U.S. company's 2004 and 2002 IRS Forms 1120, U.S. Corporation Income Tax Return, which both indicate at Schedule K, line 5, that the beneficiary is the sole owner of the company.

The director subsequently instructed the petitioner to submit evidence of the ownership and control of the U.S. and foreign entities, including stock certificates, stock registers, copies of the corporate bylaws/constitutions clearly indicating stock ownership, certified affidavits from corporate officers or legal counsel, or copies of published annual reports. The director also requested evidence of the viability of the foreign entity, including current financial records, tax records, employee rosters, and recent invoices, bills of sale, and product brochures.

In response, the petitioner submitted copies of bank statements for M/S Expressions Unlimited for the months of April, May and June 2006, and an income statement for M/S Expressions Unlimited for the accounting year ended on March 2005. Counsel stated that the foreign entity is a sole proprietorship, thus no articles of incorporation or stock certificates could be provided. With respect to the U.S. company, counsel stated: "since it's a sole proprietorship, there are no stocks being issued." Instead, the petitioner submitted a copy of its 2005 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates at Schedules E and K that Harvest Advertising & Marketing owns a 51 percent interest in the company, and is accompanied by a Form 5472, Information Return of a 25% Foreign Owned U.S. Corporation, identifying Harvest Advertising & Marketing Ltd. as a related party. The petitioner also provided a copy of the beneficiary's 2005 IRS Form 1040, U.S. Individual Income Tax Return, with Schedule C, Profit or Loss from Business, on which he reported his income from the petitioner and identified himself as a self-employed consultant.

Based on the incomplete and conflicting evidence submitted, the petitioner has not established that the claimed foreign employer, Harvest Advertising & Marketing Ltd., even exists, much less established that it in fact owns a majority interest in the petitioner and continues to do business in India. All supporting evidence related to the foreign entity identifies the business as M/S Expressions Unlimited, a business that the petitioner claims was merged into Harvest Advertising & Marketing in 2000. 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). Regardless, the petitioner has not submitted sufficient evidence to establish that either Harvest Advertising & Marketing

or M/S Expressions Unlimited is currently doing business in India, as it did not submit the requested current invoices, employee rosters, or other documentation. The bank statements and 2005 financial statement are insufficient to establish that the claimed foreign employer is doing business as defined in the regulations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Furthermore, the petitioner has not consistently identified the name of its parent company, and the record contains inconsistent claims and evidence as to the U.S. company's actual ownership. As noted above, the petitioner has concurrently claimed that M/S Expressions Unlimited and Harvest Advertising and Marketing own the U.S. company, while the beneficiary claims that he is "self-employed," and the petitioner's tax returns for 2002 and 2004 identify the beneficiary as the sole owner of the company. Counsel's statement that the petitioner, a Texas corporation, is a sole proprietorship and therefore does not issue stock certificates, is not persuasive and further raises questions regarding the credibility of the petitioner's claims. Given all of these unexplained discrepancies, the AAO will not accept the 2005 tax return identifying Harvest Advertising & Marketing as the majority owner of the U.S. company as evidence of the petitioner's ownership by a foreign entity.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 1t 591. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested visa classification, as there is no probative evidence of a qualifying relationship between the petitioner and a foreign qualifying organization. For this additional reason, the petition will not be approved.

The AAO recognizes that USCIS previously approved two L-1A petitions filed by the petitioner on behalf of this beneficiary. The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's and beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). It must be emphasized that each nonimmigrant petition filing is a separate record of proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approvals by denying the present request to extend the beneficiary's status. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. Accordingly, the AAO recommends that the nonimmigrant petitions be reviewed for possible grounds for revocation.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

ORDER: The appeal is dismissed.