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

U.S. Citizenship and Immigration Services

D7

[redacted]

DATE: MAY 04 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition to classify the beneficiary 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 Nevada corporation, states that it operates a retail clothing store. It claims to have a qualifying relationship with [redacted] located in Cuautitlan, Mexico. The petitioner has employed the beneficiary as its director/president since 2006 and now seeks to extend his status for two additional years.

The director denied the petition based on two independent and alternative grounds. Specifically, the director determined that the petitioner failed to establish: (1) that the U.S. and foreign entities have a qualifying relationship; and (2) that the U.S. entity would employ the beneficiary in a qualifying 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 the director "failed to favorably weigh substantial evidence" that the petitioner and the foreign entity share common ownership and control. In addition, counsel asserts that the director erred by concluding that the beneficiary does not qualify for the benefit sought in his capacity as a "function manager." Counsel submits a brief in support of the appeal.

I. The Law

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.

II. Discussion

The director denied the petition based on a finding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; and (2) that the U.S. company will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. The AAO will address these issues separately below.

A. Qualifying Relationship

The first issue addressed by the director is whether the petitioner established that it has a qualifying relationship with 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. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) 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;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *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.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 28, 2009. The petitioner stated on the petition that the U.S. company is a branch of [redacted] a business located in Cuautitlan, Mexico. In a letter dated August 26, 2009, the petitioner stated that it is an affiliate of the foreign entity.

The petitioner did not submit any direct evidence of the ownership and control of either the U.S. or foreign entity. The petitioner's initial evidence did include a copy of the director, Nebraska Service Center's decision to deny an I-140 immigrant petition filed by the petitioner on the beneficiary's behalf. In the decision dated June 28, 2009, the director noted the petitioner's claim that the beneficiary "is the sole proprietor" of the foreign entity [redacted]

The petitioner also submitted a copy of the U.S. company's IRS Form 1120X, Amended U.S. Corporation Tax Return for 2007. The preparer described the reason for the amendment as follows:

> We amendment [*sic*] for this reason: The other incorporator has 49% of the incorporation in the state of Nevada; [redacted] with 51%. At the beginning [redacted] stated that he had the 100% [*sic*] of the incorporation.

The director issued a request for additional evidence on October 9, 2009, instructing the petitioner to submit additional evidence in support of its claim that the U.S. and foreign entities have a qualifying relationship. Specifically, the director requested: (1) a detailed list of owners of the foreign company with names and percentages of ownership; (2) a copy of the minutes of the meeting of the foreign company that lists the shareholders and the number and percentage of shares owned; (3) a copy of the foreign entity's articles of incorporation, articles of organization, partnership agreement or sole proprietorship registration, as applicable;

and (4) evidence that the foreign entity continues to business in Mexico. With respect to the U.S. entity, the director requested a detailed list of the company's owners and the percentage interest they own. The director also requested that the petitioner clarify the type of qualifying relationship it has with the foreign entity and to support its explanation with evidence.

In response, the petitioner indicated that it was submitting the articles of incorporation for the Mexican entity, [redacted] which details its owners and stock ownership. The petitioner submitted a 12-page Spanish language document with 30 clauses, accompanied by a one-page partial English translation of the first, second, third and eighth clauses of the original document. The translation provides the following information:

> EIGHTH: The initial investment by the Association will be $1,000,000 (one million pesos) to be distributed in the following manner:
>
> The associates are the following persons:
>
> a) [redacted] who has a share in the amount of $350,000.00 pesos.
> b) [redacted] with a share in an amount of $500,000.00 pesos.

With respect to the U.S. company, the petitioner stated that the beneficiary owns a 50 percent interest and [redacted] owns the remaining 50 percent. The petitioner indicated that the U.S. company was established as a branch of the foreign company "because the owner and the duties are the same in both countries" and "they sell the same type of clothes."

In addition, counsel for the petitioner stated that the beneficiary "has 50% ownership of each company, making it a joint venture." Finally, a job description submitted for the beneficiary indicates that "he is acting as a liaison and representative for the *subsidiary* company in the U.S." (Emphasis added).

The director denied the petition on March 26, 2010, concluding that the petitioner failed to establish that the U.S. and foreign entities have a qualifying relationship. In denying the petition, the director emphasized that "the petitioner has asserted four types of relationships as well as various levels of ownership of both the US business and the foreign business by the beneficiary." The director found that there was insufficient objective evidence of the ownership and control of either entity to resolve these inconsistencies. Finally, the director noted that the petitioner failed to submit full English translations of foreign language documents, as required by 8 C.F.R. § 103.2(b)(3), and thus the evidence submitted to establish the ownership of the foreign entity was lacking in probative value.

On appeal, counsel asserts that the evidence submitted establishes that the beneficiary owns 50 percent of both the Mexican and U.S. companies and controls both companies.

With respect to the articles of association for the foreign entity, the petitioner submits an expanded two-page English summary translation of the document, which indicates that the beneficiary's total contribution to the foreign entity was 500,000 Mexican pesos, including real property valued at 350,000 pesos and 150,000 pesos

in cash. Counsel further states that the beneficiary and his spouse each own 50 percent of the U.S. entity. Counsel concludes that "the same group of individuals holds control and veto power over both entities and therefore the requisite affiliate relationship exists."

Upon review, the petitioner has not submitted evidence on appeal to overcome the director's determination. The evidence of record does not establish that the U.S. and foreign entities have a qualifying relationship.

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 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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 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. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner has not adequately documented the ownership or control of either the U.S. or foreign entities. With respect to the U.S. company, the petitioner submitted an unsupported statement indicating that the beneficiary and his spouse each own 50% of the company, and a Form 1120X for 2007 which indicates that the beneficiary owns a 51 percent interest in the U.S. company. The petitioner has not submitted the U.S. company's stock certificates, stock transfer ledger or any other primary evidence of the company's ownership and control. 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'r 1998) *(citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

With respect to the petitioner's failure to submit full English translations of Spanish language documents, the director correctly noted that the instructions accompanying the Form I-129 require that "any foreign language document must be accompanied by a full English translation which the translator has certified as complete and correct." Pursuant to 8 C.F.R. § 103.2(a)(1), the instructions on the petition form are to be given the force and effect of a regulation.

Because the petitioner failed to submit full English translations of the foreign entity's company formation documents, the director correctly granted limited evidentiary weight to such documents.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

Even if the petitioner had submitted sufficient evidence to establish that the beneficiary has the claimed 50 percent ownership interest in the U.S. and foreign entities, this ownership interest alone would be insufficient to establish de jure control of the U.S. company. Counsel's assertions that the beneficiary controls both companies based on his claimed 50 percent ownership interest are not sufficient to meet the petitioner's burden of proof. 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).

Based on the foregoing, the petitioner has not established that the U.S. and foreign entities have a qualifying relationship. Accordingly, the appeal will be dismissed.

B. Employment in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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 indicated on the Form I-129 that the beneficiary will be employed as its director/president with responsibility for "directing daily business operations, marketing, advertising, sales and marketing." The petitioner indicates that it operates a retail clothing store with gross annual income of $92,700. The petitioner did not identify its current number of employees on the petition.

In its letter dated August 26, 2009, the petitioner described the beneficiary's duties as follows:

> [The beneficiary] is responsible for the overall operations of the store. [The beneficiary's] job duties will be broken down into percentages depending on the particular job tasks. He will be required to make business trips to California and Mexico to select new merchandise and adapt new trends in the retail market. [The beneficiary] will also be responsible for maintaining and overseeing the sales goals and quotas based on the climate of the market. He will take the time to study and analyze the direction of the market competition. He will be required to attend conferences and events within the scope of the retail industry.

The petitioner also provided a chart outlining the names, titles and job duties of five employees. The chart identifies the beneficiary as the company's manager and states that he performs the following duties:

- Hiring, managing, scheduling and supervising the employees
- Purchasing the articles that are to be sold in the store
- Planning a budget or financial statement for the store and operating within this budget
- Contracting with various outside vendors and suppliers for bookkeeping, tax preparation and repair services as needed.

The petitioner indicated that [redacted] is employed as supervisor/assistant manager and is responsible for supervising and coordinating activities within the store, administering policies and procedures to ensure efficient store operations, and assisting the store manager as needed. Finally, the chart identifies three sellers who are responsible for selling products and keeping the store in order.

The petitioner provided copies of five IRS Forms W-2, Wage and Tax Statement, issued in 2008. The Forms W-2 indicate that the company paid $50,000 to the beneficiary, $31,600 to [redacted], and $22,220, $5,788 and $5,109, respectively to the three sales people. The petitioner did not provide any evidence of wages paid to its employees in 2009.

In the request for evidence issued on October 9, 2009, the director requested a more detailed description of the beneficiary's duties in the United States, including the percentage of time he spends performing each of the listed duties. The director also requested that the petitioner "indicate exactly whom the beneficiary directs including their job title and position description."

In response, the petitioner described the beneficiary's duties as follows:

- He directs and coordinate promotion of services performed to develop new markets and obtain a competitive position in the women's clothing industry. 15%
- He engages in market research and advertising. 5%
- Also, Beneficiary is responsible for conducting general administration affairs of the company, setting strategic goals for the other employees, setting sales quotas and expenses for sales employees. 20%
- Beneficiary has full discretion in hiring and firing personnel. He coordinates activities, such as operating, planning and sales strategies for the company. 20%
- He is acting as a liaison and representative for the subsidiary company in the U.S. He engages in long-range planning and identifying business opportunities in the United States and international markets, directing the business activities, and supervising all personnel. 20%

The petitioner indicated that the assistant manager spends 40 percent of her time keeping corporate records; 20 percent of her time preparing memoranda explaining policies and procedures to "supervisory workers"; 20 percent of her time directing preparation of records such as notices, minutes and resolutions for stockholders' and directors' meetings; and 20 percent of her time recording "company stock issues and transfers" and acting as "custodian of corporate documents and records."

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that the beneficiary's proposed duties are "heavily comprised of marketing tasks" and that the petitioner has not established that the other employees will relieve the beneficiary from performing non-managerial duties. The director further found that the evidence does not establish that the beneficiary has been or will be primarily supervising a subordinate staff comprised of professional, managerial or professional employees.

On appeal, counsel contends that the beneficiary qualifies as a "function manager," based on his management of the U.S. company's marketing function. Specifically, counsel asserts:

> In the instant case, the marketing activities of the U.S. company include: Researching market conditions in local and regional areas to determine potential sales of the company's clothing products, leather goods, cosmetics and accessories; establishing research methodology and

> designing format for data gathering, such as surveys, opinion polls, and questionnaires; examining and analyzing statistical data to forecast future marketing trends in the clothing and fashion industry; gathering data on competitors and analyzing prices, sales and methods of marketing and distribution; collecting data on customer preferences and buying habits; preparing reports and graphic illustrations of findings. These marketing functions are a core part of the company's business and a pivotal element of its competitiveness and success. The beneficiary manages personnel who perform these duties in the sales and marketing department. The beneficiary does not himself performs [sic] these marketing duties but spends about 60% of his time managing sales personnel. For the sake of clarity, the beneficiary's position in the United States is better construed as that of a Marketing Manager. As a manager, the beneficiary operates at a senior level within the company with respect to the function.
>
> The sales force, albeit small (three sales people), is an essential part of the company's business. The beneficiary has direct supervisory authority over sales employees who help carry out the company's marketing plans. The beneficiary also has the authority to hire and fire such subordinate employees. Because the beneficiary has input in deciding when and how such employees work time should be spent to help carry out the company's marketing plans, his duties fall within the definition of "functional managing" that is contained within the regulatory definition of managerial capacity.

Upon review, and for the reasons discussed below, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary will 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 each 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 beneficiary appears to exercise the appropriate level of authority over the U.S. operation, the petitioner has not established that his actual duties are primarily managerial or executive in nature.

The petitioner has submitted a total of four descriptions of the beneficiary's duties. At the time of filing the petition, the petitioner indicated that the beneficiary is responsible for the "overall operations" of the petitioner's retail store. The petitioner indicated that his specific duties include making business trips to select new merchandise, maintaining and overseeing the company's sales goals and quotas, studying and analyzing competitors in the petitioner's market, and attending industry conferences and events. These duties are vague and offer little insight into what the beneficiary actually does on a day-to-day basis as the manager of the

petitioner's store. 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).

Further, while the petitioner indicated that the beneficiary is responsible for planning the store's budget and hiring, scheduling and supervising employees, it also indicated that the beneficiary is responsible for "purchasing the articles that are to be sold in the store." Therefore, the petitioner's initial description of the beneficiary's duties suggested that he performs a combination of managerial and non-managerial duties, but failed to establish what proportion of his time would be allocated to managerial duties.

In response to the director's request for a description of the beneficiary's duties and the percentage of time the beneficiary allocates to each duty, the petitioner indicated that he spends a total of 20 percent of his time on market research, advertising and promotional duties, 20 percent of his time on "general administration affairs" including goal setting and setting sales quotas, 20 percent of his time on hiring and firing personnel and coordinating "operating, planning and sales strategies," and 20 percent of his time identifying business opportunities, directing business activities and "supervising all personnel." The petitioner did not indicate how the beneficiary spends the remaining 20 percent of his time. The AAO notes that this position description, in addition to being incomplete, failed to add any further detail to those descriptions previously provided. 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).

Finally, on appeal, counsel for the petitioner characterizes the beneficiary's position as that of a "marketing manager" and indicates that he manages the company's marketing function and devotes 60 percent of his time to managing the company's three sales people, who, in turn, carry out the company's marketing plans. Counsel indicates that the company's marketing activities including market research, data gathering, statistical data analysis, and preparation of marketing reports. Counsel offers no explanation as to why none of its prior descriptions suggested that the beneficiary is primarily a marketing manager or indicated that he manages an essential function of the organization. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The petitioner has failed to provide a clear or consistent account of the beneficiary's job duties sufficient to establish the nature of his actual duties or the percentage time he allocates to duties that fall within the statutory definitions of managerial or executive capacity. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of any meaningful percentages of time allocated to specific duties, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The petitioner indicates that the beneficiary supervises one assistant manager and three sales people. The AAO notes that the petitioner failed to indicate its current number of employees on the Form I-129. The petitioner has submitted evidence that it paid salaries and wages to five employees in 2008, but the record does not contain evidence of wages paid to employees in 2009. At the time of filing the petition, the petitioner indicated that the assistant manager supervises and coordinates the store's activities and the other employees; however, in response to the RFE, the petitioner did not include these supervisory duties in its expanded job description for the assistant manager. Rather, the petitioner indicated that this employee is primarily responsible for keeping corporate records. Further, on appeal, counsel asserts that the beneficiary directly supervises the three sales personnel. The AAO cannot conclude that the assistant manager, notwithstanding her job title, is actually performing supervisory or managerial duties.

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'r 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 degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform retail sales duties or to maintain company records. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act, and it has not established that the beneficiary qualifies for the benefit sought as a "personnel manager."

Counsel claims on appeal that the beneficiary's role with the U.S. company is best characterized as that of a marketing manager, and that the beneficiary is charged with managing the company's marketing function. The petitioner has not established that the beneficiary is employed primarily as a "function manager." 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. 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 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.

The petitioner has not established that the beneficiary's duties are primarily managerial or that he primarily manages the company's marketing function. The petitioner has not indicated that any of the company's other employees perform non-qualifying duties related to this function. Further, the petitioner indicates that the beneficiary spends 60 percent of his time directly supervising non-professional sales employees, and this portion of his time cannot be considered time spent performing qualifying managerial duties.

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 the organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The beneficiary in this matter, although he is referred to at times as its "director/president," has not been shown to be primarily engaged in establishing goals and policies for the U.S. company or overseeing its management given the company's preliminary stage of development.

The fact that the beneficiary manages or directs a business as its "director/president" or "general manager" does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioning company, the petitioner has failed to demonstrate that his actual day-to-day duties as of the date of filing the petition would be primarily managerial or executive. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

For the reasons discussed above, the appeal will be dismissed.

III. Conclusion

The AAO acknowledges that the beneficiary was previously granted L-1A status for employment with the petitioner in 2006. It must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The prior approval does not preclude USCIS from denying an extension of the original visa based on a reassessment of beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm'r 1988). For example, if USCIS determines that there was material error, changed circumstances, or new material information that adversely impacts eligibility, USCIS may question the prior approval and decline to give the decision any deference.

If previous nonimmigrant petitions were approved based on the same inconsistent and unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. 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 approval by denying the present request to extend the beneficiary's status. As discussed above, the evidence submitted fails to describe the beneficiary's actual job duties in detail as required by 8 C.F.R. § 214.2(l)(3)(ii) and fails to document the claimed qualifying relationship between the U.S. and foreign entities.

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'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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 previous 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). Despite any number of previously approved petitions, USCIS 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.

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. 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.

ORDER: The appeal is dismissed.