

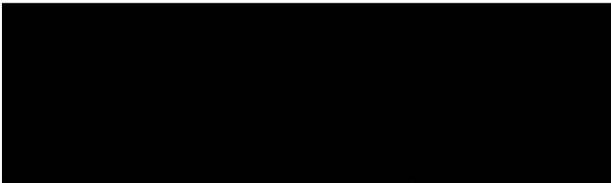


U.S. Citizenship  
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**B4**



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **APR 10 2007**  
WAC 05 246 50362

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner filed the instant immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is operating a gas station, convenience store, and car wash.<sup>1</sup> The petitioner seeks to employ the beneficiary as its chief executive officer.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary had been employed by the foreign entity and would be employed in the United States company in a primarily managerial or executive capacity; or (2) at the time of filing the immigrant visa petition the beneficiary's foreign employer and the United States entity enjoyed a qualifying relationship.

On appeal, the petitioner contends that its former counsel "did not submit specific evidence" of the beneficiary's previous and current employment in a primarily executive capacity or of a qualifying relationship between the foreign and United States entities. The petitioner submits on appeal a brief and additional documentary evidence that the petitioner claims demonstrates the beneficiary's eligibility for the requested immigrant visa classification.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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<sup>1</sup> The record indicates that in addition to operating a gas station and convenience store, the petitioner is offering management consulting services to a United States affiliate that is engaged in real estate development, as well as providing services related to "the wholesale and distribution of diesel parts" and the "administrative management" of an overseas affiliate in Mexico.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first two issues in this proceeding pertain to the nature of the beneficiary's employment capacity. The first issue is whether in the three years preceding his entrance into the United States as a nonimmigrant, the beneficiary was employed overseas by a subsidiary or affiliate of the United States employer for at least one year in a primarily managerial or executive capacity. The additional issue is whether the petitioner demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity while in the position of chief executive officer for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and

- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-140 on September 12, 2005. In an undated letter submitted with the petition, the petitioner stated that the beneficiary had been employed as the chief executive officer of the Mexican company [REDACTED] from 1997 until the beneficiary was granted an L-1A nonimmigrant visa in March 1999. The petitioner provided the following description of the beneficiary's former position in the foreign entity:

[The beneficiary] was responsible for the overall business operations of the company. He was responsible for the planning and formulation of the company's objective and business plans. His ability to plan, formulate, and establish basic policies enabled [REDACTED] to accomplish and expand both their domestic and international business objectives. Due to his extensive business experience, he was also able to establish a positive working environment, one of the mutual respect among the company's personnel. In this capacity, he was able to achieve the efficient and effective management of [REDACTED]

The petitioner submitted copies of [REDACTED] annual tax returns for the years 2002 through 2004, a partial translation of the company's articles of incorporation, and a 2004 financial statement. The petitioner did not offer additional evidence of the beneficiary's employment capacity in [REDACTED]

The director issued a request for evidence on February 24, 2006, requesting the petitioner to submit the following documentation: (1) copies of [REDACTED] payroll records; (2) a statement addressing when the beneficiary was hired to work for [REDACTED], his length of employment, the positions held by the beneficiary during his employment with the company, and why the beneficiary was selected as the chief executive officer of the petitioning entity; (3) an organizational chart of the foreign entity's managerial hierarchy and staffing levels clearly identifying the beneficiary's position with respect to other employees; (4) a brief description of the positions held by the beneficiary's subordinates; and (5) a detailed description of the specific job duties performed by the beneficiary in the foreign company, including a "concrete" depiction of what the beneficiary did on a day-to-day basis.

The petitioner's former counsel responded in a letter dated May 15, 2006. Counsel explained that the requested evidence, such as the foreign company's payroll records and organizational chart, does not make reference to the beneficiary "because he has in effect been operating the U.S. [c]ompany since 1997 and therefore does not hold a corporate position with the [f]oreign [c]ompany." Counsel states that "there currently are no individuals at the [f]oreign [c]ompany under [the beneficiary's] supervision." Counsel submits copies of the [REDACTED] payroll records for the months of December 2005 through March 2006 and its 2005 withholding statements, as well as an organizational chart depicting the company's March 2006 staffing levels.

In an August 7, 2006 decision, the director concluded that the petitioner had not demonstrated that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director stated that the description offered of the beneficiary's former position "is too general and vague to convey any understanding of exactly what the beneficiary [was] doing on a daily basis." The director stated that the petitioner's unsupported statements that the beneficiary formulated the company's objectives and business plans and established its policies are not sufficient to demonstrate that the beneficiary performed primarily managerial or executive job duties. The director further noted that the petitioner had neglected to submit requested evidence of the beneficiary's employment with the foreign company, and concluded that because the beneficiary "has in effect been operating

the U.S. company since 1997 and he has been paid through the U.S. company's payroll . . . [he] has never been employed with the foreign company." Consequently, the director denied the petition.

The petitioner filed an appeal on September 6, 2006, claiming that its former counsel had not submitted specific evidence of the beneficiary's employment in a primarily executive capacity. In an appended appellate brief the petitioner addresses the beneficiary's employment as [redacted] chief executive officer from 1997 through 1999, explaining:

Mexican corporations are not required to maintain the same records as a California corporation, and thus, specific records of [the beneficiary's] duties are not memorialized in minutes and resolutions. However, the Articles of Incorporation of [redacted] specifically provide the duties of a [c]hief [e]xecutive [o]fficer, as . . . manage the corporation; exercise corporate general powers; sign contracts; lend and borrow; preside over corporate meetings; hire and fire; delegate authority; grant pardons; and litigate in a court of law as representative of the corporation.

The petitioner submits copies of the beneficiary's Social Security "Notice of Employment" and "Social Security and Infonavit Return," payroll checks, and social security returns as evidence of the beneficiary's purported employment with [redacted] immediately prior to his entrance into the United States as a nonimmigrant. Because the petitioner has not provided translated copies of the documentation, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Nonetheless, the payroll records appear to identify the Mexican company [redacted] not [redacted] as the employer or payor. The petitioner also submits an August 25, 2006 letter from [redacted],<sup>2</sup> in which the company's legal representative certifies that the beneficiary "worked for this company within the period of time between January 1998 [through] December 1999."

Upon review, the petitioner has not demonstrated that in the three years preceding his entrance into the United States as a nonimmigrant, the beneficiary was employed overseas by a subsidiary or affiliate of the United States employer for at least one year in a primarily managerial or executive capacity.

Although the petitioner identified [redacted] as the beneficiary's foreign employer immediately prior to his transfer to the United States, the record contains conflicting representations as to whether the beneficiary was employed by [redacted] and if so, at what time the beneficiary was employed. The petitioner claimed that the beneficiary occupied the position of chief executive officer of [redacted] from 1997 through March 1999. The petitioner's former counsel, however, stated in his May 15, 2006 response to the director's request for evidence that the beneficiary "has in effect been operating the U.S. [c]ompany since 1997," and neglected to submit any requested documentation, such as payroll record, pay slips, or tax statements, establishing the beneficiary's purported employment with Jacmex. Additionally, on appeal, the petitioner submits a letter written on the letterhead of the Mexican company [redacted] in which its legal representative stated that the beneficiary "worked for this company" from January 1998 through December 1999. Furthermore, the untranslated documents submitted on appeal also reference the company [redacted]. The petitioner has failed to provide a clear and consistent account of the beneficiary's employment prior to his transfer to the United States company as a nonimmigrant. Absent translated documentation unambiguously

<sup>2</sup> The petitioner represents and [redacted]

as an affiliate of both the United States company

identifying [REDACTED] or [REDACTED] as the beneficiary's foreign employer and establishing the period during which the beneficiary was employed, the AAO cannot determine whether the beneficiary has satisfied the statutory or regulatory requirements for the requisite foreign employment. *See* § 203(b)(1)(C) of the Act; *see also* 8 U.S.C. § 204.5(j)(3)(i)(B).

The AAO notes that even if [REDACTED] were considered the beneficiary's foreign employer immediately prior to his transfer to the United States, the record is considerably deficient in establishing that the beneficiary was employed in a primarily managerial or executive capacity as the company's chief executive officer. The initial description offered by the petitioner contains only general representations of the beneficiary's job responsibilities, such as being responsible for "the overall business operations" and "the planning and formulation of the company's objective and business plans," and "establish[ing] a positive working environment." The regulations require that the petitioner submit a statement demonstrating that the beneficiary was employed abroad in a primarily managerial or executive capacity. *See* 8 U.S.C. § 204.5(j)(3)(i)(B). 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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 petitioner's former counsel neglected to submit relevant evidence requested by the director with respect to the beneficiary's foreign employment. While the petitioner submits an additional, albeit generalized, job description on appeal, it will not be considered in the instant analysis. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The 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).

Based on the above discussion, the record as presently constituted does not establish that the beneficiary was employed abroad for the requisite time period in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

In its letter submitted with the Form I-140, the petitioner provided the following description of the beneficiary's employment as chief executive officer:

He will continue to establish and implement corporate goals and policies. He will continue to receive general supervision, or direction from our Board of Directors. He will also be responsible for the successful operation and development of our company's services. [The beneficiary] will also continue to be responsible for the overall implementation of a successful organizational plan. He will continue to strive to provide vision, and direction,

and the necessary leadership and director of our company's international administrative management services to Jacmex in the export and distribution of American-made diesel auto parts, in order to assure the successful fulfillment of our company's mission, goals and objectives. He will continue to be responsible for coordinating our company's strategic planning concepts.

[The beneficiary] will also continue to be responsible for directing the implementation of strategic alliances with other domestic and international companies for the purchase of American-made auto parts products, for the exportation and/or distribution in the Mexican market. He will also continue to be responsible for directing the expansion and development of our company in the states [sic] of California.

[The beneficiary] will also continue to be the primary executive responsible for overseeing our company's international business interests, reviewing the operations and performance of our group of international companies, and recommending policies, programs, and long-term planning to the Board. He will be the primary executive in charge of overseeing our sister-company's Circle K store and gas facility, and for directing long-term planning of the facilities. In this position he will also continue to exercise ultimate authority over developing sale promotions, public relations, and maintenance of the Circle K store and gas station services.

As he has over the past six years, [the beneficiary's] approximate percentage of time spent in each of his duties is as follows:

<u>Percentage of Time</u>	<u>Description of Duties</u>
25%	Oversee company's domestic and international business interests;
20%	Review operations and performance of affiliates;
10%	Preservation of company's distribution structure and facilities;
10%	Direct long-term planning of the facilities;
10%	Exercise authority over development of corporate image, objectives, and public relations;
10%	Achieve and maintain company's recognition for excellence in service;
15%	Overall direction of company financial objectives.

The petitioner also discussed the beneficiary's responsibilities with respect to the purchase of gasoline for the Circle K gas station, and "implementing strict vigilance of internal controls . . . by maximizing employee efficiency, keeping inventory costs at a minimum and maximizing gross profit."

The petitioner submitted an organizational chart of the United States company, depicting the beneficiary as overseeing two administrative assistants, a store manager, an assistant store manager, six store clerks, and five car wash operators. Despite the staffing levels identified on the petitioner's organizational chart, the petitioner's quarterly report ending September 30, 2005 suggests that at the time of filing, the petitioner

employed the six store clerks, of which three appear to have been full-time employees, and four car wash operators, none of which appear to have been full-time employees.

The petitioner also provided a copy of a March 31, 2003 management service agreement outlining the petitioner's role as a consultant to its real estate development affiliate for the duration of three years. The associated responsibilities included "establish[ing] and implement[ing] corporate goals and policies," "exercis[ing] wide latitude in discretionary decision-making," "direct[ing] the management . . . of activities through other executive, managerial, professional and administrative staff," "develop[ing] and implement[ing] a marketing plan," "creat[ing] advertising materials and [a] promotional strategy," and "supervising marketing."

In his February 24, 2006 request for evidence, the director directed the petitioner to submit: (1) a detailed description of the beneficiary's specific job duties in the United States entity; (2) a "concrete description" of the beneficiary's "day-to-day execution" of the position of chief executive officer; (3) a list of the employees supervised by the beneficiary, their job titles and wages, and a description of each position; (4) an organizational chart of the United States company; (5) signed and certified copies of the petitioner's 2004 and 2005 federal income tax returns and quarterly wage reports for the last four quarters; and (6) copies of the petitioner's payroll summary and Internal Revenue Service (IRS) Forms W-2 and W-3.

In his May 15, 2006 response, the petitioner's former counsel referenced the letter submitted with the initial filing, stating it "greatly detail[ed] [the beneficiary's] duties as [c]hief [e]xecutive [o]fficer of the U.S. [c]ompany." Counsel attached a copy of the letter for review again by the director. Counsel further provided:

Since September 15, 2005 [the period during which the instant petition was filed], [the beneficiary] has primarily work[ed] in evaluating the U.S. [c]ompany's continued operation of the Circle K store and gas station, as well as working as a link between the Mexico [c]ompany's [b]oard through the management contract that exists between the U.S. and Mexico companies.

Counsel submitted a revised organizational chart and an amended outline of the beneficiary's job duties, which identified his subordinate staff and responsibilities in March 2006 rather than those held by the beneficiary at the time the petition was filed. As a result, the revised organizational chart and outline are not probative of the beneficiary's employment capacity, and will not be considered herein. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (finding that 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). Counsel also provided a brief description of the position held by the beneficiary's lower-level staff.

In the August 7, 2006 decision, the director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director restated the offered job descriptions, finding that they were "vague and nonspecific" and "fail[ed] to demonstrate what the beneficiary does on a day-to-day basis." The director referenced examples of the petitioner's generalized statements, and noted that they did not "define the goals, policies, [or] strategies, or clarify who actually performs the marketing, budgeting, finance and accounting, advertising, and personnel functions." The director further found that a review of the petitioner's staffing levels, and particularly the

part-time employment of several workers, failed to demonstrate that the beneficiary satisfied the statutory requirements of "executive capacity." Accordingly, the director denied the petition.

On appeal, the petitioner contends that the record did not contain specific evidence of the beneficiary's proposed employment in a primarily executive capacity. In its appended appellate brief, the petitioner claims that its former counsel "only provided general descriptions of [the beneficiary's] duties . . . [and] did not provide specific documentation which memorialized the actual decisions rendered by [the beneficiary] in his executive capacity." The petitioner submits a list of "[s]pecific executive duties" and additional evidence, including the beneficiary's employment agreement with the petitioning entity, copies of internal correspondence and the minutes from the petitioner's meetings of its directors and shareholders, which the petitioner states contains "specific executive actions undertaken by [the beneficiary]," and the job descriptions of the petitioner's store manager, administrative manager, and cashier supervisor. The petitioner also offered documentary evidence of the beneficiary's participation in new business activities in the United States.

The AAO notes that the new job outline provided by the petitioner on appeal will not be considered. The director previously requested a "more detailed" and "concrete" description of the beneficiary's executive or managerial job duties, yet the petitioner neglected to provide the requested evidence in its response. As explained previously, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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. § 204.5(j)(5).

The generalized statements offered by the petitioner are not sufficient to demonstrate that the beneficiary would occupy a primarily managerial or executive capacity. The petitioner's initial letter provides only a broad description of the responsibilities associated with the beneficiary's position as chief executive officer, such as establishing corporate goals, maintaining responsibility for the petitioner's business success, reviewing operations, directing long-term planning, and "exercising ultimate authority over developing sale promotions, public relations, and maintenance of the Circle K store and gas station services." Similarly, the "[d]escription of duties" provided in the same letter essentially reiterated the petitioner's broad statements, failing to name any managerial or executive job duties specifically related to the beneficiary's employment in the petitioning entity. As instructed earlier, reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner's response to the director's request for evidence is equally vague and deficient, focusing instead on a change in the responsibilities held by the beneficiary since the filing date. The AAO stresses the petitioner's obligation to establish the beneficiary's eligibility for the requested immigrant visa classification at

the time the petition was filed. *See Matter of Katigbak*, 14 I&N Dec. at 49. Again, a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Id.* Despite the director's request for a "detailed" and "concrete" description of the job duties performed by beneficiary during a typical workday, the petitioner's former counsel referenced the petitioner's initial letter as evidence of the petitioner's qualification as an executive. 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 petitioner's failure to specifically describe the beneficiary's managerial or executive position is particularly relevant in light of the company's various business operations. Based on the record, at the time of filing, the petitioner was operating a gasoline and convenience store and car wash, as well as distributing diesel parts and providing administrative management services to Jacmex and acting as a management consultant to its United States affiliate. The job descriptions offered by the petitioner only briefly reference each of these businesses, but fall significantly short of defining the beneficiary's specific role in each or in establishing that the beneficiary's job duties with respect to each operation would be primarily managerial or executive. If the petitioner chooses to represent the company as a wholesaler, distributor, and consultant to affiliated companies, it must clearly document and explain who is performing the related services, what specific job duties the beneficiary would perform in each function, and how the beneficiary would be employed in a primarily managerial or executive capacity.<sup>3</sup> The beneficiary's title of chief executive officer, by itself, is not sufficient to establish the beneficiary's proposed employment in a primarily managerial or executive capacity. 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)).

Moreover, an analysis of the petitioner's staffing levels in light of its overall purpose and stage of development undermine the petitioner's claim that the beneficiary would occupy a primarily managerial or executive position in the United States entity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

As noted above, at the time of filing, the petitioner was doing business as a gasoline and convenience store and car wash, while also functioning as a parts distributor and offering management services to two separate organizations. The evidence offered documents the petitioner's staffing in the gasoline and convenience store and car wash only. The petitioner did not identify any workers who would assist in performing the functions related to its additional operations, particularly its distributions, exports, inventory, and accounts payable. Additionally, with respect to the gasoline and convenience store and car wash, it is not clear from the record whether each of the business' functions might plausibly be met through the employment of its lower-level staff, which included seven part-time employees. The AAO notes that based on copies of beneficiary's electronic-mail correspondence, which the petitioner submitted on appeal, it appears that the beneficiary

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<sup>3</sup> The April 2004 amended operating agreement for [REDACTED] the United States real estate development company, identifies the beneficiary as managing the day-to-day management of the organization. However, any decisions pertaining to the company's staffing, borrowing funds, encumbering or mortgaging assets, or purchasing or selling assets in excess of \$5,000 would require the consent of the additional member holding a majority interest in the organization. Accordingly, this document is not probative of the beneficiary's purported managerial or executive authority.

would be performing non-qualifying tasks related to choosing and maintaining the store's equipment and products, determining suppliers, and overseeing the petitioner's finances. The record as presently constituted does not establish whether the petitioner's reasonable needs might plausibly be met while employing the beneficiary in a primarily managerial or executive capacity. The AAO notes that 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).

Based on the forgoing discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, for this additional reason, the appeal will be dismissed.

The third issue in this proceeding is whether the petitioner demonstrated that Jacmex and the United States entity enjoyed a qualifying relationship on the date of filing the immigrant visa petition.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States 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); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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

*Affiliate* means:

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

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

\* \* \*

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In its initial letter, the petitioner identified Jacmex as an affiliate of the United States company, noting its responsibility to distribute and provide wholesale diesel parts and administrative management services to the Mexican company. In the attached documentation, the petitioner submitted: (1) the minutes from the United States company's February 12, 1990 organizational meeting identifying [REDACTED] and Ilse [REDACTED] as the owners of 90 and 10 shares of the company's stock, respectively; (2) stock certificate numbers one and two identifying [REDACTED] and [REDACTED] as

shareholders and their stock interests; (3) a copy of the petitioner's February 26, 1990 checking account statement; (4) copies of two transaction receipts and a credit receipt for deposits made into the petitioner's checking account; (5) translated tax returns for the years 2002 through 2004; (6) a partial translation of articles of incorporation naming and shareholders of 95 percent and 5 percent of the organization, respectively; and (7) a January through December 2004 financial statement and balance sheet for Jacmex.

The director subsequently requested that the petitioner submit copies of all stock certificates issued by the petitioner, its stock transfer ledger, a copy of its franchise agreement to operate the Circle K gasoline and convenience store, and a copy of the foreign entity's annual report naming its affiliates, subsidiaries or branch offices and its percentage of ownership in each. The director also asked that the petitioner submit evidence that the petitioner's shareholders furnished consideration for the petitioner's stock, including copies of original wire transfers, cancelled checks, and deposit receipts. The director instructed that in the case of funds originating from someone other than the foreign entity, the petitioner should explain the source of the transfer, the transferor's relationship to the stockholder, and the reason for the transfer.

In his May 15, 2006 letter, counsel for the petitioner noted that the previously referenced February 27, 1990 account statement and transaction receipts totaling \$5,000 establish that transferred monies to the petitioner "for the initial stock purchase and establishment of the U.S. [c]ompany." Counsel again provided copies of the petitioner's stock certificates and stock ledger, stressing that the ownership date reflected on the stock certificates and stock transfer ledger corresponds to the date of the funds transfer on the petitioner's bank statement. Counsel also submitted copies of the franchise agreement to operate the Circle K, as well as copies of's December 31, 2006 balance sheet and annual financial statement, and a list of the Mexican company's shareholders.

The director concluded in his August 7, 2006 decision that the petitioner had not demonstrated that Jacmex and the United States entity enjoyed a qualifying relationship at the time of filing. The director, focusing on the franchise agreement to operate the gasoline and convenience store, found that the petitioning entity was a franchise, thereby precluding the foreign entity's ownership and control of the operation. Consequently, the director denied the petition.

On appeal, the petitioner challenges the director's failure to recognize an affiliate relationship between and the petitioning entity. The petitioner stresses that is a majority shareholder in both and the United States corporation, thus creating the requisite affiliate relationship. The petitioner contends that the director "misstates the character of a franchise," stating that "Circle K Corporation does not have any interest or ownership whatsoever in any of the companies owned and managed by the Petitioner, nor can it own any of the business assets." The petitioner states "the affiliate companies have full ownership and control of their business, irrespective of the franchise relationship." The petitioner contends that the record contains sufficient documentation of an affiliate relationship between and the United States company.

**The petitioner submits: an untranslated copy of's articles of incorporation and the petitioner's articles of incorporation and by-laws; copies of the minutes from the petitioner's annual meetings of directors in the years 2000, 2001, and 2003 through 2005; copies of the minutes from the petitioner's annual shareholders' meetings held in the years 2000 through 2005; and a copy of stock certificate number four issued to the beneficiary on December 31, 2000 identifying him as the owner of ten shares of the petitioner's stock.**

Upon review, the petitioner has not established that [REDACTED] and the petitioning entity enjoyed a qualifying relationship at the time the petition was filed.

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. 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.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The petitioner's claim of an affiliate relationship is based on [REDACTED] ownership and control of the United States organization, or, specifically, on whether [REDACTED] furnished consideration in exchange for his purported majority stock interest in the petitioning entity. The petitioner relies on copies of a February 27, 1990 bank statement, an advice of credit, and two transaction receipts to evidence, as claimed by former counsel in his May 15, 2006 letter, [REDACTED] transfer of monies from his personal bank account to the petitioner. The AAO acknowledges the instructions on the advice of credit stating that \$2,000 had been credited to the petitioner's checking account from a bank account held by [REDACTED]. However, there is no corresponding evidence, such as [REDACTED] bank statements or the associated wire transfer receipt, corroborating the claimed withdrawal. 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)). Moreover, even if the AAO were to accept this transfer as originating with [REDACTED] the transferred monies would account for only half of the consideration to be paid by [REDACTED] in exchange for his claimed 90 percent ownership interest.

The remaining documentation is not probative of the ownership and control of the petitioning entity. The two transactions receipts demonstrate only that a cumulative deposit of \$3,000 was made to the petitioner's checking account in January and February 2000, which, as counsel stressed, was during the same month that the petitioner's stock was issued. The transaction receipts fail to indicate from where the transfers originated. There is no evidence that either deposit originated from an account owned by [REDACTED] or represented payment for the remainder of his claimed stock interest. Moreover, the transaction receipts, which represent two deposits made in person at the California Commerce Bank, contradict counsel's original claim that monies used for the purchase of stock were transferred directly from [REDACTED] personal bank account. The offered documentary evidence fails to link the deposited monies to [REDACTED]. As a result, the limited record is not sufficient to establish that [REDACTED] furnished consideration in exchange for his claimed majority interest in the petitioning entity. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* at 165

The AAO instructs that the Circle K franchise operated by the petitioner is not material to whether a qualifying relationship existed between the foreign and United States entities. The record demonstrates that the petitioner was incorporated in the State of California as a separate and legal entity on January 4, 1990. The appropriate issue in this matter is therefore whether a common ownership and control existed between the petitioner, as a separate United States entity, and the foreign corporation at the time of filing. As the purported association between the two companies is not based solely on a terminable license or royalty agreement, the AAO need to consider the company's operations as a franchise in the present issue. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual"). Accordingly, the director's comments regarding the franchise agreement are withdrawn.

In the instant matter, the director requested specific evidence demonstrating that the petitioner's stock was in fact paid for by its two claimed shareholders, particularly [REDACTED] who was represented as a majority stockholder. The submitted stock certificates **alone are not sufficient to establish** a stockholder's ownership and control of a corporate entity. The 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). Based on the limited evidence, the AAO cannot determine whether [REDACTED] owns and controls the petitioning entity, and likewise, whether an affiliate relationship exists between the foreign and United States entities. The appeal will be dismissed for this additional reason.

The AAO recognizes that Citizenship and Immigration Services (CIS) previously approved four L-1A nonimmigrant visa petitions filed by the petitioner on behalf of the beneficiary. It should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent

residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that 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). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approvals by denying the present immigrant petition.

Finally, 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 for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.