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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
SRC 06 053 53636

Office: TEXAS SERVICE CENTER Date: MAR 27 2007

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

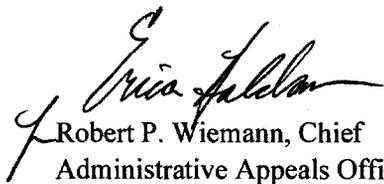
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially denied the employment-based visa petition due to abandonment on the part of the petitioner. Following the filing of a motion to reopen by the petitioner's former counsel, the director withdrew the original denial. The director subsequently issued a notice of intent to deny, and ultimately denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.¹

The petitioner filed the instant 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 partnership operating under the laws of the State of Texas as a wholesaler of office furnishings and shelving. The petitioner seeks to employ the beneficiary as its manager.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; (2) the foreign and United States entities enjoyed a qualifying relationship on the filing date; or (3) at the time of filing, the United States company had the ability to pay the beneficiary's proposed salary.

On appeal, the petitioner's present counsel contends that Citizenship and Immigration Services (CIS) erred in its review of the record and denial of the immigrant visa petition. Counsel submits a brief and additional documentary evidence in support of the appeal.

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.

¹ The AAO notes that on July 18, 1994 an I-360 immigrant petition was filed on behalf of the beneficiary for classification as a special immigrant religious worker under § 101(a)(27)(C) of the Act. Despite certification under the penalty of perjury, the information provided by the petitioner in Part Four of Form I-140 indicates that the beneficiary had not previously had an immigrant visa petition filed on his behalf.

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

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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 December 7, 2005 noting the beneficiary's proposed employment as the manager of the five-person United States organization and his responsibility for expanding the petitioner's wholesale furniture sales. In an appended December 5, 2005 letter, the petitioner addressed the beneficiary's current employment in a "managerial/executive position" with the United States organization and his responsibility "for the purchases of premises for operations, the hiring and training of staff, the selection of and oversight of manufacturer representatives in specific regions of the United States, [and] the financial growth of the company to a solid net income." The petitioner noted the beneficiary's additional responsibilities of formulating strategies for the organization's growth in the United States and the "possible expansion" of its product line. The petitioner also explained its use of manufacturer's representatives to handle marketing of the organization in the Midwest and Southeast United States, and submitted copies of four manufacturer's representative agreements that had been entered into during December 2004 and January 2005. The petitioner noted that two of the four agreements had since been terminated, as they "proved less than satisfactory."

In her April 18, 2006 notice of intent to deny, the director requested that the petitioner submit evidence that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, including a description of the petitioner's staffing levels, occupied positions and the related job duties, copies of Internal Revenue Service (IRS) Form W-2 issued to all employees in 2005, and a "definitive statement" addressing the following: (1) the beneficiary's position title, job duties, and the percentage of time spent on each named task; (2) the subordinate managers, supervisors or employees who would report directly to the beneficiary; (3) a brief description of the job duties performed by the beneficiary's subordinates; (4) the qualifications necessary to perform in each position; (5) the level of authority held by the beneficiary and whether the beneficiary would function at a senior level in the organization; and (6) an explanation of who would perform the sales and services offered by the petitioner.

The petitioner's former counsel responded in a letter dated May 16, 2006. In an attached February 10, 2006 letter, the petitioner identified the beneficiary as the senior managing partner of the United States organization, a position that the petitioner indicated required "a sound commercial knowledge, marketing experiance [sic], and personal and human resource ability along with [the] ability to formulate[,] develop and adjust strategy as circumstances require[.]" The petitioner referenced an attached list of the following job duties, which the petitioner stated documented the beneficiary's "overall financial and executive control" of the petitioning entity:

- Maintaining [c]orporate [g]oals and [f]ocus 12%
- Reviewing and [b]enchmarking [e]ffectiveness 5%
- Overseeing [i]nventory [m]anagement 2%
- Setting and overseeing sales & marketing policy 17%
- Manage and oversee credit banking and financial procedures 3%
- Ensure all managers are trained and motivated and performing 10%
- U.K. report and development 10%
- Ultimate oversight of wages, human resources, and safety issues 5%
- Develop international contacts 8%
- Set pricing policies 5%
- Ensure customer satisfaction standards are maintained 7%
- Motivational meetings with clients 3%
- Researching business opportunities 8%

- Representing the company to legal and financial entities 2%
- Staff and agency recruitment 3%

The petitioner submitted an organizational chart of the United States entity identifying the beneficiary as president with responsibilities related to company strategy, sales and marketing planning, staff supervision, key account handling, client management, and "[f]inancial, [p]urchasing [s]ales responsibility." The organizational chart depicted the beneficiary as directly overseeing the company's national sales manager and office manager, and identified three lower-level workers employed in the positions of sales manager for the State of Texas, general manager, and distribution and facilities. The AAO notes that based on the petitioner's fourth quarter wages and tax filings, despite being identified on the organizational chart, the petitioner did not employ a distribution and facilities clerk on the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (stating 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). The petitioner also noted on the organizational chart its use of two manufacturer representatives for sales in the following areas: North Carolina, South Carolina, eastern Tennessee, Illinois and southern Wisconsin. On an appended statement, the petitioner provided a brief description of the job responsibilities held by the beneficiary's subordinate employees.

In a June 6, 2006 decision, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the petitioner had provided a "vague description of the job duties performed by the beneficiary," and "[did] not clearly portray [the beneficiary's] job assignments" as being primarily managerial or executive in nature. The director noted that the statement of the beneficiary's individual job duties indicated that "a major part of the beneficiary's [time] [would] be devoted to business marketing, staff recruitment and supervision, and other duties comprising the daily productive tasks of the company." The director considered the beneficiary's employment as manager as being comprised of primarily "lower-level productive tasks" of the business. Consequently, the director denied the petition.

The petitioner's present counsel filed an appeal on July 6, 2006 claiming that CIS' failure to review evidence submitted in response to the director's notice of intent to deny resulted in its incorrect finding that the beneficiary's job duties are not primarily managerial or executive in nature. In an attached letter, dated July 5, 2006, counsel explains that the beneficiary's proposed position of executive partner, which counsel notes would be equivalent to the position of president in a corporation, "is the most executive and senior position in the [United States partnership]." In support of the beneficiary's claimed "managerial authority" in the United States organization, counsel references the documentary evidence previously submitted for review by the CIS, as well as an additional "support letter" from the petitioner, and notes that CIS twice deemed the submitted evidence sufficient to establish the beneficiary's managerial capacity for purposes of an L-1A nonimmigrant visa petition. Counsel states:

[The beneficiary] is the sole manager of the U.S. partnership as well as partial owner. He has sole responsibility for management of the organization, complete supervisory control of the work of his employees, including other managers, as well as discretion over personnel actions, and ultimate authority over the day-to-day activities of the company. [The beneficiary] does not perform the duties of a first-line manager.

Counsel further challenges the director's findings, stating:

In alleging that the beneficiary does not meet the regulatory definition[,] [CIS] does not provide any specific analysis as to why [the] beneficiary's job assignments are lower-level job tasks falling outside the definition of manager. In fact, the sentence in the job description focused on by [CIS] when taken in combination with the other supporting documents clearly demonstrates that the beneficiaries [sic] duties as they related to the supervision of others in carrying out the 'business marketing, staff recruitment and supervision and other duties comprising the daily productive tasks of the company.' The evidence in support in [sic] includes an organizational chart.

Counsel submits on appeal copies of documentation previously submitted for the record, including the outline of job duties performed by the beneficiary and list of personnel. Counsel also submits a separate undated support letter, in which the petitioner provides the following description of the beneficiary's proposed employment:

The [e]xecutive [p]artner and [m]anager is responsible for implementing and directing the goals and objectives of the [c]ompany in accordance with [the petitioner's] business plan. He analyzes operations and evaluates the performance of the [c]ompany and staff to determine areas of cost reduction and efficiency. In addition, the [e]xecutive [p]artner and [m]anager is responsible for consulting with staff members and business partners to establish [c]ompany policies and plans. He reviews financial statements, sales, and activity reports to ensure that the [c]ompany's objectives of steady growth and expansion are achieved.

The [e]xecutive [p]artner and [m]anager is responsible for directly supervising a staff of seven individuals in the United States, and a staff of 12 in the United Kingdom. The [e]xecutive [p]artner and [m]anager is responsible for delegating the everyday responsibilities necessary to import and sell office furnishings to lower-level employees under his direct supervision. The [e]xecutive [p]artner and [m]anager directly supervises a staff of seven individuals in the United States. In addition, he makes staffing-level determinations, and exercises authority over all personnel decisions, including the authority to hire and fire, grant or deny requests for leave, and promotions.

The [e]xecutive [p]artner and [m]anager monitors and directs marketing activities, and is responsible for supervising all activities related to the sale of products and the provision of services. He makes ultimate decisions regarding the goods to be sold in the U.S. market, sets prices, makes determinations and forecasts of customer demand, and oversees the movement of the company's goals into and out of production facilities.

* * *

[The beneficiary] holds weekly teleconferences with directors of the [United Kingdom] affiliate in order to evaluate the [c]ompany's product line, sales policies, financial goals, and current business practices. He reviews market data to determine the nature and marketability of new products, as well as the availability of products trends within the market.

* * *

As an executive partner of a growing business, [the beneficiary] is intimately involved in determining staffing levels requirements, and overseeing personnel processes. He maintains complete authority over all personnel decisions, including the authority to hire and fire, grant or deny requests for leave, and issue promotions. Through the selection and termination of departmental managers, [the beneficiary] ensures the efficiency and smooth operation of the [c]ompany. He is responsible for monitoring and directing marketing, and supervising all activities related to the sale of products and provision of services. [The beneficiary] makes the ultimate decisions regarding the goods to be sold in the U.S. market. He is responsible for setting prices, and making determinations and forecasts of customer demand.

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.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. The beneficiary is identified on the Form I-140 as a manager, yet is claimed to possess "executive control" over the day-to-day tasks of the United States organization. Similarly, counsel contends on appeal that the beneficiary is the petitioner's executive partner and occupies "the most executive and senior position in the company." In her brief, however, counsel focuses on the statutory definition of "managerial capacity" and alleges that the beneficiary's position as manager "falls easily within the definition of managerial authority."

A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. A petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Here, the petitioner failed to resolve the conflicting representations of the beneficiary's employment capacity. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

While the petitioner offered a list of job responsibilities held by the beneficiary, many are vague and do not specify the managerial or executive tasks associated with each. For example, the two tasks that would occupy the largest portion of the beneficiary's time, 29 percent, are "setting and overseeing sales [and] marketing policy" and "[m]aintaining [c]orporate [g]oals and [f]ocus." These brief statements fail to specify the associated managerial or executive tasks or define how the beneficiary would be acting in a primarily managerial or executive capacity, particularly with respect to the company's sales and marketing functions, on which the beneficiary is noted as spending 17 percent of his time. The beneficiary is also noted as spending an additional 20 percent of his time on training and motivating managers and reporting and developing the purported affiliate in the United Kingdom. As in the earlier statements, these vague representations fail to

explain how the beneficiary's role in training managers would be managerial or executive in nature, or what specific managerial or executive responsibilities the beneficiary would hold with respect to the overseas organization. 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 outline of job responsibilities does not coincide with or clarify the six responsibilities assigned to the beneficiary on the organizational chart. For example, based on the organizational chart, the beneficiary would be responsible for such tasks as handling key accounts, sales and marketing planning, client management, and "financial purchasing sales responsibility." Other than identifying the beneficiary's role in developing international contacts and meeting with clients for motivational purposes, the previously-referenced list of job responsibilities does not indicate that the beneficiary would personally interact with the company's "key account[s]" or clients or that the beneficiary would personally sell the petitioner's products, as suggested by the description on the organizational chart. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Similarly, the beneficiary's role in the organization's "financial purchasing sales responsibility" remains undefined. The beneficiary is noted as overseeing the organization's "banking and financial procedures," sales policies and "inventory management." However, because of the petitioner's limited statements with respect to these responsibilities, the degree of the beneficiary's participation and his specific managerial or executive job duties with respect to these functions is not clear. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The record is equally vague as to the beneficiary's responsibility of "forming and cementing links with suppliers and customers," a claim made by the petitioner in a February 10, 2006 letter submitted in response to the director's notice of intent to revoke. Case law dictates that a petitioner's blanket claim of employing the beneficiary as a manager or executive without a description of how, when, where and with whom the beneficiary's job duties occurred is insufficient for establishing employment in a primarily managerial or executive capacity. *Id.*

The petitioner's failure to explain the beneficiary's specific managerial or executive tasks is particularly relevant, as the record casts doubt on the petitioner's claim that the beneficiary would hold a primarily managerial or executive role with respect to the organization's sales and marketing functions, the task identified by the petitioner as occupying the largest portion of the beneficiary's time.

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

In the instant matter, the petitioner claimed to employ the beneficiary, as well as a national sales manager, sales manager for the State of Texas, office manager, and general manager on the filing date. The petitioner also noted its use of two manufacturer representatives for its sales in Illinois, southern Wisconsin, North and South Carolina, and eastern Tennessee. The AAO again notes that although identified on the organizational chart, there is no documentary evidence establishing the employment of a distribution and facilities clerk at the time the petition was filed. In addition, with respect to the petitioner's claimed manufacturer's representatives, the contract submitted as evidence of the organization's representation in Illinois and southern Wisconsin is not signed by the manufacturer representative, thereby suggesting that the petitioner does not maintain a sales representative in that area. As conceded by the petitioner in its December 5, 2005 letter, the other three signed contracts for representation that had been submitted for the record were terminated prior to this filing. The petitioner does not claim to use other manufacturer representatives in these areas.

The limited evidence of the petitioner's use of sales representatives begs the question of whether the organization's reasonable needs with respect to its sales function are met through the services of its one manufacturer representative, as well as its national sales manager and sales manager for the State of Texas. The AAO notes that the petitioner's national sales manager is describing only as "developing dealerships outside Texas," while the sales manager for Texas is responsible for developing dealers within that state. Neither employee is identified as actually selling the petitioner's products. Based on the record, the petitioner has one manufacturer representative for sales in North and South Carolina and eastern Tennessee. The petitioner has not accounted for the performance of its sales in the remaining areas. A review of the petitioner's invoices reveals that the petitioner has sold to customers, including both individuals and stores, in such unrepresented states as Florida, California, Iowa, Illinois, Arizona, Ohio, Louisiana, Oregon, and Maryland, and in Canada. In light of the beneficiary's responsibility of handling the organization's key sales accounts, it is questionable whether at the time of filing the beneficiary would be personally responsible for performing non-qualifying tasks associated with the petitioner's sales in the unrepresented areas. 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).

Moreover, as noted previously, at the time of filing the petitioner did not employ a distribution and facilities worker, as suggested on its organizational chart. The petitioner has not accounted for the performance of the non-qualifying tasks related to its warehousing, shipping and import functions, including the receipt of products reflected on invoices from a company in Taiwan. The AAO observes that although the petitioner's organizational chart identifies the responsibilities of its employee, [REDACTED], as relating to warehousing and stock control, the attached "staff overview" states that he would assist with "stock control," but that [REDACTED] the distribution and facilities clerk, would be responsible for "warehousing shipping and installations." As [REDACTED] was not an employee of the petitioning entity on the filing date, the record does not establish who would perform these additional non-managerial and non-executive tasks of the business. Accordingly, the record as presently constituted does not demonstrate that the petitioner's reasonable needs would be met through the services of its staff on the date of filing.

The AAO notes that counsel's response on appeal is not sufficient to establish the beneficiary's purported employment in a primarily managerial or executive capacity. Counsel chief claim is that the evidence provided in support of the instant immigrant visa petition "has been deemed sufficient to establish the managerial capacity for the purpose of the beneficiary's [L-1A] extension."

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 the instant immigrant visa proceeding, counsel's brief and unsupported statement on appeal that the beneficiary possesses managerial authority due to his "sole responsibility for the management of the organization, complete supervisory control of the work of his employees, including other managers, discretion over personnel actions, and ultimate authority over the day-to-day activities of the company," is not sufficient to overcome the above-outlined inconsistencies and inadequacies in the record. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

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).

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

The second issue in this proceeding is whether the foreign and United States entities enjoyed a qualifying relationship on the date of filing.

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 December 5, 2005 letter, the petitioner claimed to possess an affiliate relationship with the foreign entity, explaining that the beneficiary and his wife together own 72 percent of the partnership in the United Kingdom and equally own the United States partnership. An appended deed of partnership certificate for the foreign entity outlines its ownership interests as of January 2003, the time during which the partnership agreement was amended, as follows:

14%
14%
36%

36%

In her April 18, 2006 notice of intent to deny, the director directed the petitioner to submit documentary evidence of the ownership and control of the foreign and United States organizations. The director noted: "[t]his may be in the form of stock certificates, copies of corporate bylaws/constitutions which clearly indicate stock ownership, certified affidavits from corporate executives or corporate legal [counsel], or copies of published annual reports which indicate affiliates and/or subsidiaries and the percent of ownership held by the parent corporation."

In her May 16, 2006 response, the petitioner's former counsel referenced a certificate from the State of Texas certifying the petitioner's assumed business name and noting the beneficiary and his wife as registrants of the partnership in Texas. Counsel also attached a partnership agreement for the foreign entity, dated January 21, 2003, and identifying the four above-outlined partners and each person's corresponding interest. Counsel stated that as the founders of the foreign organization, the beneficiary and his wife "retain the majority ownership and control of the entity."

In the June 6, 2006 decision, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States partnerships at the time of filing. The director identified the documentary evidence submitted by the petitioner in support of the purported affiliate relationship, but noted that the petitioner had not presented evidence of the petitioner's ownership. Consequently, the director denied the petition.

On appeal, the petitioner's present counsel claims that CIS erred in rejecting the petitioner's claim of an affiliate relationship between the United States and foreign entities. Counsel states that the evidence submitted on appeal demonstrates that the beneficiary "owns and controls approximately an equal amount" in both the United States entity and the foreign organization. Counsel contends:

[The beneficiary] owns a 36% interest in [the foreign entity] in the UK and along with his spouse who owns another 36% together they own an overwhelmingly controlling interest of 72%. [The beneficiary] also owns half of the controlling interest in [the petitioning entity] or 50% of the business interest.

Primary and secondary evidence clearly demonstrates that [the beneficiary] exercises ownership and control of each of these businesses. He has declared the profit and loss from the [p]artnership of [the petitioning entity] on his [f]ederal [t]ax return. He has further provided independent documentation attesting to his ownership and management of both companies from Frost Bank and [a] [c]ertified [p]ublic [a]ccountant, serving to document both his ownership and control of the businesses. Other evidence including company catalogs, show that [the beneficiary] as [sic] head of both [the United States and foreign entities].

Counsel submits copies of the following additional evidence on appeal: (1) a June 29, 2006 certificate of common ownership signed by the beneficiary, in which the beneficiary claims to hold with his wife majority control, or 72%, over the foreign partnership, and further claims to be a co-owner of the United States partnership; (2) a deed of partnership certificate executed by the beneficiary and his wife on June 29, 2006, stating that each owns a 50 interest in the United States partnership; (3) the previously submitted partnership

certificate for the foreign entity and assumed name certificate for the Texas partnership; (4) a June 29, 2006 letter, in which the executive vice-president of Frost Bank in Texas states that the "documentation presented to us indicates full ownership of [the petitioning entity] by [the beneficiary and his wife]," and further claims to possess an "understand[ing]" that the beneficiary and his wife "maintain majority and full ownership interests" in the foreign organization; (5) a June 28, 2006 certification from a certified public accountant stating that upon review of documentation, the beneficiary and his wife "maintain majority ownership interests" in the United States and foreign partnerships; (6) a February 13, 2006 letter from a finance designer in the United Kingdom, stating that the beneficiary "retains the ultimate decision on all major management and financial decisions that affect the [foreign] company"; (7) the beneficiary's year 2005 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return; (8) a commercial contract signed by the beneficiary and his wife to purchase the petitioner's business premises; and (9) documentation, including a partnership authorization, related to a loan from Frost Bank to the petitioning entity, naming the beneficiary and his wife as general partners of the United States partnership and guarantors of the loan.

Upon review, the petitioner has not demonstrated that the foreign and United States entities enjoyed a qualifying relationship on the date of filing.

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.

The record as presently constituted contains inconsistencies and inadequacies that fail to corroborate the petitioner's claim of an affiliate relationship between the foreign and United States partnerships.

In the instant matter, the petitioner has not submitted sufficient evidence to demonstrate the beneficiary's ownership interest in the United States organization. The AAO notes that despite the director's request for certified affidavits or specific documentary evidence demonstrating each organization's ownership, the petitioner provided only a certificate from the State of Texas certifying the petitioner's assumed business name. The offered business certificate is not probative of beneficiary's interest in the United States partnership or the ownership of the organization. The record is devoid of relevant documentary evidence, such as a partnership agreement, IRS Form 1065, Partnership Return of Income, or IRS Schedule K-1 (Form 1065), Partner's Share of Income, Credit, Deductions, establishing the organization as either a general or limited partnership and the amount of each share purportedly held by the beneficiary and his wife. This documentation would provide information relevant to determining how the United States organization is owned and controlled. The petitioner's 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). 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)).

The petitioner did not submit the above-noted certifications of ownership until the instant appeal. 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. 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.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. Furthermore, the bank letter offered by the petitioner is not probative of the organizations' ownership, as it is not clear on what the bank is basing its inference. The petitioner has not identified what documents were presented to the bank for review in determining the ownership of the United States and foreign partnerships.

Nonetheless, even if the AAO were to recognize the beneficiary as owning half of the United States partnership, the record does not demonstrate the purported affiliate relationship between the foreign and United States entities. The petitioner claims the existence of an affiliate relationship between the foreign and United States organizations based on the beneficiary's ownership and control of the petitioning entity and a cumulative 72 percent interest in the foreign partnership as a result of shares held by the beneficiary and his wife in the amount of 36 percent each.

The record does not support the petitioner's claim that the beneficiary owns and controls both organizations. The petitioner mistakenly suggests that the beneficiary owns a majority interest in the foreign partnership as a result of a spousal relationship. A familial relationship is not sufficient to establish majority ownership and does not constitute a qualifying relationship under the regulations. CIS has never accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

Moreover, the record suggests that the petitioning entity is owned by two individuals while the foreign organization is comprised of four partners, none of who hold a majority interest in the partnership. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning and controlling approximately the same share or proportion of each entity" 8 C.F.R. § 204.5(j)(2). Based on the record, a qualifying relationship did not exist between the foreign and United States entities at the time of filing. Accordingly, the appeal will be dismissed for this additional reason.

The third issue in this proceeding is whether the petitioner demonstrated its ability to pay the beneficiary his proffered annual salary of \$52,000 at the time the petition was filed.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Any petition filed by or for any employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

With its initial filing, the petitioner submitted a November 21, 2005 letter, in which the company's certified public accountant stated that the net profits from the United States partnership "have been kept in the business of [the petitioning entity]," and that the beneficiary has been receiving income from the foreign entity, which as of September 30, 2005 amounted to \$16,740. In an undated statement submitted in response to the director's notice of intent to deny, the petitioner noted that the beneficiary continues to receive income of approximately \$27,000 from the foreign entity for his daily living expenses.

In her June 6, 2006 decision, the director, noting that the petitioner had not provided audited financial statements, a copy of the beneficiary's IRS Form W-2, or year 2005 federal tax returns, concluded that the petitioner had failed to demonstrate its ability to pay the beneficiary's proposed wages at the time of filing.

Counsel claims on appeal that in its analysis of whether a partnership has the ability to pay a beneficiary's proposed wage, CIS may consider the partners' individual tax returns and personal assets and liabilities in addition to annual reports, federal tax returns, or audited financial statements. As evidence of the petitioner's ability to pay, counsel submits: (1) the petitioner's year 2005 unaudited profit and loss statements reflecting net income of approximately \$100,000; (2) years 2004 and 2005 IRS Forms W-2; (3) the petitioner's first quarter earnings report for 2006; and (4) the beneficiary's 2005 federal income tax return and Schedule C attachment identifying business income in the amount of \$100,542.

Upon review, the evidence offered by the petitioner is not sufficient to establish its ability to pay the beneficiary's proffered annual salary of \$52,000.

The record contains conflicting claims as to the beneficiary's compensation for employment in the United States entity. Initially, the petitioner and its accountant claimed that the beneficiary received income from the foreign entity only, suggesting that the petitioner's profits were not distributed as income to the beneficiary or his wife. On appeal, however, counsel claims that the petitioner's entire profit of approximately \$100,000 was considered income to the beneficiary in 2005, and points to the beneficiary's federal income tax return as evidence.

The AAO recognizes that as a partnership, the petitioner's profits and losses flow through to its partners and are reported on the partners' individual tax returns. Neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A partner is liable for tax on his or her share of the partnership income regardless of whether the income was distributed by the partnership. Department of Treasury, Internal Revenue Service, 2006 Instructions for Form 1065, U.S. Return of Partnership Income, *available at* www.irs.gov/pub/irs-pdf/i1065.pdf (accessed on March 26, 2007).

Here, the beneficiary's individual federal tax return by itself is not sufficient to establish that the beneficiary received an amount equal to or greater than his proposed annual salary of \$52,000 in 2005. Counsel's suggestion that the beneficiary realized net earnings of approximately \$92,000 ignores the petitioner's claim that the beneficiary's wife owns an equal share in the partnership. As the record does not contain copies of the partnership's tax return or Schedules K-1, the AAO cannot determine the beneficiary's proportion of income or analyze whether the partnership's net income or net assets, two factors relevant to determining a partnership's ability to pay the proffered wages, are sufficient to pay the beneficiary's proffered \$52,000 salary. Also, the petitioner has not offered independent and objective evidence of the beneficiary's unencumbered, liquefiable, personal assets, an item that counsel correctly notes may be considered in the

instant analysis. Moreover, the petitioner's unaudited profit and loss statement is not sufficient to overcome the above-noted inconsistencies and inadequacies. 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).

Absent additional documentation evidencing the beneficiary's share in the United States partnership and the amount of income distributed to the beneficiary in 2005, it is unclear whether the petitioner had the ability at the time of filing to pay the beneficiary's proffered salary of \$52,000. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In its December 5, 2005 letter, the petitioner identified the beneficiary as occupying a "managerial/executive position" in the foreign entity prior to entering the United States as a nonimmigrant. The AAO notes that other than the petitioner's blanket statement of the beneficiary's purported qualifying overseas employment, the initial filing did not contain a description of the beneficiary's position in the foreign entity. Additionally, despite the director's request for a definitive statement describing the beneficiary's managerial or executive job duties in the foreign entity, as well as the percentage of time spent on each task, the petitioner's former counsel stated only that the beneficiary was employed for over 18 years as the overseas company's "senior partner." An attached January 14, 2003 letter signed by both the beneficiary as the foreign company's senior partner, and its general manager, indicated that in the position of senior partner, the beneficiary was responsible for the foreign entity's purchasing and marketing decisions. Counsel also submitted an organizational chart of the foreign entity.

The record as presently constituted is not sufficient to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner cannot rely solely on the beneficiary's title of senior partner to establish his purported employment as a manager or executive. The actual duties themselves reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Additionally, the limited evidence offered by counsel in response to the director's notice of intent to deny is not sufficient to establish the beneficiary's eligibility for the requested classification. 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).

Absent additional evidence, the AAO cannot determine whether the beneficiary's employment in the foreign entity was in a primarily managerial or executive capacity. The petition will be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.