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Office: VERMONT SERVICE CENTER

Date: **MAY 15 2007**

IN RE:

Petitioner:

Beneficiary:

[Redacted]

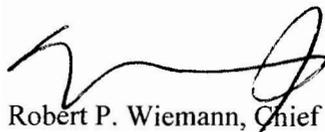
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

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DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of New York in February 2004, which claims to be engaged in the provision of construction services. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on June 26, 2006, determining that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. Counsel asserts that the beneficiary will perform primarily managerial duties, and will supervise a subordinate staff who will relieve him from performing the mundane tasks of the company. Counsel further contends that the director denied the petition, in part, based on the petitioner's failure to submit evidence that was never requested, in violation of the petitioner's due process rights. Counsel submits a brief and additional 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 and 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.

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The immigrant petition was filed on August 2, 2005. The petitioner stated on Form I-140 that the U.S. company is engaged in "contracting," employs five employees, and seeks to hire the beneficiary as its general manager. In a letter dated July 27, 2005, the petitioner provided the following description of the beneficiary's proposed duties:

- Formulating policy decisions for the company
- Negotiations with customers, clients, suppliers and other entities including government authorities
- Provide direction to the company in consultation [sic] with the board of directors, financial management, acquisition of property including purchasing, etc.
- Independent decisions both operational and administrative concerning the well being and profitability of the company
- Hiring and firing of all staff including managerial/executive staff
- Expansion of business in future

In addition, the petitioner's letter included the following description of how the beneficiary's time will be allocated on a weekly basis:

- Formulating the company's long and short-term business goals (10 hours).
- Researching the international market in order to develop import/sales strategies on a long and short-term basis (12 hours)
- Negotiating contracts and conducting follow-up with client through representatives who serve as liaison between General Manager and clients (6 hours)
- Determine customer's requirements as per the feedback from our representatives (6 hours)
- Communicating with suppliers/distributors to negotiate contract arrangements and with bank regarding necessary transfer of funds (3 hours)
- Interviewing, hiring, supervising and terminating of employees (3 hours)

The petitioner submitted its New York Form NY-45-MN, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the first quarter of 2005, which lists three employees. The petitioner also submitted a payroll report, which shows that the company paid five employees in the months of April and May 2005.

The director issued a request for additional evidence on March 2, 2006, advising the petitioner that the record did not establish that the beneficiary is to be employed in a position involving primarily managerial or executive duties. Accordingly, the director instructed the petitioner to submit: (1) a detailed description of the beneficiary's proposed duties including a breakdown of the number of hours he will spend on each duty on a weekly basis; (2) additional evidence showing the management and personnel structure of the U.S. company, including the number of subordinate supervisors, the job titles and duties of the employees managed, and the percentage of time the beneficiary will devote to managerial/executive and non-managerial/non-executive duties; (3) a copy of its 2004 IRS Forms W-2 and W-3, along with copies of the company's 2005 pay roster; (4) copies of IRS Forms 941 for the second and third quarters of 2005; and (5) if the company has utilized

contractors rather than employees to perform any functions, evidence documenting the number of contractors utilized and the duties performed.

In a response dated May 20, 2006, the petitioner stated that the beneficiary is "the senior most manager level executive who is independently responsible for all of the USA Company which he manages through line managers and supervisors." The petitioner provided the following description of his duties:

- Formulating and implementation of [m]arketing and sales [p]lans and policies (12 hours).
- Establish sales [g]oals and [m]arketing strategies (10 hours).
- Proposing and preparing [a]nnual [b]udget for all departments (2 hours).
Negotiations with customers (8 hours).
- Hiring and [f]iring of [m]anagerial and [s]upervisory personnel (3 hours).
- Any other managerial/executive functions concerning marketing, including advertising, sales and import of material used for business (5 hours).

The petitioner stated that there are three managers and supervisors working under the beneficiary's management, and that he devotes 100 percent of his time to performing "executive/managerial" duties. The petitioner submitted an organizational chart for the U.S. company which identifies the beneficiary as "general manager/marketing," and indicates that he supervises a marketing/sales manager, a finance manager, and an administration manager. The chart indicates that the marketing/sales manager supervises an assistant manager, the finance manager supervises one bookkeeper and one accountant, and the administration manager supervises one secretary, one administrative assistant, and eight casual labor employees. Of these thirteen lower-level employees, only one is identified by name on the organizational chart.

The petitioner stated that contract workers would perform "audit and accounting services" and "labor contracting." However, the petitioner did not respond to the director's specific request for evidence relating to the petitioner's use of contract employees. The petitioner submitted an interim balance sheet for the 2005 calendar year, however, there is no indication that the petitioner paid any contract labor, other than "legal and professional expenses."

The petitioner submitted the requested IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2005, which indicates that the petitioner employed three workers as of the date of filing. The petitioner's state quarterly wage report for the same quarter confirms that the beneficiary, the administration manager and the marketing/sales manager were employed as August 2005. While the petitioner's earlier quarterly reports and Forms W-2 confirm that the assistant manager and finance manager were employed in the first and second quarters of 2005, there is no evidence that they worked for the U.S. company after June 2005.

Finally, the petitioner provided a statement which included the job duties of each of the company's claimed managerial/supervisory employees, including the beneficiary, whose duties were described as follows:

General Manager: Direct and coordinate purchase, marketing and production activities to obtain efficiency and maximize profit. Plan and develop policies and goals for the company. Coordinate activities of marketing/sales and production divisions. Confer with designers to develop new designs. Direct and supervise marketing and production activities through managerial control. Supervise preparation of annual reports. Hire and fire all managerial staff including assistant managers. Prepare departmental budget. Negotiate with customers. Report to the President.

The petitioner provided the following job description for the marketing/sales manager position:

Develop and control sales programs. Coordinate sales by establishing sales territories and goals. Assign territories amongst sales department staff. Analyze sales statistics to help formulate policy. Review market analysis to determine customer needs, volume potential price schedules etc. Advise customers in developing advertisement strategies. Prepare period sales reports. Conduct performance evaluation of staff in the sales department. Report to the General Manager.

Finally, the petitioner provided the following job description for the administration manager position:¹

Coordinate all administrative functions of the Company. Prepare and maintain personnel records. Supervise preparation of payroll, disbursement of wages and pay. Supervise availability, functionality and maintenance of transportation, utilities, office equipment etc. Supervise maintenance of premises.

The director denied the petition on June 26, 2006. The director concluded that the petitioner had failed to establish that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity. The director noted a discrepancy between the number of employees identified on the petitioner's organizational chart, and the number of employees reported on the petitioner's quarterly tax return for the quarter in which the petition was filed, and further observed that only the beneficiary appears to have drawn a salary commensurate with a full-time position. The director further determined that as it is not clear how many employees the petitioner has, "it follows their titles and responsibilities can be called into question."

The director further stated that the petitioner provided an overly-general position description for the beneficiary that failed to identify the specific managerial or executive duties to be performed, and thus it was not evident that the position is executive or managerial other than in position title. The director further stated that the petitioner failed to provide a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis, which the director stated was specifically requested. The director found that based

¹ The AAO acknowledges that the petitioner provided a job description for the employee identified as the company's finance manager. However, as noted above, the petitioner has not submitted evidence to establish that this individual was employed after June 2005, or that the position was otherwise filled as of August 2005 when the petition was filed. Accordingly, the description is not relevant to a determination of the beneficiary's eligibility as of the date of filing.

on the information submitted the beneficiary's subordinates are not employed in managerial, professional or supervisory positions.

Finally, the director concluded that the petitioner had not provided evidence that it employs any salespersons or other staff to provide the sales and services of the company, and therefore it appears likely that the beneficiary will perform or help perform these duties, and that he will be primarily engaged in non-qualifying duties for the purposes of this visa classification.

Counsel for the petitioner filed the instant appeal on July 21, 2006, asserting on Form I-290B, Notice of Appeal, that the beneficiary does not perform non-qualifying duties to any significant degree, and that "the staff members perform the sales, services and other mundane activities of the company either through direct, fulltime, permanent employment or as independent contractors."

In an appellate brief dated August 13, 2006, counsel for the petitioner asserts that the director had no legal authority to require that the petitioner employ full-time employees or otherwise dictate the petitioner's employment practices and policies. Counsel asserts that the petitioner need only show that the employees relieve the beneficiary from performing the day-to-day duties associated with producing a product or providing a product or service. Counsel states that the petitioner's employees were required to complete a "comprehensive training process," prior to being offered full-time permanent positions.

Counsel objects to the director's suggestion that the petitioner had been requested to provide detailed breakdowns of time allocated to various duties for the beneficiary's subordinates, noting that no such request was included in the request for evidence. Counsel asserts that had such a request been made, the petitioner "would have easily demonstrated that the sales and services duties listed in the denial notice are in fact performed by the subordinate employees . . . , not the beneficiary." Counsel contends that the director's denial of the petition based on the petitioner's failure to submit evidence that was not requested violates due process. Counsel states that the petitioner solicits sales through telemarketing, flyers and other forms of communication, and that these duties are performed through the company's sales and marketing manager, while the beneficiary "makes all final decisions with respect to projects on property renovation and decision whether to acquire property, whether it is a viable investment venture, and the extent of investment contributions."

Counsel requests that the petition be approved, or that the matter be remanded to the director in order to allow the petitioner the opportunity to supplement the record with more detailed job descriptions for the beneficiary's subordinates, "and to show how the documents previously submitted as well as other documents not submitted can support that submission."

Upon review of the record in this matter and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed 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 petitioner's description of the job

duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

As noted by the director, the petitioner has failed to submit a detailed job description explaining the managerial or executive job duties the beneficiary performs on a day-to-day basis. Further, the petitioner has provided a total of three different accounts of the beneficiary's job duties, which further complicates the task of determining which, if any, actually provides an accurate representation of his role within the company. The petitioner initially indicated that the beneficiary devotes the largest portion of his time (12 hours per week) "researching the international market" to develop import and sales strategies. Given the petitioner's claim that it operates as a construction services provider for New York-city based customers, and not as an international import or sales company, this job duty is not credible. The petitioner further indicated that the beneficiary devotes an additional 12 hours per week negotiating contracts with customers, determining customer's requirements, and conducting follow-up with clients through "representatives who serve as a liaison" between the beneficiary and the clients. However, the petitioner does not claim to employ "representatives" and it is thus unclear who would relieve the beneficiary from performing the company's day-to-day sales and customer service tasks. 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)).

Accordingly, since the initial description of the beneficiary's duties was insufficient to establish the beneficiary's employment in a managerial or executive capacity, the director reasonably requested a more detailed position description, and a clearer explanation as to how the beneficiary's time is allocated among managerial and non-managerial duties. The job description submitted in response to the director's request, and included in the petitioner's letter dated May 20, 2006, was almost entirely different from the initial job description. In response to the director's request, the petitioner indicated that the beneficiary devotes more than half of his time (22 hours per week) to establishing, formulating and implementing sales and marketing plans, goals and policies and an additional five hours per week performing "any other managerial/executive functions concerning marketing including advertising, sales and import of materials used for business." The petitioner provided no explanation for the change in the beneficiary's job responsibilities, nor did it indicate why the beneficiary would devote the majority of his time to managing marketing and sales functions when the company also claims to employ a marketing and sales manager. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the petitioner's response included a third description of the beneficiary's duties indicating his responsibility for directing and coordinating purchase, marketing and production activities, coordinating activities of marketing/sales and production divisions, conferring with designers to develop new designs, preparing departmental budgets, and supervising production activities. The petitioner does not claim to employ designers or to have a production division. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of the beneficiary's duties will be based on the job description submitted with the initial petition.

However, as discussed above, the job description submitted with the initial petition, which indicates that the beneficiary devotes nearly one third of his time to international market research and import and sales strategies, and works through "representatives," who are not actually employed by the company, is also not credible when considered in the context of the totality of the record, including the petitioner's claimed business activities and personnel structure. The actual duties themselves 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). Therefore, the AAO is left with no detailed or credible description of the beneficiary's duties on which to base a determination regarding his claimed employment in a managerial capacity. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Although the director's decision gave the petitioner notice of the inadequacy of the job descriptions provided, counsel does not attempt to clarify the beneficiary's actual duties on appeal. Counsel simply states that the beneficiary "makes all final decisions with respect to projects on property renovation," and decides "whether to acquire property, whether it is a viable investment venture, and the extent of investment contributions." Rather than clarifying the beneficiary's duties, counsel has introduced new job duties related to property investment activities, which may or may not actually be carried out by the petitioning company. Prior to the appeal, the petitioner neither claimed nor presented evidence that the U.S. company is currently engaged in such activities. 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). According to the petitioner's balance sheet for the year ended on December 31, 2005, the U.S. company owns no property, which raises further doubts regarding counsel's claim that the beneficiary is responsible for property investment activities.

With respect to the petitioner's balance sheet, the AAO further notes that although the petitioner claims to operate as a construction services provider, and has submitted invoices primarily for bricklaying and cementing services purportedly completed by the company, the petitioner's balance sheet indicates that the company's sole source of revenue is from "sale of merchandise" and shows that the company owns no

equipment, which would appear to be a requirement for the type of work in which the petitioner claims to engage. Therefore, the AAO has reason to doubt that the petitioner has accurately or fully described the type of business operated by the company. The petitioner also claims to conduct its sales primarily through telemarketing, flyers and "other forms of communication" yet in response to the director's request for evidence, indicated that the company has no marketing materials.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. In this case, the discrepancies catalogued above lead the AAO to conclude that the evidence of the beneficiary's employment capacity is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification and for this reason alone, the appeal will be dismissed. Absent a detailed and accurate account of the nature of the petitioner's business and the beneficiary's role within that business, it is impossible to make a determination regarding the beneficiary's claimed employment capacity.

On appeal, counsel focuses primarily on the director's statement that the petitioner had failed to provide detailed breakdowns of how the beneficiary's subordinates allocate their time among their various responsibilities. The AAO concurs with counsel's assertion that the director did not specifically request this evidence. The petitioner's failure to submit specific evidence that was never requested by the director cannot be used to discredit a petitioner's otherwise consistent claim. However, in this case, the lack of a detailed breakdown of the duties performed by the beneficiary's subordinates did not have a significant bearing on the director's decision. The AAO will nonetheless withdraw the director's comment that such evidence was ever requested. The petitioner's request that the petition be remanded for the sole purpose of allowing the petitioner to submit more detailed job descriptions for the beneficiary's subordinates will not be granted. The petitioner has had ample opportunity to supplement the record.

A careful review of the adverse decision reveals that the director emphasized the lack of a detailed position description for the beneficiary, the discrepancy between the number of employees identified on the petitioner's organizational chart and the number of employees reported on the petitioner's quarterly tax returns for the quarter in which the petition was filed, and the lack of employees to perform the actual sales and services of the company. While counsel correctly states that the petitioner is not required to employ full-time employees, counsel does not address the discrepancies noted by the director with respect to the number of employees working for the petitioner at the time of filing. A review of the petitioner's quarterly wage reports, federal quarterly tax returns, and Forms W-2 for 2005 confirms that the only persons employed by the U.S. company at the date of filing were the beneficiary, the administration manager, and the marketing/sales manager. There is no evidence supporting the petitioner's claim that the company continued to employ the finance manager or assistant manager after June 2005. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Since no evidence has been submitted to clarify this discrepancy in the petitioner's

claimed staffing levels, the AAO will assume that these employees were no longer employed by the petitioner when the petition was filed in August 2005.

The petitioner also claims to employ "casual labor" on a contract basis and to utilize outside services for accounting and auditing purposes. While there is some evidence that the petitioner utilizes the services of a contracted accountant for some purposes, the record is devoid of any payments to contracted "casual labor," although the director specifically requested such evidence. The petitioner did not even acknowledge the director's instructions to provide evidence regarding contracted workers when responding to the director's request for evidence. 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). As noted above, the petitioner's accountant-prepared balance sheet for the year ended on December 31, 2005 does not indicate any expenses paid to outside or contracted employees, other than legal and professional fees. Accordingly, it is reasonable to conclude that either the U.S. company is not actually providing construction contracting services as claimed by the petitioner, or these services are being provided by some or all of the petitioner's three confirmed employees. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

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. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, a manager's or executive's duties must be the critical factor. However, as noted above, if CIS fails to believe that a fact stated in the petition is true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

At the time of filing, the petitioner was a one-year-old company that claimed to be engaged in the provision of construction and property renovation services with a gross income of approximately \$260,000. The evidence of record confirms that the petitioner employed the beneficiary as general manager, a marketing/sales manager, and an administration manager. The AAO notes that all of the employees have managerial titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company, including marketing and selling the petitioner's services, performing day-to-day financial tasks, and providing the actual construction and property renovation services of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and two additional managerial employees. If the petitioner is doing business as stated by the petitioner, it would reasonably require all three of its employees to devote a substantial portion of their time to the day-to-day non-managerial tasks associated with operating a construction services business. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act; 8 C.F.R. § 204.5(j)(2).

Here, while both of the beneficiary's confirmed subordinates have managerial job titles, the record does not support a conclusion that either employee supervises subordinate employees or performs managerial duties, or duties which require the services of a professional. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. In the instant case, the petitioner has not established that a bachelor's degree is actually necessary to perform the administrative and sales work allegedly performed by the beneficiary's subordinates.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals.

Nor does the record establish that the beneficiary will be employed as a function manager. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial in nature.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's

daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed above, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the beneficiary may exercise some discretion over the petitioning company as its general manager, the petitioner has neither claimed nor presented evidence to establish that the beneficiary devotes the majority of his time to the goals and policies of the organization, rather than participating in the day-to-day operations. The petitioner's claim that the beneficiary devotes 100 percent of his time to "managerial/executive" duties is uncorroborated by documentary evidence.

Although counsel argues that the petitioner's rights to procedural due process were violated, counsel has not shown that the director's application of USCIS regulations resulted in "substantial prejudice" to the petitioner. See *De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The respondents have fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition, in part, based on the petitioner's failure to provide evidence that was not requested. However, as noted above, there is no evidence that this was a significant factor in the denial of the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

As discussed above, the record as a whole suggests that the beneficiary and his subordinates perform the actual day-to-day tasks of operating the petitioner's property renovation business. The record does not demonstrate that the petitioner employs personnel to market, sell and perform its services, or that it outsources any of these basic operational functions to contracted staff. The petitioner's vague and inconsistent

descriptions of the beneficiary's duties, discrepant evidence regarding the type of business operated by the petitioner, and the lack of sufficient personnel in the United States to perform the petitioner's services, preclude a determination that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the petitioner was doing business for one year as of the date of filing on August 2, 2005. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires that the petitioner submit evidence that the prospective United States employer has been doing business for at least one year. For the purpose of this visa classification, "doing business" means the regular, systematic and continuous provision of goods and/or services. 8 C.F.R. § 204.5(j)(2). Accordingly, the petitioner must establish that it has been doing business since August 2, 2005.

The record shows that the petitioner was incorporated in the State of New York on February 11, 2004, and the beneficiary was granted L-1A classification in order to open the new office for a one-year period commencing on July 22, 2004. The beneficiary was granted an L-1 visa at the U.S. Consulate in Abu Dhabi on September 24, 2004, and was admitted to the United States in L-1A status for the first time on November 15, 2004, less than nine months prior to the filing of the instant petition. The director requested documentary evidence of the petitioner's business activities for the previous year, and a copy of the petitioner's 2004 IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner did not submit a copy of its 2004 tax return, or any evidence of business activities conducted prior to January 2005. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Further, it appears that the bank account for the U.S. company was opened in November 2004 upon the beneficiary's arrival to the United States, so it is reasonable to assume, and has not been shown otherwise, that the company was not operational until November 2004 at the earliest, and was not doing business for one full year at the time the petition was filed. The director's statement that the petitioner established that the U.S. company had been doing business as required by the regulations is withdrawn, as the petitioner was not doing business for the required time period as of the date of filing. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the final issue to be discussed in the present matter is whether the petitioner has established that a qualifying relationship exists between the petitioner and the beneficiary's former overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner claims to be a wholly owned subsidiary of [REDACTED] located in United Arab Emirates. In support of the immigrant petition, the petitioner submitted a copy of its certificate of incorporation dated February 11, 2004, indicating that the U.S. company is authorized to issue 200 shares of

stock with no par value, and a copy of the company's stock certificate number one issuing 200 shares (100%) of its stock to the claimed parent company on February 15, 2004. The director subsequently requested a copy of the petitioner's stock ledger and copies of the minutes of the meetings of the parent company addressing the formation of the U.S. entity. In response, the petitioner submitted a different copy of its stock certificate number one, indicating that 200 shares were issued to the claimed parent company on February 27, 2004. The petitioner submitted a copy of its shareholders register indicating the issuance of 200 shares of stock to the claimed parent company on February 27, 2005. The petitioner did not provide an explanation for the existence of two different stock certificates number one issued on different dates, nor did it clarify the discrepancy between the dates on the stock certificate and the date of stock issuance indicated in the company's stock ledger. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner also provided copies of two receipts for wire transfers from the Bank of Baroda in the United Arab Emirates, dated February 26, 2005 and May 23, 2005 respectively, showing that a total of \$100,000 was transferred to the petitioner's Bank of America account. The beneficiary appears to be the originator of the transfer request. The petitioner indicated that this evidence demonstrates "proof of payment" from the parent company. However, there is no evidence that the monies were transferred from the foreign entity's account, or that the funds were intended as payment for an ownership interest in the petitioning company, particularly considering that the petitioner was established more than one year prior to the claimed money transfer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Although requested by the director, the petitioner has not submitted copies of its tax returns for the 2004 or 2005 years which may have assisted in corroborating the petitioner's claims regarding the ownership of its stock and the value of the issued stock. Overall, the inconsistencies and deficiencies in the evidence preclude the AAO from concluding that the foreign entity actually owns the petitioner. For this additional reason, the appeal will be dismissed.

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 AAO acknowledges that USCIS previously approved a new office L-1 petition and a petition requesting an extension of the beneficiary's L-1A status. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 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).

It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Based on the lack of required evidence of eligibility in the current record and inconsistencies catalogued above, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approvals by denying the instant immigrant petition.

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).

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

The director is instructed to review the prior nonimmigrant L-1A nonimmigrant petition approvals for possible revocation, pursuant to 8 C.F.R. § 214.2(l)(9).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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

ORDER: The appeal is dismissed.