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U.S. Citizenship
and Immigration
Services

134

FILE:

[REDACTED]
LIN 06 245 50317

Office: NEBRASKA SERVICE CENTER

Date: APR 01 2009

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Handwritten signature of John F. Grissom in black ink.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, allegedly a footwear manufacturer and exporter, is an Indian business entity authorized to do business in the State of Colorado, which claims to be a branch office of the beneficiary's previous employer in India. 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 concluding that the petitioner failed to establish (1) that it is the same as the beneficiary's foreign employer, or an affiliate or subsidiary thereof; or (2) that it will employ the beneficiary in a primarily managerial and executive capacity.

On appeal, the petitioner claims that the petitioner is a branch office of the foreign employer and that the beneficiary will be employed in a primarily executive capacity in the United States. The petitioner submits additional evidence in support of its 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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 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.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) must be accompanied by a statement from an authorized official of the "petitioning United States employer" which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The first issue in this proceeding is whether the petitioner has established that it is same employer as, or a subsidiary or affiliate of, the Indian business entity by which the beneficiary was employed abroad, ██████████ ██████████ of Kanpur, India.

A "subsidiary" is defined at 8 C.F.R. § 204.5(j)(2) as:

[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.

Likewise, an "affiliate" is defined in pertinent part at 8 C.F.R. § 204.5(j)(2) as:

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

The regulations 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 Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). In the context of this 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 at 595.

In this matter, the petitioner claims to be a "branch office" of the beneficiary's previous employer in India, ██████████. Accordingly, the petitioner claims to be the same employer as "the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(C). In support, the petitioner submits, *inter alia*, a copy of an "Application for Authority to Transact Business" filed with the State of Colorado on October 29, 2003, a certificate of good standing issued by the State of Colorado, evidence that the petitioner has acquired a federal employer identification number, and minutes from 2004 indicating the foreign employer's intent to acquire the assets and liabilities of a Colorado corporation called ██████████.

Furthermore, the petitioner submits evidence that ██████████ and his spouse jointly own approximately 74.37% of ██████████. However, the petitioner also submits copies of the petitioner's United States tax returns from 2003, 2004, and 2006 in which the petitioner claimed that ██████████ is its 100% owner. As it is claimed that the petitioner is the same business entity as the Indian employer, and that the Indian business entity is simply authorized to do business in the State of Colorado as a foreign corporation, these two descriptions of the petitioning organization's ownership and control are inconsistent.

On November 6, 2007, the director requested additional evidence. The director requested, *inter alia*, further evidence establishing that the petitioner and the foreign employer are qualifying organizations under the regulations. The director specifically notes the listing of ██████████ as the sole owner on the tax returns.

In response, counsel submitted a letter dated January 24, 2008 in which he explains that the current United States entity, ██████████, is a branch office of the India-based foreign employer. Counsel again asserts that the India-based employer has registered under Colorado law to transact business as a foreign corporation. Finally, counsel clarifies that the foreign employer, once registered to do business in Colorado, acquired the assets and liabilities of a Colorado corporation called ██████████ in 2004. It is noted that ██████████ is not a petitioner in this matter. However, counsel did not clarify the inconsistency in the record pertaining to the ownership and control of the petitioning organization. Instead, counsel submitted a copy of the foreign employer's 2005 Indian tax return indicating that ██████████ and his spouse jointly own a 74.37% interest in the petitioning organization even though the United States tax returns for the petitioning organization indicate that ██████████ is the 100% owner.

On March 26, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that it and the foreign employer are qualifying organizations. Specifically, the director found that

the record contains unresolved discrepancies pertaining to the ownership and control of the business organizations.

On appeal, counsel again asserts that the current United States entity ██████████, is a branch office of the India-based foreign employer registered to do business in the State of Colorado as a foreign corporation.

Upon review, the AAO concurs with the director's ultimate determination, and the appeal will be dismissed because the petitioner failed to resolve inconsistencies in the record pertaining to its ownership and control.

As noted above, in order to establish eligibility for the benefit sought under this immigrant visa classification, the petitioner must establish that it "is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(C). In this matter, the petitioner claims that it and the India-based foreign employer are the "same employer." Although the petitioner submitted evidence establishing that it is more likely than not registered to do business in the State of Colorado as a foreign corporation, the record contains substantial and material inconsistencies pertaining to the ultimate ownership and control of the petitioning organization so that the record is not persuasive in establishing that the petitioner and the beneficiary's foreign employer are indeed the "same employer."

As noted above, the petitioner claims that the foreign employer is 74.37% owned by ██████████ and his spouse jointly. A variety of other family members are alleged to own the remaining interests. As the petitioner is claiming to have the same corporate identity as the foreign employer, logic dictates that the petitioner would be claiming the same ownership structure in the United States. However, the petitioner's United States tax returns from 2003, 2004, and 2006 indicate that ██████████ is the 100% owner of the petitioning organization. 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). 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. *Id.* at 591. Not only are these averments inconsistent with the Indian organizational documents submitted for the record, which undermines the credibility of the petition, the ownership structure described in the tax return would result in the United States and the foreign organizations not being qualifying organizations. A foreign employer 74.37% owned jointly by a husband and wife is not an affiliate, subsidiary, or branch of a United States petitioner which is 100% owned by the husband, absent evidence establishing that the husband truly "controls" the foreign employer. 8 C.F.R. § 204.5(j)(2). In this matter, the record is devoid of evidence establishing that ██████████, as the "joint" owner of a majority interest, controls the entity. 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, the petitioner has failed to establish that it is same employer as, or a subsidiary or affiliate of, the India-based foreign employer, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner also failed to establish that the beneficiary was employed by the entity abroad for at least one year in the three years immediately preceding the filing of the petition. 8 C.F.R. § 204.5(j)(3).

In this matter, the petitioner claims in a letter dated January 17, 2008 that the beneficiary was employed abroad by ██████████ from 1997 until June 2003. On July 28, 2003, a corporation called ██████████ filed a Form I-129 seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L) (LIN 03 230 51375). This employment was approved from October 30, 2003 until June 30, 2006. The beneficiary was issued a visa on December 3, 2003 and was admitted to the United States on January 9, 2004. It appears that the beneficiary was employed in the United States by ██████████ until the expiration of the petition. It is noted that U.S. Citizenship and Immigration Services (USCIS) records do not indicate that either the petitioner or ██████████ has ever filed an amended petition reflecting a change in employment or qualifying relationship pursuant to 8 C.F.R. § 214.2(i). The instant petition was filed by ██████████ on August 21, 2006, three years and two months after the beneficiary ceased working for the petitioning organization abroad.

As noted above, although the petitioner contains conflicting evidence, the petitioner specifically avers that the foreign employer is 74.37% owned by ██████████ and his spouse jointly. The petitioner also claims that ██████████ is 100% owned by ██████████. As explained previously, a foreign employer 74.37% owned jointly by a husband and wife is not an affiliate, subsidiary, or branch of a United States corporation which is 100% owned by the husband, absent evidence establishing that the husband truly "controls" the foreign employer.¹

Accordingly, the beneficiary's intervening employment from January 2004 until June 2006 in the United States by ██████████, which has not been established as having a qualifying relationship with the foreign employer, is not qualifying for purposes of Section 203(b) of the Act and 8 C.F.R. §§ 204.5(j)(3)(i)(A) or (B), and thus the beneficiary was not employed abroad for one out of the past three years in a managerial or executive capacity. The beneficiary's last period of arguably qualifying employment ended in June 2003. The petition may therefore not be approved for this additional reason.

The second issue in this proceeding is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary 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--

¹In view of this determination, it is noted that it was material or gross error to approve the petition filed by ██████████, LIN 03 230 51375, as it does not appear as if a qualifying relationship existed between ██████████ and ██████████

- (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), 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 AAO reviews appeals on a *de novo* basis. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The petitioner does not clearly state in the underlying petition whether the beneficiary will be employed in a managerial *or* executive capacity. Therefore, while counsel on appeal argues that the beneficiary will be employed in an executive capacity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed in either a managerial *or* executive capacity and will consider both classifications on appeal.

The petitioner describes the beneficiary's proposed duties as "country head" in the United States in a letter dated August 12, 2006. As this job description is in the record, it will not be repeated here verbatim.

Generally, the beneficiary is described as devoting 30% of his to performing sales and marketing tasks; 30% to strategic planning, including making market entry choices and choosing product lines; 20% to general management duties such as establishing policies and goals; 15% to financial and banking tasks; and 5% to selecting and evaluating employees.

The petitioner also submitted an organizational chart for the United States operation. The chart portrays the beneficiary at the top of the organization directly supervising the accounts/administration manager, the warehouse manager, the operations manager, and 18 non-employee sales agents. The warehouse manager is, in turn, shown supervising warehouse and shipping workers, and the operations manager is shown supervising an imports assistant.

The petitioner further described the duties of these claimed subordinate supervisors in the August 12, 2006 letter. The accounts/administration manager is described as performing primarily customer service tasks. The operations manager is described as having one assistant and as having the following duties:

- a.) Expedites import-export arrangements and maintains current information on import-export tariffs, licenses, and restrictions.
- b.) Ensures compliance of imported merchandise with regulations on U.S. Customs Service.
- c.) Import documentation, shipping & freight documentation, Bills of Lading and way billing.
- d.) Liaison with customs and export/import agents in US and India for smooth functioning of import/exports operations.
- e.) Liaison with US customs officials to effect release of incoming freight and resolve customs delays.
- f.) Coordinates activities of exporting merchandi[s]e from [foreign employer] to USA.

The warehouse manager is described as having two assistants and as having the following duties:

- a.) Supervises workers engaged in receiving, warehousing, shipping & freight.
- b.) Verification of incoming shipments
- c.) Loading and unloading of inventory
- d.) Warehousing of inventory
- e.) Cleaning and maintenance of warehouse
- f.) Shipping and delivery
- g.) Packing, marking, price labeling
- h.) Working with shipping and delivery firms and their agents
- i.) Sales returns
- j.) Inventory control

However, the petitioner also submitted payroll documents and wage reports for the record. In the payroll records for the period ending August 11, 2006 (10 days prior to the filing of the petition), the petitioner claims to employ six people. The six individuals listed in the payroll records match some of the individuals listed in

the organizational chart, i.e., the accounts/administration manager, the warehouse manager, the operations manager, and the shipping worker. However, two of the individuals listed in the organizational chart are not listed in the most recent payroll statement. **Likewise, two of the individuals listed in the payroll statements do not appear on the organizational chart, i.e., ██████████ and ██████████**

Furthermore, the payroll records for the period ending July 28, 2006 and the quarterly wage report for the second quarter of 2006 list ██████████ as an employee of the petitioner. ██████████ is also identified as having received compensation equal to the beneficiary, making these two individuals the petitioner's most highly compensated employees. However, the organizational chart does not acknowledge the employment of or explain what role he plays in the enterprise.

On November 6, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's proposed duties in the United States, an organizational chart "which represents the petitioning organization at the time of filing," and descriptions of the duties of the beneficiary's subordinates.

In response, the petitioner submitted a letter dated January 17, 2008 in which it further describes the beneficiary's proposed duties as follows:

- a. Serve as CEO of USA Branch operations – manage, direct and supervise the operations of the US Company[;]
- b. Responsible for all final judgments and decisions relating to US operations[;]
- c. Oversee Strategic planning and US investments;
- d. Plan, develop and establish policies and objectives of ██████████, USA operations;
- e. Review activity reports and financial statements to determine progress of US operations[;]
- f. Manage all financial operations for United States Company – Sole Authorization for financial and banking matters, set and approve budgets and authorize expenditures;
- g. Responsible for all legal matters[;]
- h. Represent the business to all agencies and organizations[;]
- i. Meetings and Discussions with Customers (existing and potential), and Business Associates to establish business relations, ascertain customer needs, complaints, market perception, and current trends in the leather export industry[;]
- j. Establish Marketing Strategies and Planning for the North American market – Direct exports sales and marketing operations, market penetration, expansion plans in existing markets, determination of product offerings, market definition and segmentation for company's product offerings[;]
- k. Direct Product Advertising and Placement, and Catalogue production, and work outsources to Advertising Agencies[;]
- l. Develop relationships with government officials, banking officials, shipping companies, customs brokers, shipping agents, freight forwarders, freight insurers and other personnel customarily involved in international trade;
Ensure compliance with USA export and foreign exchange regulations[;]

- n. Attend Trade Shows and meet with clients and customers[;]
- o. Meetings and Discussion with ██████████ Staff;
- p. Evaluate performance of subordinates for compliance with established policies and objectives of firm and his/her contributions in attaining desired objectives[;]
- q. Make all hiring and termination decisions[; and]
- r. Prepare Management Reports for Board of Directors.

The petitioner also submitted the following breakdown of duties:

Executive Management Duties including Strategic Planning	50%
Sales & Marketing, Customer Relationships	20%
Financial, Banking and Legal Matters	15%
Meetings and discussions	10%
Personnel Management	5%

The petitioner also submitted an organizational chart for the United States operation. The chart again portrays the beneficiary at the top of the organization supervising subordinate supervisors. The warehouse supervisor is described as supervising two workers who, in turn, are also described as supervising two workers each. The operations manager is described as supervising an "assistant," who appears to be a contractor. The chart again fails to identify ██████████ or to explain his role with the organization, even though the wage reports for the third quarter of 2006, the period in which the petition was filed, list ██████████ (along with the beneficiary) as the petitioner's most highly compensated employees.

As noted above, the petitioner also submitted wage reports for the third quarter of 2006. These reports indicate that in August 2006 the petitioner employed 8 workers, even though the petitioner claims in the organizational chart that it has 11 employees on payroll at the time the petition was filed.

Finally, although the petitioner did not submit job descriptions for the subordinate workers, counsel indicates in his letter dated January 24, 2008 that the beneficiary will be employed in an executive capacity.²

On March 26, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial and executive capacity.

On appeal, the petitioner asserts that the director erred and claims that the beneficiary will be employed in an executive capacity.

²It is noted that the director commented in his decision that the petitioner failed to state whether the beneficiary will be employed in an executive or managerial capacity and, thus, he assumed the petitioner was asserting that the beneficiary will be employed in both a managerial and executive capacity. However, as counsel stated in his letter submitted in response to the Request for Evidence that the beneficiary will be employed in an executive capacity, this conclusion made by the director will be withdrawn. Nevertheless, and as explained herein, as the petitioner failed to establish that the beneficiary will be primarily employed in either a managerial *or* an executive capacity, the appeal will be dismissed.

Upon review, the petitioner's assertions are not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity.

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

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will "manage, direct and supervise the operations," oversee strategic planning, establish policies, review activity reports, and establish marketing strategies. The petitioner claims that the beneficiary will devote 50% of his time to such "executive management duties." However, the petitioner fails to specifically describe these strategic plans, policies, and strategies or explain who will prepare documents to be reviewed, such as activity reports and financial statements. Importantly, the petitioner fails to explain what, exactly, the beneficiary will do to "manage, direct and supervise the operations" other than to act as a first-line supervisor of approximately seven clerical, customer service, and warehousing workers and coordinate the efforts of commission-based sales agents. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties in his operation of the enterprise. To the contrary, it appears more likely than not that the beneficiary will primarily perform first-line supervisory, administrative, and operational tasks. Given that the beneficiary's subordinate workers have not been established to be managerial, supervisory, or professional (*see infra*), it has not been established that the tasks associated with the beneficiary's supervision of these workers will be qualifying duties, as they will be at most first-line supervisory duties overseeing non-professional employees. Furthermore, absent evidence to the contrary, the record is not persuasive in establishing that the other duties ascribed to the beneficiary will be truly managerial or executive in nature. For example, the petitioner claims that the beneficiary will devote substantial periods of time to meeting with customers, directing advertising efforts, developing relationships with officials and vendors, ensuring compliance with regulations, and attending trade shows. However, these duties do not appear to be managerial or executive in nature. Accordingly, it appears that the beneficiary will more likely than not "primarily" perform non-qualifying administrative, operational, or first-line supervisory tasks. 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 International, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will directly or indirectly supervise approximately seven subordinate workers. Although the petitioner claims that at least two of these employees are supervisory or managerial employees, the record is not persuasive in establishing that the operations and warehouse managers are bona fide supervisors or managers. The petitioner does not describe these workers as having supervisory responsibilities over subordinate workers. To the contrary, it appears that both of these workers are primarily performing the operational or warehousing tasks necessary to the business and not truly supervising subordinate employees. Furthermore, as the petitioner failed to submit job descriptions for all the subordinate workers, even though this was requested by the director, it cannot be determined whether the organization reasonably requires a subordinate tier of supervisors and managers. 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). An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. 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 managerial position. In this matter, the petitioner has not established that the reasonable needs of the United States operation compel the employment of a managerial or executive employee to oversee one or more subordinate supervisors. To the contrary, it is more likely than not that the workers are all primarily performing non-qualifying tasks. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Accordingly, it appears that the beneficiary will be, at most, the first-line supervisor of the subordinate employees. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Finally, as the petitioner failed to establish the skills necessary to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will supervise professional employees.³

³In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.⁴

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. 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. 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 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The beneficiary's job description is so vague that it cannot be discerned what, exactly, the beneficiary will do on a day-to-day basis. Also, as explained above, it appears more likely than not that the beneficiary will primarily perform administrative or operational tasks and work as a first-line supervisor of non-professional workers. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration*

⁴While the petitioner has not argued that the beneficiary will primarily manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage 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)(2) and (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 tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record indicates that the beneficiary will more likely than not primarily perform non-qualifying tasks and be a first-line supervisor of non-professional workers. 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 will be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

Services, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS 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 USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the record contains several inconsistencies pertaining to the staffing of the petitioner which undermines its credibility. For example, the petitioner claims in the organizational chart submitted in response to the Request for Evidence to have employed at least 11 workers at the time the instant petition was filed in August 2006 even though the wage reports for this same time period indicate that the petitioner had no more than 8 employees. Moreover, the petitioner's wage reports and payroll records indicate that the petitioner employed a person named [REDACTED] both before and after the petition was filed in August 2006. This individual and the beneficiary were the two mostly highly compensated employees during these time periods. However, the petitioner's organizational chart and narratives describing its operation completely ignore the employment of [REDACTED]. The petitioner fails to describe his duties or to account for his compensation. Once again, 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. 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. *Id.* at 591.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that 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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility as discussed above, this petition cannot be approved.

As a final note, USCIS records indicate that the beneficiary has previously been approved for L-1 employment with the same petitioner. However, with regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter

the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and USCIS 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 USCIS spends less time reviewing Form I-129 nonimmigrant 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 at 29-30 (recognizing that USCIS approves some petitions in error).

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 USCIS 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 USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant 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 petition was 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. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

In addition, 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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.