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Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:
LIN 07 055 50701

APR 27 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:

[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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, an Arizona limited liability company, is a wholesale diamond merchant. It seeks to employ the beneficiary as its regional sales manager.

The director denied the petition based on two independent grounds, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that the petitioner and the beneficiary's prior foreign employer have a qualifying relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the beneficiary performs primarily managerial duties and suggests that the director failed to understand the nature of the offered position. The petitioner further attempts to clarify the ownership of the foreign and U.S. entities and states that both companies are owned by members of the same immediate family and therefore have the requisite qualifying relationship. The petitioner submits a brief and documentary evidence in support of the appeal.

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

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

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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 visa petition was filed on January 3, 2007. The petitioner indicated on Form I-140 that it is a wholesale diamond merchant with four employees. In a letter dated November 15, 2006, the petitioner described the beneficiary's qualifications and proposed duties as regional sales manager as follows:

[The beneficiary] is an accredited gemologist, diamonds expert and Southwest Sales Manager for [the petitioner's group] in Scottsdale, Arizona. Specifically, [the beneficiary] manages our wholesale jewelry design, crafting and sales operation in Denver, Colorado and Scottsdale, Arizona, and is personally in charge of our largest customer (a major jewelry manufacturer based in Denver and Scottsdale) and of more than 40 other customers that generate \$3 million in sales.

The petitioner further stated that the beneficiary is in charge of developing the company's Southwestern markets, supporting the company's existing retail clients, and providing guidance and assistance to the company's independent sales representatives in the area.

The director issued a request for additional evidence on August 14, 2007, in which he requested, inter alia, additional evidence to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director requested a statement from the petitioner describing the beneficiary's proposed employment, including information regarding specific job duties, types of employees supervised, the beneficiary's level of authority, and the level of authority of the beneficiary's immediate supervisor. The director also requested an organizational chart for the U.S. company.

In response, the foreign entity's vice president, [REDACTED], submitted a letter dated September 16, 2007. However, the letter did not include any additional information regarding the beneficiary's proposed role as the petitioner's regional sales manager. Rather, [REDACTED] reiterated the statements made in the petitioner's letter dated November 15, 2006.

The petitioner submitted an employee list for the U.S. company which identifies a company president, the beneficiary's position of regional sales manager, a second regional sales manager, and an office manager.

The director denied the petition on March 28, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director observed that the beneficiary is engaged in sales duties and account management related to sales, and that such duties are not performed in a managerial or executive capacity. The director acknowledged the petitioner's statement that the beneficiary supervises sales representatives, but emphasized that no evidence was submitted to corroborate this claim.

On appeal, the petitioner asserts that "there can be no question that a sales manager performs in a managerial capacity by managing an essential function of an organization." The petitioner re-iterates the position description included in its letter dated November 15, 2006, asserting that the language "clearly shows that [the beneficiary] did much more than simply manage his own customers' accounts. The petitioner asserts that the position description is consistent with the description of a "sales manager" position as found at the U.S. Department of Labor's O*Net Online Occupational Information Network, and is therefore clearly managerial in nature.

The petitioner further asserts that its sales representatives were not listed on the petitioner's organizational chart because they are independent contractors, rather than direct employees. The petitioner identifies three independent sales representatives by name and asserts that the beneficiary has been responsible for directing and assisting them.

Upon review, the petitioner has not established that the beneficiary will be employed in the United States 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.* In addition, the definitions of executive and managerial capacity each have two separate parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner's brief description of the beneficiary's duties offers little insight into what he does on a day-to-day basis. The petitioner stated that the beneficiary manages its "wholesale jewelry design, crafting and sales operation" in Scottsdale and Denver, but did not indicate the specific tasks the beneficiary performs. The petitioner has not established that it employs jewelry design or crafting employees, or sales employees, other than the beneficiary and one other regional sales manager. Therefore, it is reasonable to question to what extent the beneficiary performs managerial duties associated with these functions, or whether he is directly involved in performing product design, sales and marketing activities. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner further states that the beneficiary is "in charge of" the company's largest customer and 40 other customers, in charge of developing Southwestern markets, and responsible for supporting the company's retail clients. The petitioner has outlined the beneficiary's general areas of responsibility but has failed to indicate what specific duties he performs to "develop" markets or "support" retail customers, such that they could be classified as managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Based on the initial position description, the director reasonably requested clarification regarding the beneficiary's actual job duties, his level of authority, and the employees, if any, who work under his supervision. As noted above, the petitioner failed to provide any additional information regarding the beneficiary's job duties in response to the director's specific request. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Absent a clear and detailed position description, the AAO cannot discern the beneficiary's actual duties and cannot conclude that he will be employed in a primarily managerial or executive capacity. The AAO will not accept a vague position description and speculate as to what the beneficiary does on a day-to-day basis.

On appeal, rather than clarifying the beneficiary's actual duties within the context of the petitioner's specific business operations, the petitioner states that the duties are similar to those of a "sales manager" as that

position is described by the U.S. Department of Labor's O*Net Online occupational database. The petitioner cannot rely on generic occupational classifications in lieu of providing a description of the beneficiary's actual duties. 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)).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

On appeal, the petitioner asserts that the beneficiary will manage an essential function of the U.S. company. 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. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

As discussed, the petitioner has not clearly described or documented the beneficiary's duties, the scope of the beneficiary's authority, or his indirect supervision of other employees who relieve him from performing the non-qualifying duties associated with the claimed "essential function." Based on the minimal evidence in the record, it cannot be determined that the beneficiary would be primarily managing an essential function of the petitioning company, rather than personally performing the petitioner's sales and marketing function in the southwest United States.

The AAO acknowledges the petitioner's claim on appeal that it did not include independent sales representatives on its organizational chart because the sales representatives are independent contractors. While the petitioner has now named three representatives, the petitioner has not presented evidence to document the existence of these employees nor identified the type and scope of services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to personally conduct the petitioner's sales function with respect to the 40 or more

customer accounts stated to be under his responsibility. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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

The second issue addressed by the director is whether the petitioner established that the U.S. company has a qualifying relationship with the beneficiary's last foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. 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 regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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

The petitioner indicated in its letter dated November 15, 2006 that it is a subsidiary of [redacted], a Maryland corporation, which in turn is the U.S. headquarters of [redacted] an Israeli company. The petitioner described the corporate relationship as follows:

Both [redacted] and its American affiliate, [redacted], are owned by [redacted] and his sons, [redacted] and [redacted] is President of [redacted]

[redacted] is the majority member of [the petitioning company], which serves as the regional office for [redacted]'s Southwestern United States operations.

In support of the petition, the petitioner submitted the following documentary evidence of the ownership of the three companies:

- A letter dated May 3, 2005 from [REDACTED], stating that [REDACTED], located in Israel, is owned by [REDACTED] and [REDACTED]
- The Maryland Articles of Incorporation for [REDACTED] indicating that the company is authorized to issue 50,000 shares with \$1.00 par value per share.
- A letter dated September 27, 2005 from [REDACTED] accountants, indicating that [REDACTED] owns 33^{1/3} percent of the issued shares of [REDACTED].
- The Arizona Articles of Organization for the petitioning company identifying [REDACTED] and [REDACTED] as the petitioner's members as of the date of organization on December 21, 2004.
- An agreement dated February 1, 2005 between [REDACTED] and [REDACTED] under which [REDACTED] agreed to transfer his share in the petitioning company to [REDACTED] effective immediately.
- A letter dated September 19, 2006 from [REDACTED], accountants, indicating that [REDACTED] owns 51 percent of the petitioning company and [REDACTED] owns the remaining 49 percent.
- [REDACTED] 2005 Form 1120, U.S. Corporation Income Tax Return, which indicates that [REDACTED] and [REDACTED] each own 50 percent of the company's stock.
- The petitioner's 2005 Form 1120, U.S. Corporation Income Tax Return, which identifies [REDACTED] as its 51 percent owner and [REDACTED] as the petitioner's 49 percent owner.

In the request for evidence issued on August 14, 2007, the director requested additional evidence to establish the qualifying corporate relationship between the petitioner and the foreign entity. The director advised that such evidence may include, but is not limited to, annual reports, articles of incorporation, financial statements and/or evidence of ownership of all outstanding stock for both entities.

In response, the petitioner submitted the following additional evidence:

- Minutes of Organization Meeting of Board of Directors for [REDACTED] dated January 5, 1999, which indicates that 500 shares were issued to each of the following individuals: [REDACTED], and [REDACTED]. [REDACTED] stock certificates numbers three, four and five, indicating the issuance of 500 shares each to [REDACTED] and [REDACTED]
- [REDACTED] stock transfer ledger, which indicates that stock certificates one and two were canceled, and indicates the issuance of 500 shares each to the three above-referenced individuals.
- A letter dated March 5, 2007 from [REDACTED] of the accounting firm [REDACTED] indicating that [REDACTED] is owned, one-third each, by [REDACTED] and [REDACTED]

The director denied the petition, concluding that the petitioner failed to establish that the U.S. company and the foreign entity have a *qualifying relationship*. In denying the petition, the director noted that the record contains conflicting information regarding the ownership of the petitioner's U.S. parent company, [REDACTED]. The director observed that [REDACTED]'s tax return indicates that the company is owned by Alon and [REDACTED], while the company's stock certificates indicate that the company is owned by [REDACTED] and [REDACTED]. The director further observed that the foreign entity, based on the evidence submitted, is owned by a different group of individuals, [REDACTED] and [REDACTED], and therefore the foreign entity does not appear to have the claimed qualifying relationship with the petitioner. Citing to *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1998) the director emphasized that it is incumbent upon the petitioning company to resolve any inconsistencies in the record by independent and objective evidence.

On appeal, the petitioner submits a letter dated February 19, 2006 from the foreign entity's accountant, Rubin, [REDACTED], which describes the ownership of [REDACTED] as follows:

[REDACTED]	54.95%
[REDACTED]	45.00%
[REDACTED]	0.05%

The petitioner also submits two letters from [REDACTED], the accountant for [REDACTED]. One letter, dated April 28, 2008, indicates that [REDACTED] is owned 50% each by [REDACTED] and [REDACTED]. The other letter, dated October 25, 2007, indicates that [REDACTED] and [REDACTED] each own one-third of [REDACTED].

In its statement submitted on appeal, the petitioner states that [REDACTED] and [REDACTED] each own 50 percent of [REDACTED]. The petitioner explains as follows:

[REDACTED] is the brother of [REDACTED] and the son of [REDACTED] and [REDACTED]. Originally, the stock of the company was owned in equal 33.33% shares by [REDACTED] and [REDACTED] as indicated in earlier correspondence. Several years ago, [REDACTED] for estate planning purposes, transferred his interest in equal parts to his two sons.

Petitioner believes that under the circumstances there are the requisite company interrelationships. The same immediate family members own all of the ownership of [REDACTED] Israel and [REDACTED].

The petitioner's assertions are not persuasive. The petitioner has not established that the petitioner and the beneficiary's foreign employer have a qualifying relationship.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or

indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Here, the petitioner indicates that it is majority-owned by another U.S. company, [REDACTED] which in turn is ultimately owned by two individuals, [REDACTED] and [REDACTED]. The petitioner has not adequately resolved the discrepancy between [REDACTED] stock certificates indicating that the company is owned by three individuals, nor offered an explanation as to why no changes in ownership were reflected in the company's corporate records when [REDACTED] allegedly transferred his share in [REDACTED] to his sons. Moreover, although the petitioner claims that the change took place "several years ago," the evidence submitted on appeal contains a letter from [REDACTED]'s accountant dated 2007 which indicates that the company is owned by three individuals. 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.

Nevertheless, assuming that the petitioner's U.S. parent company is owned in equal portions by [REDACTED] and [REDACTED], then it can only establish a qualifying affiliate relationship with the Israeli company if that company is also owned by the same individuals in the same proportions. The petitioner concedes on appeal that the foreign entity is majority owned by [REDACTED]. [REDACTED] has no ownership interest in [REDACTED] and [REDACTED] owns only a 0.05% interest in [REDACTED]. Therefore the extent of common ownership and control between the petitioner and the foreign entity is less than one percent.

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

In this case the U.S. entity is owned by one individual and one company, and the foreign entity is owned by three individuals. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Although counsel claims that the petitioning company and the overseas company are

all owned by members of the same immediate family, this familial relationship does not constitute a qualifying relationship under the regulations.

Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue in this proceeding is whether the petitioner established that the beneficiary was employed by the foreign entity in a managerial or executive capacity for at least one year within the three years preceding his entry to the United States as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

In its letter dated November 15, 2006, the petitioner stated that the beneficiary joined the foreign entity in January 1997. The petitioner described his duties as follows:

[The beneficiary] was hired into our management-training program. For 14 months, [the beneficiary] worked out of our Israeli international headquarters and was groomed for a management position in the United States. Besides making several trips to the United States on a B1/B2 visa to assist our regional sales management team, he received training in the grading, cutting and pricing of polished diamonds. During this period, he also completed his formal education in gemology and diamond grading studies at the Institute for Diamond Studies in Tel Aviv, Israel.

The petitioner stated that the beneficiary was transferred to the United States in 1998 and has worked for the petitioner and its U.S. parent company since that time, in E-1 nonimmigrant status.

The record of proceeding also contains a copy of the beneficiary's resume, in which he indicates that he was employed by the foreign entity from 1997-1998, performing the following duties:

Six months of training in grading, cutting and pricing of polished diamonds. 14 months as a full-time member in the company's marketing department. Trained at the U.S. subsidiary, [REDACTED], as a regional sales and professional support manager.

In the request for evidence issued on August 14, 2007, the director requested additional evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year within the three years prior to his transfer to the United States. The director instructed the petitioner to submit a statement identifying the beneficiary's dates of employment with the foreign entity, job titles held, specific job duties, types of employees supervised, if any, level of authority and title and level of authority of the beneficiary's immediate supervisor. The director also requested an organizational chart for the foreign entity depicting the beneficiary's last position abroad.

In a letter dated September 16, 2007, the foreign entity's vice president states that the beneficiary was hired into the company's management training program in Israel on January 10, 1997. The beneficiary's duties were described as follows:

[The beneficiary] was put in charge of our import-export department of polished diamonds for both our Israeli international headquarters in Ramat Gan and our U.S. headquarters in Rockville, Maryland.

As a manager, his duties were organizing purchase orders for the rough diamonds being imported; sorting them by size and quality; and instructing the diamond cutters daily according to the very specific needs of our U.S. subsidiaries and affiliates. [The beneficiary] oversaw the department's office staff in daily administration including preparation of invoices, bank deposits, collection calls on all customers, accounting, and all sales reports, as well as being in charge of confirming all shipments.

At the same time, he was receiving his training in the grading, cutting and pricing of polished diamonds and completed his formal education in gemology and diamond grading studies at the Institute for Diamond Studies in Tel Aviv, Israel.

[The beneficiary] was also responsible for interviewing potential diamond and jewelry sales representatives for our U.S. subsidiaries and affiliates, hiring them, and training them before they were transferred to the U.S.

The foreign entity's letter indicates that the beneficiary transferred to the United States operations on March 18, 1998. The petitioner provided an organizational chart for the foreign entity depicting a president, a vice president, an office manager, two sales managers, two salesman, two secretaries, and a certified public accountant. In a letter dated September 21, 2007, counsel explained that the beneficiary held a position "comparable to that of an office manager," and supervised the employees who currently hold the positions of sales manager and salesman with the foreign entity.

Upon review, the petitioner has failed to submit a consistent and credible description of the beneficiary's employment with the foreign entity. The beneficiary's resume indicates that he spent 14 months as a "member" of the marketing department, during which time he completed six months of training in grading, cutting and pricing diamonds, and made several trips to the United States for additional training. The petitioner's initial description of the beneficiary's 14 months of employment with the foreign entity was similar in content and suggested that he was primarily undergoing training during his tenure with the foreign entity. Completion of a management training program is not equivalent to employment in a managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act. There was nothing in the petitioner's initial evidence to suggest that the beneficiary's period of employment with the foreign entity involved primarily managerial or executive duties, any type of personnel supervision, or management of an essential function of the foreign entity. Rather, it appears that the beneficiary spent the 14 months of employment learning the diamond trade, including technical and sales aspects of the business.

In response to the RFE, the petitioner identified the beneficiary's title simply as "manager" or "comparable to that of an office manager," and stated that he supervised management-level employees, oversaw an "import-export department" not identified on the organizational chart, and interviewed and hired sales staff. The petitioner also claimed that the beneficiary supervised "office staff" and provided instruction to diamond cutters, all while completing training in how to cut diamonds himself. Given the significant differences between the initial position description and the description submitted in response to the RFE, the AAO does not find the description in the foreign entity's letter of September 16, 2007 to be credible. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If USCIS fails to believe that a fact stated in the petition is true, USCIS 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). The record indicates that the beneficiary was hired by the foreign entity immediately after completing his service in the Israeli Defense Force, and that he had no prior experience in the diamond industry at the time he was hired. The petitioner's claim that the beneficiary was hired in a managerial capacity, after initially claiming that he was hired as a management trainee, is not persuasive. Accordingly, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to his transfer to the United States as an E-1 nonimmigrant in March 1998. For this additional reason, the petition cannot be approved.

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. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or 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).

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.