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U.S. Citizenship
and Immigration
Services

B4

File: [REDACTED]
LIN 07 121 50223

Office: NEBRASKA SERVICE CENTER

Date: JAN 30 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)

IN 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).

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 is a non-stock corporation which claims to be a "subsidiary" of a foundation located in South Korea. 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 the beneficiary was employed abroad in a primarily managerial or executive capacity; or (2) that the petitioner will employ the beneficiary in the United States in a primarily managerial or executive capacity.

On appeal, counsel disputes the director's findings, asserts that the beneficiary was and will be employed in an executive capacity, and submits a brief and additional evidence in support of his arguments.

Furthermore, on October 7, 2008, the AAO issued a Notice of Consideration of Derogatory Information pursuant to 8 C.F.R. § 103.2(a)(16)(i). In the Notice, the AAO indicated that it does not appear as if the foreign employer owns and controls the United States entity, a non-stock corporation, and thus it does not appear as if the two entities are qualifying organizations. In response, counsel argues that the foreign employer owns and controls the petitioner and submits additional evidence.

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 provided sufficient evidence to establish that the foreign entity employed 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--

- (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.

Although counsel on appeal claims that the beneficiary was employed abroad in an executive capacity, the petitioner does not clearly assert in the underlying petition whether the beneficiary was primarily performing managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary was employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner claims in a resume and certificate of employment attached to the initial petition that the beneficiary was employed abroad as "Head of Team of [Research and Development] Human Resources Exchange Programs." However, the petitioner did not specifically describe the beneficiary's duties abroad.

On June 21, 2007, the director requested additional evidence. The director requested, *inter alia*, a detailed description of the beneficiary's job duties abroad, including a breakdown of the amount of time devoted to each ascribed duty. The director also requested a detailed organizational chart indicating the beneficiary's position within the organization as well as job descriptions for any subordinate employees.

In response, the beneficiary submitted a statement in which he described his duties abroad as follows:

In the past I served in various executive roles for the Parent Foundation. From February 1, 2001 to July 31, 2004 I acted as Head of Team and R&D Human Resource Exchange Programs Director for the Parent Foundation (KOSEF). I have overseen the day-to-day Foundation functions for bilateral cooperation between the U.S. National Science Foundation (NSF) and KOSEF for scientific and technology research. I was in charge of placing personnel of various academic backgrounds to work together in creative research activities in the fields of basic science and technologies at universities and research centers. The placement of the appropriate researchers and scholars at the proper universities and research centers is an exacting and time consuming task.

(Emphasis omitted).

The petitioner also submitted an organizational chart for the foreign employer. However, while the organizational chart identifies the beneficiary, the position ascribed to the beneficiary in the chart is "Division of International Cooperation," which was his position abroad until January 2001. The position described above, which he allegedly held abroad from February 2001 until July 2004, the period of employment relevant to these proceedings, is not identified in the organizational chart. The record does not contain any further evidence addressing the beneficiary's foreign position, its placement within the foreign organization's hierarchy, or the duties of the beneficiary's subordinates, if any. The petitioner also did not provide a breakdown of the amount of time devoted to each ascribed duty.

On October 22, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary was employed abroad primarily in an executive capacity. In support, counsel submits a brief and additional evidence, including a statement from the beneficiary and a letter from the foreign employer. The statement includes a more detailed description of the beneficiary's duties both abroad and in the United States as well as clarification that the beneficiary assumed the position "Head of Team of R&D Human Resources Exchange Programs Director" in February 2002, and not in February 2001 as stated in the underlying petition.

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity.

As a threshold issue, it is noted that the petitioner's attempt on appeal to supplement the record with a more detailed job description for the beneficiary's position abroad was inappropriate and will not be considered by the AAO. The director clearly requested a more detailed description of the beneficiary's job duties abroad, including a breakdown of the amount of time devoted to each ascribed duty, in the Request for Evidence. The petitioner chose not to submit this evidence. As the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, the AAO will not consider this evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (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 acted in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description of his position as "Head of Team of R&D Human Resources Exchange Programs Director" which fails to sufficiently describe what the beneficiary did on a day-to-day basis. For example, the petitioner states that the beneficiary oversaw the day-to-day "functions for bilateral cooperation between the U.S. National Science Foundation (NSF) and [the foreign employer] for scientific and technology research" and that he "was in charge of placing personnel of various academic backgrounds to work together in creative research activities in the fields of basic science and technologies at universities and research centers." However, the petitioner fails to specifically describe what, exactly, he did to oversee these bilateral cooperation "functions" or what duties he performed as the one "in charge" of placing personnel in activities at universities and research centers. The fact that a petitioner has given a beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that a beneficiary actually performed managerial or executive duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties were 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 (Reg. Comm. 1972).

Consequently, the record is not persuasive in establishing that the beneficiary primarily performed qualifying duties abroad. As noted above, the petitioner asserts that the beneficiary "oversaw" certain day-to-day functions and was "in charge of placing personnel." However, the record is devoid of evidence that the beneficiary was relieved of the need to perform the non-qualifying administrative and operational tasks inherent to these ascribed duties by a subordinate staff. The organizational chart submitted by the petitioner does not portray the beneficiary as having any subordinates, and the petitioner failed to provide a breakdown of the amount of time devoted by the beneficiary to each of his ascribed duties, even though this evidence was requested by the director. 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). Accordingly, it appears more likely than not that the beneficiary performed most, or all, of these vaguely described tasks unaided by subordinates.

Moreover, the record is not persuasive in establishing that those duties ascribed to the beneficiary were truly managerial or executive in nature. For example, the petitioner claims that the beneficiary was in charge of placing personnel. The petitioner specifically notes that the "placement of the appropriate researchers and scholars at the proper universities and research centers is an exacting and time consuming task." However, absent evidence to the contrary, it appears that the placement of personnel is an administrative or operational task and not a qualifying managerial or executive duty. As the petitioner failed to provide a breakdown describing how much time the beneficiary devoted to such a time consuming non-qualifying duty, even though this evidence was requested by the director, it cannot be concluded that the beneficiary "primarily" performed qualifying duties. Once again, failure to submit requested evidence that precludes a material line

of inquiry shall be grounds for denying the petition. *Id.* Accordingly, it appears more likely than not that the beneficiary primarily performed non-qualifying administrative or operational tasks abroad. 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. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As noted above, the record is devoid of evidence that the beneficiary supervised any subordinate workers. The petitioner failed to specifically describe the duties of these subordinates, if any, even though this evidence was requested by the director. Once again, 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). Accordingly, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.¹

Similarly, the petitioner has failed to establish that the beneficiary acted 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

¹While the petitioner has not argued that the beneficiary managed 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 managed an essential function, the petitioner must furnish a written job offer that clearly describes the duties 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 managed the function rather than performed the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. The petitioner’s vague job description fails to document that the beneficiary’s duties were primarily managerial. Also, as explained above, the record indicates that the beneficiary more likely than not primarily performed non-qualifying tasks. 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 were managerial, nor can it deduce whether the beneficiary was 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).

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 acted primarily in an executive capacity. The beneficiary's job description is so vague that it cannot be discerned what, exactly, the beneficiary did on a day-to-day basis. As explained above, it appears more likely than not that the beneficiary primarily performed the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary was primarily employed abroad in a managerial or executive capacity, and the petition may not be approved for that reason.

The second issue in the present matter is whether the petitioner has established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner described the beneficiary's proposed duties in the United States as "general manager and director" in a document titled "Offer of Employment" dated February 23, 2007 as follows:

[The beneficiary] will continue to have the full executive responsibility for the management of the U.S. Corporation including the following duties and responsibilities:

- Overall charge [sic] of the U.S. Corporation;
- Overseeing the day-to-day functions of the branch office and the center;
- Serving as the person in charge of communications with persons in charge of the U.S. National Science Foundation (NSF), which is [the foreign entity's] equivalent organization for bilateral cooperation in science and technology, as well as other U.S. government agencies;
- Coordinating and arranging various events and programs hosted and/or organized by [the United States entity], as well as representing [the United States entity] in other social or diplomatic functions involving scientific cooperation;
- Attending and reporting to the Board of Directors of [the foreign employer] concerning [the United States entity's] operations[.]

On June 21, 2007, the director requested additional evidence. The director requested, *inter alia*, a detailed description of the beneficiary's proposed job duties, including a breakdown of the amount of time to be devoted to each ascribed duty. The director also requested a detailed organizational chart indicating the beneficiary's position within the organization as well as job descriptions for any subordinate employees.

In response, the beneficiary submitted a statement in which he provided a materially identical description of his proposed duties in the United States. He further indicated that 60% of his time will be devoted to "[c]oordination and arrangement for various events and programs hosted and/or organized by [the United States entity], as well as representing [the United States entity] in other social or diplomatic functions involving scientific cooperation."

The petitioner also submitted a document titled "organizational chart" pertaining to the United States entity. Although the beneficiary is identified in the document as "general manager/managing director," the beneficiary's position is not placed within a hierarchy and the chart fails to identify any subordinate workers. Accordingly, it is unclear whether the United States entity employs any workers subordinate to the beneficiary or how the beneficiary's position fits within the organization.

On October 22, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary will be employed primarily in an executive capacity. In support, counsel submits a brief and additional evidence, including a statement from the beneficiary which includes a more detailed description of the beneficiary's proposed duties in the United States.

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

As a threshold issue, it is again noted that the petitioner's attempt on appeal to supplement the record with a more detailed job description for the beneficiary's proposed position in the United States was inappropriate and will not be considered by the AAO. The director clearly requested a more detailed description of the beneficiary's job duties in the United States. The petitioner chose not to submit this evidence. As the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, the AAO will not consider this evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *Matter of Obaigbena*, 19 I&N Dec. 533. The appeal will be adjudicated based on the record of proceeding before the director.

Once again, 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. At 1108, *aff'd*, 905 F.2d 41.

Similar to the position abroad, the petitioner's description of the beneficiary's proposed 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 of his position 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 be "overall [in] charge of the U.S. Corporation," oversee the day-to-day functions of the office, and be "in charge" of communicating with the U.S. National Science Foundation. However, the petitioner fails to specifically describe what, exactly, he will do to be "in charge" of the United States entity or communicating with the National Science Foundation or what he will do to "oversee" the day-to-day functions of the office. Again, 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 will be 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. As noted above, the petitioner asserts that the beneficiary will be “in charge” of various duties and oversee day-to-day functions. However, the record is devoid of evidence that the beneficiary will be relieved of the need to perform the non-qualifying administrative and operational tasks inherent to these ascribed duties by a subordinate staff. The organizational chart submitted by the petitioner does not portray the beneficiary as having any subordinates. Accordingly, it appears more likely than not that the beneficiary will perform most, if not all, of these vaguely described tasks unaided by subordinates.

Moreover, the record is not persuasive in establishing that those duties ascribed to the beneficiary will be managerial or executive in nature. For example, the petitioner claims that the beneficiary will devote 60% of his time to “[c]oordination and arrangement for various events and programs hosted and/or organized by [the United States entity], as well as representing [the United States entity] in other social or diplomatic functions involving scientific cooperation.” However, it appears more likely than not that coordinating and attending events is an administrative or operational task which will not rise to the level of being managerial or executive in nature. Accordingly, it appears that the beneficiary will primarily perform non-qualifying administrative or operational tasks in the United States. Once again, 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 604.²

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 noted above, the record is devoid of evidence that the beneficiary will supervise any subordinate workers. The petitioner failed to specifically describe the duties of his subordinates, if any, even though this evidence was requested by the director. Once again, 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). Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

²It is noted that, on appeal, counsel submits a statement from the beneficiary which indicates that he devoted, and will devote, 60% of his time to coordinating and arranging events both abroad and in the United States. Although the AAO will not consider this evidence on appeal, it is noted that, if this evidence were considered, it appears that the beneficiary would more likely than not be ineligible for the benefit sought. It appears that the beneficiary was, and will be, “primarily” engaged in performing non-qualifying administrative and operational tasks abroad and in the United States.

³Once again, while the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The petitioner’s vague job description fails to document that the beneficiary’s duties will be primarily managerial. Also, as explained

Similarly, the petitioner has failed to establish that the beneficiary will act 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 the tasks necessary to produce a product or to provide a service, e.g., coordinating and attending events. 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 Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (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).

Accordingly, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity, and the petition may not be approved for that reason.

Beyond the decision of the director, the record does not establish that the United States employer is the "same employer" as the foreign entity, or that it is an "affiliate or subsidiary" of the foreign entity.

Title 8 C.F.R. § 204.5(j)(3)(C) requires the petitioner to establish that 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."

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:

above, the record indicates that the beneficiary will more likely than not primarily perform non-qualifying event coordination tasks. 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 be primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

- (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[.]

In this matter, the petitioner described the relationship between the United States employer and the foreign entity in a letter dated March 7, 2007 as follows:

The Petitioner is a subsidiary of the Korea Science and Engineering [sic] (KOSEF) and, hereafter "Parent Corporation" based in Seoul, Korea. The Parent Corporation is a successful foundation, which is a leader in its field of research funding and has been in operation in Korea since 1977. The Parent Corporation owns 100% of the Petitioner's, [REDACTED] outstanding equity.

On October 7, 2008, the AAO issued a Notice of Consideration of Derogatory Information pursuant to 8 C.F.R. § 103.2(a)(16)(i). In the Notice, the AAO indicated that it does not appear as if the foreign entity "owns" and "controls" the United States employer, a non-stock corporation, and thus it does not appear as if the two entities are qualifying organizations. The AAO also stated that the records of the Internal Revenue Service indicate that the petitioner is a private operating foundation. Finally, the AAO indicated that, as a separate corporation, it does not appear as if the United States employer is the "same employer" as the foreign entity. The petitioner was given thirty days to rebut this derogatory information.

The petitioner responded to the Notice on November 10, 2008. In response, counsel argues in a letter dated November 6, 2008 that the United States employer, a Virginia non-stock corporation, is "fully funded and controlled" by the foreign entity through the corporation's bylaws, plan of operation, and shared leadership. Counsel also argues that at least one precedent decision has acknowledged that "non-stock organizations may qualify as parent/subsidiary or affiliate organizations under certain circumstances." *Matter of Church Scientology International*, 19 I&N Dec. 593.

Upon review, counsel's arguments are not persuasive in establishing that the two entities are qualifying organizations for purposes of this visa classification.

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. 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 case, the record is devoid of any evidence establishing that the foreign employer has any ownership interest in the petitioner, a non-stock corporation which, according to its bylaws, has “no members.” In fact, it does not appear possible under Virginia law for any individual or corporation, foreign or domestic, to claim a bona fide ownership interest in such an entity. Such organizations do not issue stock or otherwise vest third parties with ownership or membership interests. While it is possible for a non-stock organization to be “controlled” within the limits set by Virginia law for such non-profit or charitable institutions, these controlling parties cannot be said to “own” any interest in the non-stock corporation. *See* Va. Code Ann. §§ 13.1-801 *et seq.* (2008).

Moreover, it is noted that counsel’s reliance on *Matter of Church Scientology International*, 19 I&N Dec. 593, in arguing that non-stock corporations may qualify as parent/subsidiary or affiliate organizations is misplaced. In that decision, the Commissioner compared and contrasted the Church of Scientology with the Roman Catholic Church in determining whether an affiliate relationship existed between two branches of the Church of Scientology. The Commissioner concluded that, in that particular case, an affiliate relationship did not exist between the two Scientology churches. The Commissioner also opined that, in certain circumstances, it appears that the Pope, as the supreme head of the Roman Catholic Church, could be found to bind certain organizations together for L-1 visa purposes as the one who owns and controls the organizations. *Id.* at 600-601. The basis of this opinion, expressed in *dicta*, appears to relate primarily to the ownership of a diocese’s property by a bishop as a “corporation sole” who, in turn, is appointed by the Pope. *Id.* However, the Commissioner never held that a non-stock corporation may qualify as a parent/subsidiary or affiliate organization for purposes of this visa classification, Catholic or non-Catholic, religious or secular. Instead, the Commissioner reasoned as follows:

[This discussion] cannot be construed to mean that there is a qualifying relationship between all organizations associated with the Roman Catholic Church, or that there is not a qualifying relationship between the Church of Scientology and its other associated organizations. Such a determination is made on a case-by-case basis after considering the petitioner’s evidence of ownership and control.

Id. at 602.

In this matter, the record is devoid of evidence establishing that the foreign entity “owns” the United States employer. While there appears to be some modicum of control over the United States employer by the foreign employer and its management, this does not constitute “ownership” of a non-stock corporation under Virginia corporate law nor is it reasonably analogous to the structure of certain organizations related to the Roman Catholic Church in which individual bishops own corporate assets as a “corporation sole.”

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

The previous approval of L-1A petitions for this petitioner does not preclude CIS from denying a subsequently filed non-immigrant or immigrant petition based on a reassessment of the petitioner’s qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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, 8 U.S.C. § 1361.

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). Therefore, based on the additional ground of ineligibility as discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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 at 1043, *aff'd*, 345 F.3d 683.

As a final note, USCIS records indicate that the beneficiary has previously been approved for L-1 employment with the instant 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 CIS 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 CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Eng. 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.