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U.S. Department of Homeland Security  
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U.S. Citizenship  
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER  
LIN 07 243 53038

Date: NOV 03 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).

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner owns and operates a chain of membership shopping warehouses located primarily in Latin America. It seeks 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 petitioner asserts that it had a qualifying relationship with the beneficiary's foreign employer, Servicios Ejecutivos a PriceSmart Mexico, S.A. de C.V. during the beneficiary's qualifying period of employment in Mexico, and at the time the beneficiary was transferred to the United States as an L-1 nonimmigrant intracompany transferee in 2003. The petitioner seeks to employ the beneficiary in the position of Corporate Buyer and Distribution Center (DC) Consultant.

The director denied the petition, concluding that the petitioner no longer has a qualifying relationship with the beneficiary's foreign employer and is therefore ineligible for the immigration benefit sought.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that, in denying the petition, the director failed to heed the statute, regulations and relevant policy guidance pertaining to qualifying relationships. Counsel asserts that "the law and guidance on the law is clear that at the time of filing, the employer abroad does not have to be doing business as long as the U.S. petitioner has been doing business for at least one year and that it is doing business in at least one other country, and that the qualifying relationship existed between the employer aboard and the U.S. petitioner at the time of transfer of the beneficiary." Counsel submits a lengthy brief and supporting documentation in support of the appeal.

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

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

\* \* \*

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

The primary issue in this proceeding is whether the petitioner continues to have a qualifying relationship with the foreign entity that previously employed the beneficiary. 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).

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;

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*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 filed the immigrant visa petition on July 26, 2007. In a letter dated July 19, 2007, the petitioner stated that the beneficiary, who is currently in the United States as an L-1A nonimmigrant intracompany

transferee, was employed by Servicios Ejecutivos PriceSmart Mexico, S.A. de C.V. from May 2002 until her transfer to the United States in September 2003. The petitioner further stated:

The requisite qualifying relationship exists between [the petitioner] and the former Employer abroad, Servicios Ejecutivos PriceSmart Mexico, S.A. de C.V. ("PriceSmart Mexico"), in that PriceSmart was the controlling company in a 50-50 joint venture with its Mexican partner, during which period the qualifying employment of the beneficiary took place.

While PriceSmart Mexico is no longer part of the group, [the petitioner] maintains extensive international operations through other subsidiary companies and branch offices abroad that are involved in substantial international business, and therefore, retains the eligibility as a qualifying organization.

The petitioner stated that PriceSmart Mexico opened its first retail shopping warehouse in 2002, and closed its warehouse club operations in February 2005, two years after the beneficiary's transfer to the United States.

In support of the petition, the petitioner provided a corporate organizational chart showing all domestic and international subsidiaries of the U.S. company. The chart indicates that the petitioner and Grupo Gigante S.A. de C.V., as of May 2006, each owned 50 percent of PSMT Mexico S.A. de C.V., a Mexican holding company established on February 1, 2002. Servicios Ejecutivos a PriceSmart Mexico S.A. de C.V. was listed as a subsidiary of PSMT Mexico S.A. de C.V.

The petitioner submitted a copy of its 1996 Annual Report, which confirms the petitioner's joint venture relationship with Grupo Gigante S.A. de C.V., and the closure of PSMT Mexico's warehouse operations as of February 28, 2005. The annual report indicates that the joint venture sold two out of three locations in September 2005. The petitioner also submitted a copy of its Form 10-Q, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the period ended May 31, 2007. The Form 10-Q, at Note 12, states:

In January 2002, the Company entered into a joint venture agreement with Grupo Gigante S.A. de C.F. ("Gigante") to initially open four PriceSmart warehouse clubs in Mexico. The Company and Gigante contributed \$20.0 million each for a total of \$40.0 million, and each owned 50% of the operations in PSMT Mexico, S.A. de C.V., which owned five subsidiary companies (collectively, "PSMT Mexico"). . . . Three warehouse clubs were eventually opened during fiscal year 2003.

The director issued a request for additional evidence (RFE) on February 22, 2008, in which he instructed the petitioner, inter alia, to submit documentary evidence to establish the qualifying relationship between the U.S. entity and the entity which employed the beneficiary in the joint venture. The director requested annual reports, articles of incorporation, financial statements, and/or evidence of ownership of all outstanding stock for both entities.

In a response dated May 14, 2008, the petitioner submitted: (1) a copy of the petitioner's Form I-797 Approval Notice for its Blanket L petition (WAC 03 058 55302), which lists PriceSmart Mexico S.A. de C.V. as a

foreign subsidiary, indicating a 50-50 joint venture relationship; (2) a summary translation of the articles of incorporation of PSMT Mexico, S.A. de C.V., which indicates that the petitioner owns 25 Series "A" shares of the foreign entity's stock, while Grupo Gigante owns 25 Series "B" shares; (3) a partial copy of the petitioner's Form 10-K for the period ended August 31, 2006, in which PSMT Mexico and the beneficiary's former Mexican employer are listed as 50% owned subsidiaries of the petitioner; and (4) the consolidated financial statements of PSMT Mexico, S.A. de C.V. for the years ended December 31, 2005, 2004 and 2003, which indicates that PSMT Mexico owns 99.99% of the shares of Servicios Ejecutivos a PriceSmart Mexico, S.A. de C.V.

The petitioner also submitted a copy of its 2007 Annual Report, which indicates the following at Note 16 to the Consolidated Financial Statements:

On October 31, 2007, Grupo Gigante S.A. de C.V. purchased all 164,046 shares held by [the petitioner] in PSMT Mexico for \$2.0 million, thereby allowing Grupo Gigante S.A. de C.V. to assume 100% control and ownership of PSMT Mexico.

In a letter dated May 14, 2008, counsel for the petitioner emphasized that the petitioner was "the ultimate controlling company in a 50-50 joint venture with its Mexican partner, during which period the qualifying employment of the beneficiary took place."

Counsel further stated:

While PSMT Mexico and its subsidiaries are no longer part of the group, [the petitioner], the parent company, maintains extensive international operations through other subsidiary companies and branch offices abroad that are involved in substantial international business and, therefore, retains the eligibility as a qualifying organization as per 8 C.F.R. § 214.2(L)(ii)(G)(2).

The dissolution or cessation of PSMT Mexico does not preclude an alien beneficiary's eligibility as an L-1 intracompany transferee since section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L) requires only the employment of the beneficiary outside the U.S. by the foreign organization for one year prior to entry. *See Matter of Thompson*, 18 I&N 169 (BIA 1981). Furthermore, the continued existence of the foreign employer of the United States employer is not required. *See Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977).

The director denied the petition on June 16, 2008, concluding that the petitioner failed to establish that the U.S. and foreign entities maintained a qualifying relationship at the time the petition was filed. The director noted that "the 50/50 joint venture relationship between the petitioner and the beneficiary's foreign employer was severed when the joint venture was dissolved."

The director noted that counsel's reliance on the statute and regulations governing L-1 regulations was not persuasive in the context of this immigrant visa petition. The director emphasized that the petitioner must

establish eligibility at the time of filing the immigrant visa petition, and thus determined that the fact that the qualifying relationship existed at the time the beneficiary was transferred to the United States does not exempt the petitioner from its burden to establish the existence of an ongoing qualifying relationship with the beneficiary's previous foreign employer. The director found that while the precedent decisions and arguments employed by counsel were relevant with regard to nonimmigrant L-1A petitions, the same is not true with regard to Form I-140 immigrant petitions such as the one filed by the petitioner in the present matter.

On appeal, counsel for the petitioner asserts that the director's position is "contrary to statutory and regulatory authority, congressional intent, and thus is an abuse of discretion." Counsel asserts that the record does not demonstrate a qualifying relationship existed "because this relationship no longer existed at the time of filing nor is it a legal prerequisite for filing that the employer where the beneficiary worked prior to transferring to the U.S. in L-1A status had to be doing business at the time of filing the immigrant petition."

In support of this claim, counsel refers to a USCIS memorandum issued by Michael Aytes on September 12, 2006, which revised Chapter 22 to the *Adjudicator's Field Manual (AFM)*.<sup>1</sup> Counsel asserts that "Mr. Aytes explains very well on page 46 that '[b]oth the U.S. employer and at least one qualifying organization abroad must be doing business up until the time of visa issuance of status.'" Counsel contends that the director "did not bother to understand the laws nor did he or she bother to properly read the adjudications manual."

Counsel quotes from section 203(b)(1)(C) of the Act, stating that the statute "makes no mention whatsoever to the status of the specific employer abroad at the time of filing, nor can any such status be implied, assumed or deduced." Counsel further asserts that the definition of "multinational" at 8 C.F.R. § 204.5(j)(2) states that "the qualifying entity" must be doing business in two or more countries, one of which is the United States." Counsel emphasizes that the definition of multinational "does not specify that it must conduct business in the country from where the beneficiary of the I-140 petition was transferred, nor does it specify that the employer abroad has to be the one conducting business." Counsel asserts that in this case, the beneficiary's foreign employer has numerous affiliate companies that were continuing to do business.

Counsel further states:

The regulatory definition of qualifying organization as it applies to the L-1 category at 8 CFR 214.2(l)(ii)(G)(2) and for multinational, as stated in 8 CFR Section 204(j)(2) are not identical but the concept is the same – that the petitioner be doing business in the U.S. and, through a qualified corporate entity, in at least one other country. The criteria for L-1A and EB13 are too similar to believe that Congress intended the kind of result that has now occurred by the denial of this underlying petition.

Finally, counsel argues that "the congressional intent for both immigrant and nonimmigrant multinational managers and executives is the ability to move personnel on a global scale and to facilitate the growth of

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<sup>1</sup> See Memorandum of Michael Aytes, Acting Assoc. Dir., USCIS, "AFM Update: Chapter 22: Employment-based Petitions (AD03-01)," (September 12, 2006)("Aytes memorandum")

multinational organizations." Counsel asserts that the director's decision "makes no logical sense" in the context of "multinationalism, globalization and Congressional intent."

Upon review, counsel's assertions are not persuasive. The petitioner has not established that it maintains a qualifying relationship with the beneficiary's foreign employer.

Although the AAO concurs with the director's ultimate conclusion in this matter, the AAO must address a critical and repeated misstatement of fact in the record that has been accepted by both the director and counsel.

Despite the petitioner's statements and the director's findings to the contrary, there is no evidence that the foreign entity that employed the beneficiary, Servicios Ejecutivos a PriceSmart a S.A. de C.V., was dissolved or otherwise had ceased to exist as of the date the petition was filed. The petitioner indicates that PSMT Mexico closed its warehouse operations as of February 2005. However, the record shows that PSMT Mexico and its subsidiaries continued to exist as legal entities at the time the petition was filed. As of July 2007, PSMT Mexico, and indirectly, Servicios Ejecutivos a PriceSmart a S.A. de C.V., were still legally recognized subsidiaries of the U.S. petitioner. The record shows that the petitioner included financial results for PSMT and its subsidiaries in the notes to its consolidated financial statements in its annual report for the fiscal year ended on August 31, 2007.

Therefore, the director's finding that no qualifying relationship existed between the petitioner and the foreign entity as of the date of filing was incorrect. As of July 26, 2007, the petitioner and the beneficiary's foreign employer enjoyed a parent-subsidiary relationship, pursuant to the definition of "subsidiary" at 8 C.F.R. § 204.5(j)(2). The AAO notes that this qualifying relationship would have been sufficient to establish the eligibility for the requested classification, despite the ongoing closing of the Mexican company's operations, because the petitioner does continue to meet the definition of "multinational" set forth at 8 C.F.R. § 204.5(j)(2).

However, the petitioner's 2007 annual report at page 52 indicates: "On October 31, 2007, Grupo Gigante S.A. de C.V. purchased all 164,046 shares held by [the petitioner] in PSMT Mexico for \$2.0 million, thereby allowing Grupo Gigante S.A. de C.V. to assume 100% control and ownership of PSMT Mexico." Therefore, as of October 31, 2007, the petitioner and the beneficiary's foreign employer no longer have the requisite common ownership and control. It is this event, and not the closure of the Mexican company's shopping warehouse operations, which render the petitioner and beneficiary ineligible in this matter.

The AAO recognizes that the petitioner continues to conduct business in two or more countries, one of which is the United States. However, the issue here is not whether the petitioner meets the definition of multinational under 8 C.F.R. § 204.5(j)(2), but whether it maintained (at the time the petition was filed) and continues to maintain a qualifying relationship with the separate legal entity that employed the beneficiary abroad. The current regulations expressly state that the petitioner must establish the beneficiary's "prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity" which employed the beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(i)(C). The regulation's use of the word "is" prescribes that the relationship between the petitioner and the beneficiary's

foreign employer must exist in the present, i.e., at the time of filing and continue to exist until such time as the beneficiary is granted an immigrant visa or adjusts status to that of a permanent resident of the United States. The petitioner's burden of establishing eligibility for the benefit sought is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In direct contradiction to the express language in the relevant regulatory provision, counsel's faulty reasoning focuses on the petitioner's circumstances prior to the filing of the Form I-140, thereby suggesting that eligibility need not be present at the time of filing and ongoing so long as the petitioner established that it met the relevant regulatory provisions at some other time. This line of reasoning suggests that once a qualifying relationship is established as having existed, the petitioner can continue relying on that old qualifying relationship for a petition filed in the future, even if the relationship ceases to exist at the time of filing, or while the petition is pending adjudication, as is the case in the present matter. The AAO cannot, however, adopt counsel's interpretation. Precedent case law specifically instructs against such unsound logic by specifically requiring that each petitioner establish its eligibility at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41.

Here, by the time the RFE was issued on February 22, 2008, the petitioner was no longer eligible for the immigration benefit it was seeking by virtue of the severing of the parent-subsidiary relationship between the petitioner and the beneficiary's foreign employer. It would be factually impossible for the petitioner to establish an ongoing qualifying relationship with a foreign entity that is now wholly-owned by a company that has no documented common ownership and control with the U.S. employer. Accordingly, as the petitioner did not have a qualifying relationship with the beneficiary's foreign employer as of October 31, 2007, this petition cannot be approved.

The AAO acknowledges counsel's claim that the Aytes memorandum and AFM provide that the petitioner only need establish that it is doing business in the United States and one other country at the time of filing the immigrant visa petition. This interpretation is incorrect. The Aytes memorandum at page 43 states:

As described in 8 CFR 204.5(j)(3), the petitioner must demonstrate that the:

- U.S. organization and the organization abroad maintain a qualifying relationship;
- U.S. organization and the organization abroad are both actively engaged in doing business; and
- U.S. organization has been actively engaged in doing business for at least one year.

The "qualifying relationship" requirement is separate from the "doing business" requirement and therefore requires USCIS to make independent factual determinations. Here, the petitioner meets the definition of "multinational" but no longer maintains a qualifying relationship with the foreign organization that employed the beneficiary. The Aytes memorandum further states at page 44: "When an employer wishes to transfer an alien employee working abroad to a U.S. company location as an E13 immigrant, a qualifying relationship must exist between the foreign employer and the U.S. employer." Neither the memorandum nor the AFM

state that the qualifying relationship must have existed at some time in the past, nor do they contemplate the approval of a petition when there is no longer a qualifying relationship between the petitioner and the foreign entity.

Although the regulations at 8 C.F.R. § 204.5(j)(3)(i)(B) reference beneficiaries who are already employed by the petitioner as nonimmigrants, the fact that the beneficiary is currently in the United States in L-1A classification does not exempt the petitioner from its burden to establish the existence of an ongoing qualifying relationship with the beneficiary's previous foreign employer as of the date the petition is filed, and until the beneficiary's application for permanent residence is ultimately approved. Rather, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) simply allows USCIS to look beyond the three-year period immediately preceding the filing of the I-140 Petition in order to determine whether the beneficiary has the requisite one year of qualifying employment abroad. To construe the regulation as creating an exception that allows aliens to qualify as multinational managers without a qualifying relationship between the U.S. and foreign entity would contravene the plain language of the statute.

In this case, the parent-subsidary relationship between the petitioner and the beneficiary's foreign employer was severed when the petitioner sold its shares in PSTM Mexico to its joint venture partner in October 2007. The fact that the petitioner continues to be part of a multinational group is irrelevant in this proceeding, as this group does not include the foreign company that employed the beneficiary. The beneficiary's employment abroad with a subsidiary of PSTM Mexico can no longer be considered employment with a qualifying entity for the purposes of this immigrant visa classification, and it cannot be found that the beneficiary is seeking "to continue to render services to the same employer or to a subsidiary or affiliate thereof."

As noted by the director, counsel's reliance on the beneficiary's continuous maintenance of L-1A status, and on the regulations governing L-1 nonimmigrant intracompany transferees at 8 C.F.R. § 214.2(l) is not persuasive in the context of this immigrant visa petition. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of "subsidiary" and "affiliate." *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(K) and (L); 8 C.F.R. § 204.5(j)(2). However, there are situations in which changes in corporate relationships will render an L-1A nonimmigrant ineligible for classification as a multinational manager or executive pursuant to section 203(b)(1)(C), even when such changes do not affect the nonimmigrant alien's ability to maintain his or her L-1A status.

The L-1 nonimmigrant classification only requires that the petitioning organization continue to operate outside the U.S. *See* 8 C.F.R. § 214.2(l)(ii)(G)(2) (defining "qualifying organization" as a United States or foreign firm, corporation, or other legal entity which is or will be doing business in at least one other country for the duration of the alien's stay in the United States as an intracompany transferee.) While a qualifying relationship with the beneficiary's foreign employer must exist at the time of the beneficiary's transfer to the United States in L-1 status, a subsequent sale or dissolution of the foreign entity that employed the beneficiary will not necessarily render the beneficiary ineligible to maintain L-1 status, so long as the petitioner continues to do business in at least one other country through a qualifying branch, parent, affiliate or subsidiary. In such an instance, the regulations require the petitioner to file an amended I-129 petition so that USCIS can determine whether the petitioner is still a qualifying organization. *See* 8 C.F.R. § 214.2(l)(7)(i)(C).

In contrast, in order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it maintains a qualifying relationship with the beneficiary's foreign employer; the foreign corporation or other legal entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. §204.5(j)(3)(i)(C). A multinational executive or manager is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

Based on the foregoing discussion, the petitioner has not established that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record as presently constituted does not demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for one year, or that she will be employed by the United States entity in a primarily managerial capacity. The petitioner does not claim that the beneficiary has been or would be employed in an 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.

With respect to the beneficiary's employment abroad, the petitioner indicates that the beneficiary was employed by the foreign entity for a total of sixteen months, from May 2002 until September 2003, during

which time she held three different positions: import manager; distribution and logistics manager; and exports and logistics manager. The petitioner has provided a detailed position description for the exports and logistics manager position, and an organizational chart depicting this position within the foreign entity's organizational hierarchy. Upon review, the petitioner has demonstrated that the beneficiary's last position with the Mexican entity was in a primarily managerial capacity. However, the record does not contain detailed position descriptions or organizational charts for the beneficiary's prior positions, and the petitioner has not provided the beneficiary's dates of employment in each specific role. 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)).

Based on the organizational chart submitted for the foreign entity, it does not appear that the import manager position supervises subordinate personnel, nor can it be concluded based on the job title alone that the position manages an essential function. Furthermore, the position of "distribution and logistics manager," the second position the beneficiary held with the foreign entity, is not depicted on the foreign entity's organizational chart. Accordingly, the record does not demonstrate that the beneficiary has the requisite one year of employment in a managerial or executive capacity with the foreign entity. For this additional reason, the petition cannot be approved.

Finally, the AAO finds insufficient evidence to establish that the beneficiary's proposed position in the United States will be in a primarily managerial or executive capacity. The petitioner submitted a letter dated July 19, 2007 in which it stated that the beneficiary, as "Corporate Buyer and DC Consultant," will "oversee essential functions of the buying department of the Company and Mexico DC operations"; "manage the professional staff of four Assistant Buyers"; "have the authority to exercise wide discretion regarding policies and procedures"; hire and terminate personnel, and operate at a high level within the company, reporting to the Senior Vice President of buying. The petitioner submitted an organizational chart which depicts the beneficiary as "Buyer/Mx Dc Consultant" for office supplies, lawn & garden and seasonal products, supervising four assistant buyers. She reports to the senior vice president of buying for non-foods, who reports to the executive vice president of buying. The chart shows that the beneficiary is one of five buyers in the non-foods buying department.

The petitioner submitted a list of 13 duties performed by the beneficiary in this position, along with the percentage of time she devotes to each job duty. The petitioner also provided its standard job description for the position of "buyer," which lists seven "essential duties and responsibilities" performed by the position. Upon review, there are key differences between the descriptions which raise questions regarding the position's actual level of authority. For example, the official position description does not indicate that the position is responsible for hiring employees or recommending personnel actions, nor does the position indicate any supervisory duties, or policy-making authority. The buyer position does not require a college degree, which raises questions as to whether the lesser position of "assistant buyer" is actually a professional position as claimed by the petitioner. The buyer position requires five years of buying experience, the "ability to work with others in a team environment," the ability to "take direction and accomplish tasks with minimum supervision," math and computer skills, and negotiation skills, but no supervisory experience. 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).

The petitioner also modified several of the official duties of the position in an attempt to establish that the position is managerial in nature. For example, the petitioner indicates that the beneficiary's primary task, requiring 25 percent of her time, is "leading the negotiations at management level with vendors/suppliers regarding product costs, terms of sale, discounts, freight return allowances, etc." The official job description for the position of buyer states: "Negotiate with vendor/supplier product costs, terms of sale, discounts, freight return allowances, etc." The petitioner states that the beneficiary is responsible for "overseeing, through subordinate personnel, the maintenance of proper and accurate item information in computer system." The official job description states that the buyer will "manage and maintain proper and accurate item information in computer system." The petitioner's insertion of the words "oversee" or "manage" does not automatically elevate the position to one which meets the definition of managerial capacity. 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).

Furthermore, although the petitioner stated that the official job description for the position of "buyer" summarizes the beneficiary's position, the petitioner indicated in its letter that the beneficiary devotes only 57 percent of her time to performing the duties of a buyer, while she spends the remainder of her time "overseeing the Mexico DC Operations," managing the delivery of training to unidentified "in-country," logistics, and accounting personnel, and overseeing export shipping documentation. The petitioner has not identified with any specificity what the beneficiary does to "oversee" the distribution center operations, and the distribution center and its staff do not appear on any of the submitted organizational charts. The petitioner has not adequately outlined the actual duties the beneficiary performs as "DC Consultant" such that the AAO could conclude that such duties are primarily managerial or executive in nature.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Based on the unresolved discrepancies addressed above, the AAO is not persuaded that the beneficiary primarily supervises and controls a subordinate staff of professional, managerial or supervisory employees. The petitioner has not demonstrated that the beneficiary's position involves the authority to hire and fire subordinates, or any supervisory authority, nor has it established that her claimed subordinates are

professionals.<sup>2</sup> An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even 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. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)).

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.

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.

The petitioner states that the beneficiary will "oversee essential functions of the Buying Department of the Company and the Mexico DC operations," but it has failed to demonstrate that the beneficiary's primary duties will be overseeing an essential function of the organization. The beneficiary appears to be the senior employee of

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<sup>2</sup> In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. 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 AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The petitioner has not established that a bachelor's degree is a prerequisite for employment as an assistant buyer.

the three workers responsible for buying office supplies, lawn and garden products and seasonal items for the petitioner's stores, but the record does not demonstrate that she or any other buyer functions at a senior level within the petitioner's organizational hierarchy. The job descriptions submitted, particularly the official job summary for the position, do not establish that the position's level of authority rises to the level of a function manager.

For the foregoing reasons, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

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). 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 AAO acknowledges that USCIS previously approved a petition requesting an extension of the beneficiary's L-1A status. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

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

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on

behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The 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 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.

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.