(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: NOV 29 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is a real estate investment company incorporated in Florida that claims to be a wholly owned subsidiary of Sainc Ingenieros Constructores S.A., the beneficiary's former foreign employer located in Colombia. The petitioner is seeking to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. On August 20, 2011 the director issued a request for evidence (RFE) to establish the beneficiary's qualifying employment for the foreign and proposed employer. The petitioner submitted additional documents in response to the request, however the director noted additional deficiencies and on March 22, 2012, the director issued a Notice of Intent to Deny (NOID). After reviewing the petitioner's response to the NOID, the director denied the petition on January 22, 2013. The director determined the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; and (2) that the foreign entity employed the beneficiary in a managerial or executive capacity for at least one year.

On appeal, counsel asserts that the director erroneously "relied on a flawed investigation to come to the conclusion that the United States petitioner and the foreign employer do not meet the relationship of subsidiary or affiliate." Additionally, counsel asserts that the director overlooked evidence that establishes the beneficiary's one full year of employment with the foreign entity in the three years preceding her admission to the United States as a nonimmigrant.

I. The Law

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.

II. Qualifying relationship between the petitioner and the foreign employer

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

The pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines a "subsidiary" as follows:

> *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 regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362

(Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

A. Facts

In the present matter, the petitioner states that 100 percent of its 100 outstanding shares of stock are owned by the foreign employer, thus establishing a parent-subsidiary relationship. In support of this claim, the petitioner initially submitted its Articles of Incorporation establishing the company on October 28, 2003. The Articles of Incorporation state that the petitioner is authorized to issue 100 shares, and identify as president and the foreign entity as incorporator.

The petitioner also submitted three stock certificates. Stock Certificate No. 1 represents 60 shares issued to the foreign employer and the certificate was signed on October 28, 2003 by the beneficiary as president and secretary. Stock Certificate No. 2 represents 40 shares issued to the beneficiary and it was also signed by the beneficiary as president and secretary. Certificate No 2 also indicated that all 40 shares were transferred on January 15, 2008. Stock certificate No 3 represented the issuance of 100 shares to the foreign entity on January 15, 2008, and the certificate was signed by the beneficiary as president and secretary.

Notably, the petitioner also submitted a copy of its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for 2009. The petitioner indicated "No" at Schedule K where asked if the company has foreign ownership.

In support of its assertion that the petitioner is a subsidiary of the foreign entity, the petitioner submitted a "Commitment for Financing" document allegedly prepared by the approving the consolidation and assumption of the petitioner's mortgage loan. The petitioner notes that the document identifies the foreign company as "Corporate Guarantor" of the loan. The letter is dated October 26, 2009. The letter is signed as "agreed and accepted" on November 6, 2009 by the beneficiary on behalf of the petitioner; however the corporate guarantor signature block is unsigned. The petitioner submitted an Amortization Schedule from the reflecting the petitioner's loan date of November 24, 2009. The petitioner did not provide the approved mortgage document and the foreign employer is not identified on any legally binding mortgage documents presented as guarantor of the loan.

In the NOID issued on March 22, 2012, the director acknowledged the petitioner's claim that it is a wholly-owned subsidiary of the foreign entity, but observed that the petitioner failed to submit

evidence to establish that money was exchanged for the company's stock. In addition, the director emphasized that the petitioner's IRS Form 1120 for 2009 indicates that the petitioner does not have a foreign shareholder.

In response to the director's NOID, the petitioner presented new documents in rebuttal to these noted deficiencies. Specifically, the petitioner submitted another version of the "Commitment Letter." The revised version of the document was signed by representatives of both the petitioner and the foreign employer but the agreement and acceptance are dated February 26, 2009. The document states that the acknowledgement and approval must be signed and returned by the petitioning company no later than November 9, 2009 and the loan must be closed no later than November 16, 2009 or the Commitment will become null and void. The October 26, 2009 Commitment letter further states that it will expire "five (10) business days from the date of the letter."

The petitioner also submitted a statement from its accounting firm addressing the company tax returns and the company stock certificates. The firm explained in a letter dated April 18, 2012 that the errors on the 2009 tax return were omissions made by the "first accountant" on the initial 2004 tax return and the mistake had been carried over since that year. The firm referenced and the petitioner attached a Form 1120X, Amended U.S. Corporation Income Tax Return for 2009 indicating the foreign employer's 100% ownership on Schedules G and K. The petitioner also included a Form 1120, U.S. Corporation Income Tax Return for 2010, dated September 14, 2011, and a return for tax year 2011 reflecting the same ownership information. Regarding the stock certificates, the firm stated that stock certificate No. 3 is a combination of the first two certificates thus establishing 100% ownership of the shares by the foreign employer.

The petitioner's response included a "Stock Purchase Agreement Receipt" dated January 15, 2008. The document indicates that the beneficiary transferred all of her shares in the petitioner to the foreign employer. The document states "[t]he consideration for this transfer is to receive yearly salary increases and bonuses at the discretion of [redacted] There was no exchange of monetary transactions for this transfer." The petitioner also submitted minutes of a board meeting held by the foreign employer in June 2008 documenting its purchase of all the petitioning company's stock.

In denying the petition, the director acknowledged the submitted evidence, but found that "an investigation revealed that [the petitioner] has . . . no parent or subsidiary location" and that [redacted] . owns 100% of [the petitioner's] corporate stock, not [redacted] Finally, the director noted that the "investigation" found that the foreign entity does not have subsidiaries outside of Colombia.

On appeal, the petitioner asserts that the director erred in finding that the petitioner and the foreign employer are unrelated business entities. The petitioner refers to "substantial" evidence provided to establish the claim and asserts that the USCIS relied on a "flawed investigation" and "faulty and erroneous information from in the ' The petitioner further asserts that the USCIS failed to consider evidence such as the commitment letter in its decision. The petitioner asserts that it has provided "voluminous, relevant, probative, and credible evidence" establishing a qualifying relationship with the foreign employer and insists that the evidence is sufficient to meet the preponderance of evidence standard applicable to this matter.

B. Analysis

Upon review, the petitioner has not established that it has a qualifying relationship with the foreign entity.

Although the director's determination will be affirmed, counsel correctly contends that the director erred by citing to an "investigation" in the notice of decision without first informing the petitioner that USCIS was relying on information that is outside the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(requiring that USCIS provide notice to the petitioner in cases where an adverse decision will be based on derogatory information of which the petitioner is unaware). Denial of this petition cannot be based upon the allegations of the director without evidence offered in support of those conclusions. Just as the unproven assertions of counsel are not evidence, neither are the unsupported conclusions of the director. *Cf. Matter of Obaigbena*, 19 I&N Dec. 533, 534 note (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As such, the director's analysis based on the referenced "investigation" is hereby withdrawn.

Although the director's reasoning was flawed, the evidence of record contains deficiencies and inconsistencies which undermine the petitioner's assertions that it has a qualifying relationship with the foreign employer. The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As a preliminary matter, the AAO notes that counsel includes in support of the appeal a copy of an email thread allegedly exchanged between the beneficiary and a representative of in which acknowledges receipt of the petitioner's verification of its subsidiary relationship with the foreign employer. A subsequent report appears to verify this relationship. Notwithstanding this information from the organization, the petitioner must submit primary evidence of its eligibility for the benefit sought. In this matter, the AAO looks to the evidence provided and not conclusions drawn by outside organizations in determining whether the petitioner established by a preponderance of evidence that it has the requisite qualifying relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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

In this matter, the petitioner submitted three stock certificates and several other documents intended to corroborate the validity of the stock certificates. A review of the stock certificates as presented suggests that the foreign company owns 140 shares of a company authorized to issue only 100 shares of stock. The petitioner submitted a letter from its accountant asserting that the stock certificates, as issued, are intended to reflect that the shares issued on certificate No. 1 and certificate No. 2 should be added together to reflect the total issued on certificate No. 3. The petitioner did not provide evidence that either stock certificate no. 1 or no. 2 was ever cancelled. Although not requested by the director, a stock ledger or registry could have resolved questions and inconsistencies and provided credibility to the evidence but the petitioner failed to provide additional documentation.

Further, the stock certificates themselves raise questions. All three certificates were signed by the beneficiary in her capacity as president and secretary. However, the record establishes that the beneficiary was not the president or the secretary of the company at the time the certificates were issued. Rather, was president of the company and the beneficiary was vice-president. The record demonstrates that had, on occasion, authorized the beneficiary to act on the company's behalf in specific transactions and the authorization had been memorialized on paper. However, the petitioner provided no such authorization permitting the beneficiary to issue and sign company stock. This raises questions regarding the validity of the stock certificates that have not

been resolved by the petitioner. 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). Rather than provide corporate documentation to verify stock ownership, the petitioner provided a statement prepared by its accountant asserting the stock holdings as claimed by the petitioner but the letter did not explain the resource upon which the accountant relied to make that determination. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The foreign employer purportedly recognized its acquisition of the beneficiary's 40% ownership interest through board meeting minutes dated June 28, 2008; however, the petitioner provided no such corporate documentation to reflect its initial acquisition of stock from the petitioner in 2003.

Other documents submitted to bolster the petitioner's claim of the subsidiary relationship with the foreign employer are insufficient. The commitment letter does not support the claim because a commitment letter merely indicates the bank's willingness to extend credit and does not necessarily represent a legal obligation of the petitioner or a guarantor. Further, the petitioner submitted two different versions of the letter, one of which is incomplete and contains typographical mistakes and inaccurate dates. Absent some explanation for the different versions, these documents have little probative value. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The amortization schedule does indicate a loan was actually closed in November 2009; however, the foreign employer as guarantor is not identified in the document. Further, the AAO acknowledges that the foreign employer has made wire transfers to the petitioning company's financial accounts but the AAO also observes that and several other companies have made significant deposits as well but they have not been claimed as shareholders and the transfers have not been explained in sufficient detail to support the petitioner's claims.

Finally, the petitioner's 2009 Form 1120 contradicts its claim that it is a wholly owned subsidiary of the foreign employer. After the director noted the issue, the petitioner acknowledged and claimed to have corrected the purported error. Specifically, the petitioner's accountant asserted in a letter dated April 2012 that the error was an omission from the time the company was established in 2003; an error that had continued with each subsequent tax filing. The petitioner asserted that it submitted an amendment to the erroneous 2009 return and attached a copy of an amended return, Form 1120X, dated April 18, 2012; however, the return was not a certified copy and there was no indication that the document was actually filed with the IRS. Furthermore, the petitioner provided no evidence to establish that it had submitted amendments to any other tax returns that contained incorrect information. Notably, the petitioner provided a copy of its IRS Form 1120 for 2010 which

was signed on September 14, 2011 and indicated the foreign ownership as currently claimed by the petitioner, though the document was not certified. It is unclear when the petitioner became aware of the error or why the petitioner waited until April 2012 to fix the error on the 2009 tax return. Simply asserting that all of the tax returns since the company's incorporation were erroneous due to omissions does not qualify as independent and objective evidence. 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'r 1998). Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. 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).

For the foregoing reasons, the petitioner has not established that it has a qualifying relationship with the foreign entity. Accordingly, the appeal will be dismissed.

III. Foreign Employment in a Managerial or Executive Capacity

The next issue to be addressed is whether the petitioner has established that the beneficiary was employed by the foreign employer in a managerial or executive capacity for at least one full year in the three years preceding her admission to the United States. 8 C.F.R. § 204.5(j)(3)(i)(B). The beneficiary was last admitted to the United States on October 9, 2003 and, as of the date of filing, had been maintaining L-1A nonimmigrant status since May 30, 2004.

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), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The petitioner's undated letter submitted in support of the Form I-140 stated that the beneficiary worked for the foreign employer as "Assistant to the CEO" prior to entering the United States in L-1A status. Further, the letter stated that the beneficiary "was in charge of administrative and financial matters; executing with efficiency and accuracy all her managerial and executive duties. Furthermore, she had shown the ability of assisting in the directing the company, implementing innovative ideas, making our company one of the most successful in the field in the Republic of Colombia." The petitioner did not provide the beneficiary's dates of employment with the foreign entity or any further information regarding her duties.

In support of the petition, the petitioner also provided a copy of the beneficiary's resume describing her job duties from 2001 - 2003 as follows:

- Responsible for review and verification of consistency in performance on contracts, customers' assets and potential customers, monitoring of knowledge important issues for the president.

- Review and classification of local and national publications, related with building, construction, works, tenders, etc.
- Executive development report for the president.
- Continuous monitoring of the monthly billing to customers of the builder, in order to verify by timeliness of engineers projects or potential problems with the owner of works or the auditor to the adoption of quantities of work or the minutes final payment. (*sic*)
- Design and monitoring program of work for your assessment in pesos, for comparison with the programs approved by the owner. Partial data and cumulative per month contract. Vance verification of respect to the applicable… (*sic*)

In response to the director's RFE issued on August 20, 2011, the petitioner provided an undated duty description for the position "Assistant to the CEO and Commercial Manager." The description listed 22 general responsibilities for the assistant position and 18 general responsibilities for the commercial manager position. The petitioner also submitted two different organizational charts with its response, one which identified the beneficiary as Assistant to the CEO and Commercial Manager, and one which did not identify the beneficiary or her claimed position of Assistant to the CEO.

In the NOID, the director requested additional evidence to establish the beneficiary's dates of employment with the foreign entity. The director also advised the petitioner that the duty description provided in response to the RFE was vague and appeared to include primarily administrative tasks.

In response to the director's NOID, the petitioner re-submitted the beneficiary's foreign employer pay stubs for the period 2001 through 2003, an employment contract from 2001, a pre-employment psychological evaluation of the beneficiary and a letter from the foreign employer's president regarding the beneficiary's employment.

The letter dated February 16, 2012 signed by the foreign employer's president, stated that the beneficiary was hired in 2001 as Assistant to the CEO and Commercial Manager and "[d]uring the three (3) years she occupied such job positions, the Company managed to place itself at a new level in the construction sector, expanding our operation." In this letter, the president does not discuss or address the fact that the beneficiary went to the United States on a paid "sabbatical" just over a year after starting her position with the company. The petitioner submitted an employment contract that indicates the beneficiary would commence employment as assistant to the CEO and Commercial Manager for the foreign employer in Colombia starting January 1, 2001.

The letter provided by the foreign employer in response to the director's NOID stated:

> Before [the beneficiary] was transferred to the U.S. to work for our parent company [the petitioner], she held the senior professional position of Assistant to the CEO reporting to the President of the company on a daily basis, prior the three years before her transfer. The Commercial Manager position was held for the entire dates of employment with the company, from 2001 – 2004 until she was transferred to the U.S.

Further, according to the letter the beneficiary held the senior executive position for three years before her transfer to the U.S. and "[w]hile holding both positions, she performed executive managerial duties and performed discretionary (*sic*) making decision on a daily basis." The following duty description was also included in the letter:

ASSISTANT TO THE CEO

- Created and established the company's policies and procedures. 2% of the time.
- Planned committee meetings to define the main working areas in construction and financial and commercial, etc. 1% of the time.
- Attended senior management level meetings and prepared executive summaries for CEO and remaining members. 2% of the time.
- Revise and approved business protocols. 4% of the time.
- Established contact with different group associations related to engineering and constructions works, such as, housing, real estate, and public works. 4% of the time.
- Collected and oversaw the company's sales reports from various departments. 1% of the time.
- Reviewed engineering contracts and approved respective agreements that regulated the technical and legal relationships among the different consortium members. 4% of the time.
- Prepared and summarized finance repots (*sic*) and collected them from various internal departments 2% of the time.
- Managed multiple projects and followed completion in a timely manner. 4% of the time.
- Reviewed along with the CEO employees performance evaluations. 1%
- Reviewed reports submitted by staff members and recommended approval to the CEO. 2% of the time.
- Directed and reviewed Human Resources activities and took final decisions as to the hiring and firing of potential new and current employees. 1% of the time.
- Prepared interdepartmental budget for funding and implementation and made decisions on approvals. 2% of the time.

COMMERCIAL MANAGER

- Planned marketing sales strategies and supervised execution. 15% of the time.

- Identified market opportunities by attending events and construction expos. 7% of the time.
- Designed [petitioner] brand positioning strategies by creating company's website and promoting company in local marketing campaigns. 3% of the time.
- Prepared operation plans for each segment of our regional offices. 3% of the time.
- Prepared and analyzed market trends in the public and private sectors by holding meetings with potential customers and local politicians and prepared bid for contracts. 10% of the time.
- Provided gathered data and market opportunities to the CEO and discuss target opportunities to obtain contracts. 5% of the time.
- Ensured that the engineering team provided timely project integration and designs. 5% of the time.
- Developed a plan to deliver our project designs through presentations and a persuasive marketing campaign that demonstrated innovative product features and service. 5% of the time.
- Ensured that the Product Engineering department provided the right blend of business and design expertise for an increasingly complex and sophisticated client base. 5% of the time.
- Developed project schedules and budget and track report. 2% of the time.
- Worked closely with the engineering team to confirm appropriate project scopes, goals, objectives and identify resources and project completion. 4% of the time.
- Facilitated exchange of ideas and information among the project and engineering teams. 2% of the time.
- Hired, promoted and fired personnel. 1% of the time.
- Directed market assessment goals. 3% of the time.

In this letter, the president reiterated that the "[The beneficiary] made discretionary decision on a daily basis in the firing and hiring of employees" and while the beneficiary held the managerial position "she was responsible for managing and supervising the work of three managers and employees on a daily basis." Specifically, the foreign entity indicated that the beneficiary supervised the sales department, purchasing department and chief estimator department.

After consideration of the record, the director found that the petitioner did not establish that in the three years preceding the beneficiary's entry as a nonimmigrant, the beneficiary was employed for at least a year in a managerial or executive capacity with a qualifying organization. Specifically, the director acknowledged the petitioner's letter explaining that the beneficiary was employed with the foreign employer from January 1, 2001 through March 2004. However, the director noted that USCIS records indicate that from April 2002 through April 2003 and again from October 9, 2003 through March 30, 2004 the beneficiary was in the United States on a B-2 visa as a visitor for pleasure. The director found nothing in the record to explain the discrepancy and the contradictory

evidence and therefore caused the director to question the reliability and sufficiency of the evidence regarding the beneficiary's foreign employment.

On appeal, counsel asserts that the petitioner provided pay stubs sufficient to establish that the beneficiary had been paid as a commercial manager for the foreign employer from 2001 to 2003. In the appeal brief, counsel explains that the beneficiary was absent from her employer during certain periods however she "was still employed and paid by the company but was not performing her managerial duties." Specifically, counsel explains that from April 2002 through April 2003, the beneficiary was a tourist in the United States, but her foreign employer had put her on a paid sabbatical. Further, from October 2003 through March 2004 the beneficiary was again in the United States as a tourist but during this period of time she was on paid maternity leave. Therefore, counsel asserts that even excluding these absences from the foreign employer, the beneficiary was still employed and has over one and a half years in country with the foreign employer preceding her entry as a nonimmigrant. In support of this explanation, the petitioner provided two additional letters, one dated March 5, 2013 and another dated March 6, 2013 explaining the beneficiary's absences. Counsel also asserts that the preponderance of evidence standard, applicable to this case, has been met and questions the standard applied by the director.

Upon review, the AAO does not find counsel's assertions persuasive. The AAO agrees with the director's ultimate finding that the petitioner failed to establish that the beneficiary was employed for the foreign employer in a qualifying capacity. However, the AAO's findings are not limited to deficiencies in the time frame of the beneficiary's employment but extends to the actual duties performed by the beneficiary.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In this matter, the petitioner's evidence regarding the beneficiary's prior employment with the foreign employer is inconsistent and contradictory. The initial description was inadequate to establish eligibility in an executive or managerial capacity. In fact, although the brief description did refer to managerial and executive duties it omitted the commercial manager job title. A job title alone is not dispositive but its omission raises questions regarding the beneficiary's actual employment. The AAO does recognize that the petitioner provided pay stubs that identify the beneficiary's commercial manager job title. However, the petitioner's claim that the beneficiary held an executive or managerial position from 2001 through 2003 is questionable in light of the beneficiary's own personal resume, discussed above, that includes none of the higher level duties the petitioner indicates she performed from 2001 through 2003. The position description provided in the resume is consistent with the responsibilities of an assistant but does it not establish the typical duties of an executive or manager and it bears little resemblance to the description provided by the petitioner as part of the initial petition or subsequent submissions. This document was provided by the petitioner but there was no explanation to reconcile the inconsistencies in comparison to the beneficiary's duties claimed by the

petitioner from 2001 through 2004. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

In response to the director's NOID, the petitioner provided a duty description for the beneficiary that allocated her time among the various duties required for both positions held, specifically the assistant to the CEO and the commercial manager. However, the petitioner failed to reconcile this description with a different, more generic version, provided in response to the director's RFE.
The foreign employer's president provided the beneficiary's duty description in response to the NOID and repeatedly asserted that the beneficiary performed all of the duties in the description and did so on a daily basis from 2001 through 2004. However, for the first time on appeal, the petitioner now submits information explaining that the beneficiary was not actually on site and actively working for the foreign employer from 2001 through 2003. Instead, the beneficiary was in the United States on a lengthy sabbatical and maternity leave for a period that covered almost half of her time employed with the foreign employer. This is a clear contradiction to the foreign employer's statement that that the beneficiary was involved with the company on a daily basis throughout her employment. Given this omission, the AAO is left to question the validity of the petitioner's claim. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Notably, the petitioner provided the explanation regarding the beneficiary's absence only after the director noted that the beneficiary's previous admission to the United States coincided with the period the beneficiary was to have been employed overseas. The petitioner's claim regarding the beneficiary's daily performance of managerial and executive duties while she was not present casts doubt upon the entire claim, a doubt which has not been resolved. Further, the timing of the contradictions and the explanation for the contradiction negatively impacts the credibility of the petitioner's claims. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In conclusion, the petitioner has failed to provide consistent and credible evidence regarding the beneficiary's overseas employment. Based on these deficiencies, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. For this additional reason, the appeal must be dismissed.

As noted by counsel, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The

petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. Here, for the reasons already discussed the petitioner has not met this standard.

The AAO acknowledges that USCIS approved nonimmigrant petitions that had been previously filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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 USCIS 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).

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

IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.