U.S. Department of Homeland Security
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Washington, DC 20529

clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

D7

[redacted]

File: WAC 03 016 51061 Office: CALIFORNIA SERVICE CENTER Date: AUG 17 2005

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that operates a General Nutrition Center store. The petitioner claims that it is the subsidiary of [redacted] located in Mumbai, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States in 1997 and was subsequently granted two extensions of status. The petitioner now seeks to extend the beneficiary's stay for an additional two-year period.

The director denied the petition concluding that (1) the petitioner did not establish a qualifying relationship between the United States entity and the foreign entity, and (2) the petitioner did not establish that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The director denied the petition in part because the petitioner is operating a franchise, noting, "the petitioner may purchase a franchise but can never own and control it."

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 the director erred by concluding that the petitioner's franchise agreement with General Nutrition Center precludes a finding that the U.S. and foreign entities have a qualifying relationship. Counsel further asserts that the director placed undue emphasis on the number of subordinate employees managed by the beneficiary, and contends that the petitioner provided sufficient evidence to establish that he would be employed in a qualifying managerial or executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in the present proceeding is whether the beneficiary's foreign employer and the U.S. entity are qualifying organizations as required in the regulation at 8 C.F.R. § 214.2(l)(3)(i).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *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.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) 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.

On the L Classification Supplement to Form I-129, the petitioner stated that the United States entity is 100 percent owned by the beneficiary's previous foreign employer, an Indian partnership. The petitioner claimed that the foreign entity is owned in equal parts by the beneficiary and two other individuals. The petitioner did not submit any supporting documentation to establish the claimed parent-subsidiary relationship with the initial petition, which was submitted on October 21, 2002.

On December 3, 2002, the director issued a request for additional evidence asking that the petitioner submit, in part: (1) the foreign company's articles of incorporation; (2) the U.S. company's articles of incorporation; and (3) copies of the U.S. company's state and federal income tax returns with all required schedules and statements from the date the U.S. company was established to the present. The director also requested various documents to establish that both the foreign company and U.S. company are doing business.

In a response dated February 24, 2003, the petitioner provided the requested evidence and additional documents in an attempt to establish a qualifying relationship between the United States and foreign entities. The petitioner submitted the Deed of Partnership and subsequent supplement for the foreign entity, which shows that as of 1993, the foreign entity was owned by three individuals - the beneficiary, [redacted] and [redacted] The petitioner also submitted the foreign entity's financial statements and audit reports for 2001 and 2002 which indicate that two partners – [redacted] and [redacted] currently own the foreign company in equal parts.

As evidence of the U.S. company's ownership, the petitioner provided a copy of a stock certificate number one identifying the foreign entity as the owner of 400 shares of the petitioner's common stock. The stock certificate indicates on its face that the United States company is authorized to issue 10,000 shares of common stock. The petitioner also submitted its articles of incorporation and a copy of an "action of directors by written consent" in which the directors of the company agreed to issue 400 shares of stock to the foreign entity for consideration of $40,000. The petitioner also submitted a State of California "Notice of Transaction Pursuant to Corporations Code Section 25102(f)" stating that the U.S. company issued common stock for consideration of $40,000 on September 19, 1997. In addition, the petitioner submitted its Forms 1120, U.S. Corporation Income Tax Return, for the years 1997 through 2001. The director did not request, nor did the petitioner submit, a copy of the franchise agreement with GNC Franchising, Inc.

In a decision dated June 20, 2003, the director concluded that the petitioner had failed to establish a qualifying relationship between the beneficiary's foreign employer and the U.S. entity. The director noted that the requisite factors for a qualifying relationship are ownership and control, and stated that in a franchise relationship neither the beneficiary's foreign employer nor the U.S. corporation can own and control the business. The director stated that the franchiser essentially owns and controls the store while the franchisee has only purchased a license to operate it. The director consequently denied the petition.

On appeal, counsel for the petitioner states "it was erroneous to deny the petition on the basis that GNC and [the foreign entity] share only a franchise business relationship. . . . The correct focus is on the business relationship between [the foreign entity] and [the petitioner.] The foreign entity has the requisite ownership and control of [the petitioner] to establish a qualifying relationship...." Counsel further states "from the franchise agreement, it is clear that [the petitioner] (and indirectly [the foreign entity]) still retain control over the GNC business . . .. The franchiser exercises contractual control only to the extent of protecting the strength and quality of its trademark and other proprietary marks." Finally, counsel cites an unpublished AAO decision in which the AAO considered the specific terms of the petitioner's franchise agreement in order to determine its actual effect on ownership and control. Counsel submits a copy of the GNC franchise agreement and states "it is the specific terms in the GNC franchise agreement, and not a general denial, that should be the focus in deciding on whether a qualifying relationship exists."

On review, the director incorrectly focused on the petitioner's operation of a franchise rather than on the necessary qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner. *See* 8 C.F.R. § 214.2(l)(3)(i) (requiring that the petitioner and the organization which employed the beneficiary are qualifying organizations). Contrary to the director's statements that "the evidence of stock ownership is immaterial," the evidence of stock ownership is not only material to the petitioner's claims, but critical to determining whether a qualifying relationship exists.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are "ownership" and "control." *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International,* 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual

control of the entity. *See Matter of Siemens Medical Systems, Inc.,* 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In general, a "franchise" is a cooperative business operation based on a contractual agreement in which the franchisee undertakes to conduct a business or to sell a product or service in accordance with methods and procedures prescribed by the franchiser, and, in return, the franchiser undertakes to assist the franchisee through advertising, promotion, and other advisory services. A franchise agreement, like a license, typically requires that the franchisee comply with the franchiser's restrictions, without actual ownership and control of the franchised operation. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual"). An association between a foreign and U.S. entity based on a contractual franchise agreement is usually insufficient to establish a qualifying relationship. *Id. See also,* 9 FAM 41.54 N7.1-5; O.I. 214.2(l)(4)(iii)(D) (noting that associations between companies based on factors such as ownership of a small amount of stock in another company, or licensing or franchising agreements, do not create affiliate relationships between the entities for L-1 purposes).

By itself, the fact that a petition involves a franchise will not automatically disqualify the petitioner under section 101(a)(15)(L) of the Act. When reviewing a petition that involves a franchise, the director must carefully examine the record to determine how the franchise agreement affects the claimed qualifying relationship. As discussed, if a foreign company enters into a franchise, license, or contractual relationship with a U.S. company, that contractual relationship can be terminated and will not establish a qualifying relationship between the two entities. *See Matter of Schick,* 13 I&N Dec. at 649. However, if a foreign company claims to be related to a U.S. company through common ownership and control, and that U.S. company is doing business as a franchisee, the director must examine whether the U.S. and foreign entities possess a qualifying relationship through common ownership and management under section 101(a)(15)(L) of the Act.

Nonetheless, it is critical in all cases that the petitioner fully disclose the terms of any franchise agreement, especially as the agreement relates to the transfer of ownership, voting of shares, distribution of profit, management and direction of the franchisee, or any other factor affecting actual control of the entity. *Cf. Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-65.

In the present matter, the critical relationship is that between the beneficiary's previous overseas employer, [redacted] and the U.S. petitioner, [redacted] Although the petitioner claims that it does business in the United States through a franchise agreement with GNC Franchising, Inc., the claimed relationship between Bombay Chemists in India and Bombay Chemist USA, Inc. is based on stock ownership and not the franchise agreement. In order to determine whether a qualifying relationship exists, the AAO must examine the number of shares of stock issued by the petitioner, the ownership of that stock, and the resulting percentage ownership of the U.S. petitioner.

Upon review, the petitioner has failed to demonstrate the existence of the requisite qualifying relationship between the foreign and U.S. entities. There are several contradictions and omissions from the record that

undermine the petitioner's claim that the foreign entity is currently the sole owner of the United States entity. As of the date of filing, it appears that there is no common ownership between the two companies.

As evidence of the foreign entity's ownership interest, the petitioner submitted a copy of its stock certificate number one, representing the issuance of 400 shares of common stock in Bombay Chemist USA, Inc., to Bombay Chemists on September 19, 1997. Secondary documents, including the petitioner's articles of incorporation, confirm that the foreign entity was to provide consideration of $40,000 in exchange for the stock. The petitioner did not submit copies of its stock certificate ledger, stock certificate registry, or any evidence that would confirm the receipt by the petitioner of $40,000 from the foreign entity. Furthermore, the articles of incorporation and stock certificate indicate that the petitioner is authorized to issue a total of 10,000 shares of common stock. Accordingly, because of the petitioner's failure to submit all of the relevant corporate documents, the AAO cannot determine how many shares of stock have been issued in total, how many shares are currently owned by the overseas entity, and whether there are currently any other owners.

The petitioner's failure to provide a copy of its stock certificate ledger and stock certificate registry is especially damaging to its claim in light of conflicting evidence regarding the current ownership of the petitioner's stock. As noted above, the petitioner has submitted its federal income tax returns for the years 1997 through 2001. All six income tax returns, on Schedule K, identify the beneficiary, not the foreign entity, as the sole owner of 100 percent of the petitioner's stock. In addition, the petitioner's income tax returns, on Schedule L, indicate the value of its issued common stock as $10,000, which conflicts with other evidence that the foreign entity purchased the petitioner's stock for $40,000 in 1997. These additional discrepancies undermine the petitioner's claimed relationship with the beneficiary's foreign employer.

Furthermore, although the petitioner claims that the foreign entity continues to be owned in equal parts by the beneficiary and two other partners, the financial statements and audit reports for the foreign entity for the years 2001 and 2002 indicate that the beneficiary is no longer a partner in the foreign entity. If, as indicated on the petitioner's tax returns, the beneficiary is currently the sole owner of the U.S. company, and if he no longer has any ownership interest in the foreign entity, it must be concluded that the two companies currently share absolutely no common ownership or control.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Absent full disclosure of all relevant documents, the AAO is unable to conclude that the foreign and U.S. entities are qualifying organizations, and specifically that the beneficiary's foreign employer has ownership and control of the petitioning organization. For this reason, the petition may not be approved.

As the petitioner has failed to establish a qualifying relationship with the foreign entity, the fact that the petitioner operates as a General Nutrition Center franchise is immaterial and will not be discussed in this decision. However, the AAO concurs with counsel that the terms of the franchise agreement, and not the mere

existence of the franchise agreement, should be considered when the petitioner has otherwise established a qualifying relationship with a foreign entity. Furthermore, the AAO notes for the record, that based on the evidence provided, the franchise agreement in this case is between GNC Franchising, Inc. as franchiser and the beneficiary and his spouse as franchisee. The AAO cannot conclude, absent evidence that the agreement was subsequently transferred or assigned to the petitioner, that the petitioner is doing business as a GNC store.

The second issue this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

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

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

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

In an October 18, 2002 letter appended to the initial petition, the petitioner described the beneficiary's duties as follows:

> As the highest executive officer of [the petitioner], [the beneficiary] will continue to be responsible for directing the management of the company and establishing the goals and policies. He analyzes the company's progress towards its business goals. [The beneficiary] plans, implements and carries-out the business plan of the company. [The beneficiary] directs the expansion of the company's business. He establishes the business plan and determines the policies and standards of [the petitioner.] He organizes and establishes the sales policies of the company as well as directs new business operations. [The beneficiary] is responsible for directing the marketing activities of the company. He also makes all personnel decisions and has the authority to hire and fire all managerial, supervisory and other employees for the GNC® store and any business which are acquired by the company.
>
> As President of [the petitioner], [the beneficiary] manages the day-to-day business activities of the corporation and GNC® store and future business acquisitions and implements modifications when required. He is responsible for negotiating the purchase of new businesses on behalf of the company. [The beneficiary] also reviews the finances of the company and analyzes the expenses and profitability of the company.

The petitioner indicated on Form I-129 that it had one employee at the time the petition was filed. The petitioner also submitted its Forms 1120, U.S. Corporation Income Tax Return, for 1999 and 2000, showing that the company paid salaries and wages of $8,270 and $4,857, respectively, for the years ended on June 30, 2000 and June 30, 2001.

On December 3, 2002, the director requested additional evidence, including: (1) a description of the job duties, educational level, annual salaries/wages and immigration status for employees under the beneficiary's supervision; (2) a more detailed description of the beneficiary's duties in the United States; (3) copies of the petitioner's California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Report for all employees for the last four quarters that were accepted by the State of California; and (4) copies of its state and federal corporate income tax returns since the date of establishment.

In response, the petitioner submitted a letter dated February 21, 2003, which incorporates the same job description submitted with the initial petition and quoted above. The petitioner also added the following explanation regarding the beneficiary's duties:

> [The beneficiary] analyzes the future goals and business objectives of [the petitioner]. [The beneficiary] makes all executive determinations regarding the purchases of new businesses on behalf of [the petitioner]. He was involved in all negotiations regarding expansion and acquisition of new businesses. In August 1998, [the beneficiary] negotiated the purchase of an additional GNC store directly with GNC Franchising, Inc. which did not result in an acquisition. In May, 2000, [the beneficiary] negotiated the purchase of a Subway franchise store located in Norwalk, California. After an accountant reviewed the financial statements of

> this Subway store, [the beneficiary] rejected the purchase this business on behalf of [the petitioner.] As previously stated, on February 14, 2003, the beneficiary negotiated the purchase of a Midas business located in Laguna Beach, California.

The petitioner submitted documentation as evidence of the beneficiary's attempts to purchase additional franchises, including a letter and receipt from GNC Franchising Inc., dated August 1998; a May 2000 letter from OhCal Foods, Inc./Subway; and a February 7, 2003 letter from Midas International Corporation indicating that the beneficiary was granted preliminary approval to purchase a Midas franchise. The petitioner also submitted evidence that the beneficiary "opened an escrow" on the petitioner's behalf to purchase a business known as "Midas Auto Service Experts," and provided the current owners' Forms DE-6 for the previous four quarters.

With respect to the petitioner's staffing, the petitioner indicated that the U.S. company has hired a total of seven employees since 1997 but that "due to a high turnover, there is a constant change in the number of employees. The number of employees varies from 1 to 3." The petitioner noted that while it had only one employee at the time the petition was submitted, it subsequently hired two employees. The petitioner provided the following description of the claimed subordinate staff:

> [redacted] This employee manages the GNC store in the absence of the president. She has an accounting degree. [redacted] works 20-30 hours per week and receives a salary of $700-$800 per month. [redacted] is a U.S. citizen.
>
> [redacted] This employee is responsible for stocking the GNC store. He has a background as a physical fitness trainer; [redacted] works 15-20 hours per week and receives a salary of $439-585 per month. [redacted] is a U.S. citizen.

The petitioner submitted a single Form DE-6, Quarterly Wage Report, which indicates that the petitioner paid a total of $10,000 in wages during the fourth quarter of 2002, including $7,000 to the beneficiary, $1,750 to [redacted] and $1250 to [redacted] The petitioner failed to provide its Forms DE-6 for the previous four quarters as requested by the director. In addition, the petitioner provided the requested Forms 1120, U.S. Corporation Income Tax Returns for the years 1997 to 2001, reflecting payments as follows: (1) 1997- $5,000 for compensation to officers and $3,098 in wages; (2) 1998 - No compensation to officers and $5,277 in wages; (3) 1999 – No compensation to officers and $8,720 in wages; (4) 2000 – No compensation to officers and $4,857 in wages; and (5) 2001 – 30,000 in compensation to officers and no salaries and wages.

The director denied the petition on June 20, 2003, concluding that the petitioner did not establish that the beneficiary has been or will be functioning in a managerial or executive capacity. The director noted that there is insufficient evidence that the beneficiary has been exercising significant authority over generalized policy or that his duties have been primarily managerial or executive in nature. The director further noted that the record did not establish that the beneficiary would manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner contends, "the director's assertion that there is no indication that the beneficiary has been exercising significant authority over generalized policy or that the beneficiary's duties have been primarily managerial or executive in nature is unfounded." Counsel notes that the Form DE-6 indicates the beneficiary is the highest paid employee, and emphasizes the beneficiary's role in extending the petitioner's lease in May 2002 and his role in negotiating the purchase of a new franchise operation in 2003 as evidence of his status as an executive with authority over the generalized policy of the company. Counsel further notes that the petitioner submitted evidence that it employs two employees who relieve the beneficiary from performing non-qualifying duties.

In addition, counsel states: "In requiring proof that the beneficiary will not be performing 'non-qualifying duties,' (i.e., that the beneficiary will only perform qualifying duties) the Service reads in legal requirements that do not exist." Counsel asserts that the petitioner has satisfied its burden of establishing that the beneficiary's duties are primarily executive, such that "the mere inference that the beneficiary might be performing non-qualifying duties is irrelevant." Counsel also argues that by requiring the presence of a subordinate staff "the Service is indirectly requiring a numerical quantity of subordinate employees. Yet the service cannot infer the executive nature of the beneficiary on the basis of the number of subordinate employees." Counsel states that the reasonable need of the petitioner is such that "only a few" employees are required, and further notes that a beneficiary may qualify as a manager or executive even when no subordinate employees are supervised. Counsel cites an unpublished AAO decision in support of this assertion.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager.

In this case, counsel asserts on appeal that the beneficiary qualifies as both a manager and an executive. However, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the management of the company, establishing the goals and policies of the organization, and exercising discretion over the generalized policy of the organization. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. The petitioner indicated that the beneficiary "planned, implemented and carried out the business plan," "directed the expansion of the company's business," and "directed the purchase of new business operations" but has not explained its business plan or the actions taken to implement it, provided evidence of any expansion, or established that the petitioner actually purchased new business operations during the beneficiary's first five years in L-1A status. The petitioner further indicated that the beneficiary was responsible for "directing the marketing activities of the company," "reviewing finances" and "analyzing expenses," but does not clarify who actually performs routine marketing and bookkeeping duties for the petitioner, if not the beneficiary. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). The AAO cannot determine from the beneficiary's job description whether the beneficiary's duties are primarily managerial or executive; the AAO cannot be expected to accept a vague job description and speculate as to the related managerial and executive job duties. Merely claiming that the beneficiary is a manager or executive is insufficient to establish eligibility.

The AAO notes that the petitioner and counsel place great emphasis on the beneficiary's executive role in planning the petitioner's expansion and acquisition of additional franchise businesses, suggesting that such planning and negotiating requires a significant portion of the beneficiary's time. While decisions involving the acquisition of new businesses may indeed be executive in nature, the record shows that in the five years preceding the filing of the instant petition, the beneficiary considered purchasing a total of two businesses and completed neither purchase. The most recent potential acquisition had taken place more than two years prior to the filing of the instant petition. Based on the evidence on record, the AAO cannot conclude that the beneficiary has devoted a significant portion of his time to negotiating the acquisition of additional businesses for the petitioner. Furthermore, although the petitioner has provided evidence that the petitioner was prepared to complete the purchase of a second franchise in March or April of 2003, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). There is no evidence that the beneficiary was involved in efforts to purchase the Midas Auto Services business at the time the petition was filed. Therefore, evidence submitted with respect to this business need not and will not be considered.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive

capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a five-year-old retailer operating a GNC store. The company employed the beneficiary as its president and no other employees. The petitioner failed to submit its Forms DE-6 for the first three quarters of 2002; however, the petitioner's 2001 income tax return indicates that the petitioner did not have any employees, other than the beneficiary, between July 1, 2001 and June 30, 2002. The petitioner's financial statement for the calendar year ended on December 31, 2001 indicates that the petitioner budgeted no money for wages for the year, and paid a total of $1,172 in wages and benefits. In its first five years of operations, the petitioner never paid more than a total of $8,720 in wages in a single year. The petitioner did not submit evidence that it regularly employed anyone other than the beneficiary, much less a subordinate staff who would perform the actual day-to-day, non-managerial operations of the company. The petitioner operates a retail store that is likely open for business at least eight to ten hours a day, six days a week. The petitioner clearly requires employees to perform a number of non-managerial tasks, such as review and order inventory, stock merchandise on shelves, answer customer questions regarding its products, operate a cash register, reconcile daily sales, balance a checkbook, pay monthly bills, etc. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president with the occasional, intermittent assistance of one or two part-time employees. Rather, at the time the petition was filed, and during much of the petitioner's first five years of operation, the beneficiary, as the only employee, would have been required to perform many or all of the routine administrative and operational duties inherent in operating a retail healthcare products store. Although the petitioner and counsel assert that the beneficiary's duties are primarily executive or managerial, it is clear from the record that the reasonable needs of the petitioner would require that the beneficiary work in the store performing non-qualifying duties on a full-time, or near full-time basis.

On appeal, counsel places great weight on the petitioner's Form DE-6, Quarterly Wage Report, for the fourth quarter of 2002 as evidence that the beneficiary supervises a subordinate staff which relieves him from performing non-qualifying duties. The Form DE-6 indicates that the petitioner had three employees in October, November and December 2002. According to a notation on the report, in order to be included on the form, the employees must have been on the petitioner's payroll during the pay period that included the twelfth day of each month. The petition was submitted on October 21, 2002, and the petitioner concedes that it had only one employee as of that date. Therefore, it is not clear why the two new employees would be included in the petitioner's headcount for October 2002 on its Form DE-6. 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). Given this discrepancy, a photocopy of the first page of the Form DE-6, which has not been certified by the California Employment Development Department, is insufficient to establish when or if the petitioner hired the claimed subordinate staff. Regardless, as noted above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO does not dispute that the beneficiary does indeed exercise discretion over the petitioner's business operations. However, it can be assumed, and has not been proven otherwise, that the beneficiary, who is more often than not the petitioner's sole employee, has been performing many or all of the routine operational tasks necessary to operate a retail store. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Furthermore, it is evident that such duties would, by necessity, be his primary duties. The store could not operate if its only full-time employee, and often its *only* employee, did not work in the store on a full-time basis. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel states on appeal that the "mere inference that the beneficiary might be performing non-qualifying duties is irrelevant." However, the statute requires that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where, as here, an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

Counsel further refers to an unpublished in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the case cited. 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)). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. As noted above, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Finally, it is noted that the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions submitted by the petitioner on behalf of this 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. 1988). It would be absurd to suggest that CIS 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.