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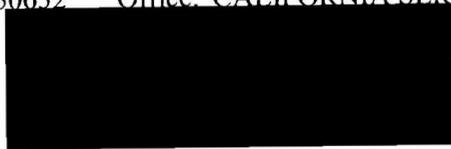
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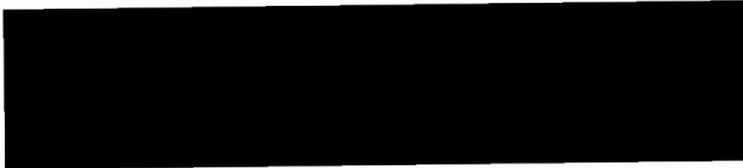
File: WAC 05 020 50652 Office: CALIFORNIA SERVICE CENTER Date: **MAP 28 2006**

IN RE: Petitioner:  
Beneficiary:



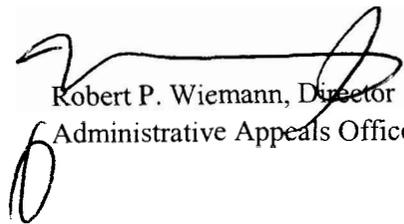
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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 product marketing specialist 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 California corporation engaged in the importation and wholesale of finished jewelry. It claims to be a subsidiary of [REDACTED] located in Mumbai, India. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States and subsequently received a two-year extension of stay. The petitioner now seeks to extend the beneficiary's status for three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a managerial or executive capacity. The director also addressed inconsistencies in the evidence submitted by the petitioner to establish the existence of a qualifying relationship with its claimed parent company, but did not ultimately deny the petition on these additional grounds.

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 evidence of record establishes that the beneficiary will be employed in both a managerial and executive capacity. Counsel contends that the director performed only a cursory analysis of the evidence submitted with the petition and in response to the request for evidence, based his conclusions on speculation, and placed undue emphasis on the number of employees supervised by the beneficiary. Counsel briefly addresses the issue of the petitioner's qualifying relationship with its claimed parent company, asserting that the director placed excessive weight on information contained in the petitioner's corporate income tax returns. Counsel submits a brief 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 primary issue in 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.

The petition was filed on October 28, 2004. On the Form I-129 petition the petitioner described the beneficiary's duties during the previous three years as follows:

As marketing executive, the alien was responsible for designing strategies [and] test plans to increase website traffic, sales, customer lifetime value [and] average order size. He has developed marketing programs, identified and assembled marketing information and contact management.

The petitioner indicated that the beneficiary's duties under the extended petition would be to continue "to create and implement strategic marketing plan, using established market and competitive research techniques and analysis; he will continue to develop objectives, programs, and procedures for marketing activities."

In an October 18, 2004 letter, the petitioner provided the following description of the beneficiary's duties as a product marketing specialist:

- (60%) Direct creative development and implementation of seasonal advertising and promotional programs, including all marketing collateral materials, displays and point of sale materials, through the use of in-house designer and out-source vendors. Direct execution of marketing materials associated with product line rollout.
- (20%) Create and implement a strategic marketing plan using established market and competitive research techniques and analysis. Develop objectives, programs, and procedures for marketing activities. Prepare marketing budgets and monitor performance against these numbers.
- (10%) Conduct seasonal promotion review, evaluation and provide reports of work progress to the President. Manage scheduled mailings for all marketing programs.
- (5%) Coordinate with management for the hiring of additional personnel for his department when a need arises.
- (5%) Special projects as assigned by the Chief Executive Officer. Such as the development and implementation of a marketing system that will be available to the marketing staff of the company at the conclusion of his period of stay.

The petitioner stated that it employed four people, including the beneficiary, and submitted an organizational chart depicting a president and vice president over five departments, including quality control, computer data/entry, finance and accounting, sales and marketing, and import/export. The beneficiary is identified as the product marketing specialist in the sales and marketing department. According to the chart, the department will also include a customer service representative, an advertising coordinator, a public relations representative, and a marketing representative. Although the chart shows a total of approximately 13 positions in the company, only the president and the beneficiary are identified by name.

The petitioner also submitted its California Forms DE-6, Quarterly Wage and Withholding Report, for the first three quarters of 2004. At the end of the September 2004, the petitioner reported four employees including the beneficiary, the president and two other employees who were not identified on the organizational chart. The Forms DE-6 show that the beneficiary was the petitioner's sole employee during the first eight months of 2004.

On November 4, 2004, the director issued a request for evidence, in part, instructing the petitioner to submit the following: (1) an organizational chart including the names and job titles of all executives, managers and supervisors, and all employees under the beneficiary's supervision, as well as a brief description of their job duties, educational level, and annual salaries and wages; and (2) evidence that the beneficiary 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.

In a letter dated January 24, 2005, the petitioner provided the following response to the director's request for evidence that the beneficiary would be employed in a managerial capacity:

[The beneficiary] is currently performing the duties of both vice-president/marketing executive, which is [an] executive level position. Our company realizes that merely using the title vice-president does not qualify one to be an executive; however, [the beneficiary] actually performs the duties of a vice-president besides working as a marketing executive.

\* \* \*

As vice-president/marketing executive of the U.S. company, [the beneficiary] has ultimate control over the enterprise's overall operation and establishment and direction. He will establish policies for the enterprise and has authority to hire and fire staffs.

In addition, [the beneficiary] is responsible for making discretionary decisions and setting policies for business operations, and supervising high level employees. He will formulate both short-term and long-term goals. [The beneficiary] will carry out special duties with regard to operation of the company as delegated by the company president. [The beneficiary] will directly report to the president.

Moreover, [the beneficiary] will take over duties and responsibilities in lieu of the company president during the president's absence. He will prepare a final report of the year's activities of the company. His responsibility also include[s] recommendations for the following year.

The petitioner indicated that it had recently hired two additional employees and anticipated hiring more employees as the business grows. The petitioner submitted a revised organizational chart depicting the beneficiary as vice president/marketing analyst, supervising a sales manager, office manager, and a finance and account employee. The office manager is shown over a production and diamond assortment employee and an accounts receivable and accounts payable employee. The employees identified as "office manager" and "finance and account" were reported on the petitioner's quarterly wage report for the third quarter of 2004.

With respect to the beneficiary's direct subordinates, the petitioner indicated that the office manager has a bachelor's degree, takes care of "all basic office needs," takes care of walk in customers, and has authority to hire employees and order stock from overseas vendors. The petitioner stated that the "finance and account" employee has a master's degree in finance and "is in charge of total finances," takes care of account receivables, oversees billing, and assists the petitioner's certified public accountant.

The director denied the petition on February 11, 2005, concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The director noted the significant revisions made to the beneficiary's job description in response to the request for evidence, and noted that the petitioner merely paraphrased the statutory definitions of managerial and executive capacity in the second iteration of the beneficiary's job duties. The director further observed that despite the five subordinates shown on the second organizational chart, the beneficiary supervised only two employees at the time the petition was filed. The director determined that many of the beneficiary's described duties would be tasks necessary to provide a service or produce a product and could not be considered managerial or executive duties. Finally, the director found that the petitioner had failed to establish that the beneficiary would supervise a staff of managerial, supervisory or professional employees, and determined that the beneficiary would be required to perform the majority of the day-to-day business activities of the company.

On appeal, counsel refers to the beneficiary variously as the petitioner's president, product marketing specialist, and vice president/product marketing specialist, and asserts that the petitioner submitted sufficient evidence to establish that the beneficiary will be employed in a both a managerial and an executive capacity. With respect to the beneficiary's employment in a managerial capacity, counsel asserts that the director erroneously concluded that the beneficiary's responsibilities, specifically related to marketing, are tasks necessary to produce a product or provide a service. Counsel contends that "these job duties are, however, beyond those engaged by an employee engaging in primary tasks to justify denial of said Petition. Consequently, Petitioner has been precluded from hiring its professional staff in the United States until Beneficiary has been transferred to the U.S. subsidiary."

Counsel also asserts that the director engaged in speculation by concluding that the beneficiary would be required to perform all the day-to-day business activities of the petitioner based on a lack of subordinate staff, and contends that the record contains "ample evidence of organizational complexity to warrant having

the beneficiary perform executive duties.” In support of this assertion, counsel emphasizes the petitioner’s gross sales of nearly four million dollars, stating that the petitioner’s tax return establishes that “this is a sophisticated and complex business operation.”

Referring to the beneficiary’s role as “Vice President/Product Marketing Specialist,” counsel states that the beneficiary also meets the criteria for executive capacity, claiming that he will direct the management of a major component of the petitioner’s organization. Counsel disputes the director’s observation regarding the disparate information provided in the petitioner’s initial organizational chart and that provided in response to the director’s request for evidence, and asserts that “this variation is nothing more than an exercise in semantics and not a basis to deny the instant application.” Counsel contends that the record verifies that the beneficiary will establish the goals and policies of the company and exercise wide latitude in discretionary decision making.

Finally, counsel provides an overview of the petitioner’s expansion plans and asserts that the director should not have adjudicated the petition “based solely on the fact that [the] Beneficiary currently supervises two employees.” Counsel contends that the director was required to review the totality of the petitioner’s business operations and consider the gross revenues achieved under the beneficiary’s “executive capacity.”

Upon review, counsel’s assertions are not persuasive. The petitioner has not established that the **beneficiary’s duties for the petitioner will be primarily managerial or executive.** Preliminarily, the AAO will address the petitioner’s response to the director’s request for additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity. As noted by the director, the petitioner initially identified the beneficiary’s position as a product marketing specialist, provided a description of his job duties which clearly relates only to the petitioner’s marketing activities, and submitted an organizational chart identifying his role as a product marketing specialist reporting to an un-staffed vice president position, which would in turn report to the president of the company. It appears that the petitioner employed two other employees, but they were not identified on the organizational chart, nor was there any other indication that the beneficiary would supervise them.

In its response to the director’s request for further evidence regarding the petitioner’s employees and organizational structure, the petitioner elevated the beneficiary to the role of “vice president/marketing executive” and stated that he “has ultimate control over the enterprise’s overall operation and establishment and direction” including authority to establish policies, develop short-term and long-term goals for the company, and supervise “high level employees.” The petitioner submitted a new organizational chart depicting the beneficiary supervising a total of five employees. Essentially, the petitioner initially indicated that the beneficiary would manage a component of the petitioning organization, and, in response to the director’s request, indicated he would serve as an executive exercising discretionary authority over the entire company. On appeal, counsel refers to these material changes as “a variation” and an “exercise in semantics,” noting that it is common for companies to have more than one vice president position. However, the AAO notes that the petitioner did not simply alter the beneficiary’s job title, but instead dramatically revised his job duties and greatly elevated his level of authority within the company.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position or clarify the petitioner's organizational structure as of the date of filing, but rather, inexplicably elevated his role within the company to that of a chief executive with job duties paraphrased from the statutory definition of executive capacity, notwithstanding the fact that the petitioner already employs a president. Therefore, the analysis of the beneficiary's duties will be based on the job description and organizational chart submitted with the initial petition.

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.*

In the instant matter, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. See 8 C.F.R. § 214.2(l)(3)(ii).

The job description submitted with the initial petition does not sufficiently demonstrate that the beneficiary's tasks are the high-level responsibilities that are specified in the definitions of managerial or executive capacity. For example, the petitioner stated that the beneficiary's primary responsibilities, which account for 60 percent of his time, include responsibility to "direct creative development and implementation" of all marketing and advertising materials through the use of an "in-house designer" and vendors and "direct execution of marketing materials associated with product line rollout." However, the petitioner has not established that it actually employs an "in-house designer," which raises questions as to whether the beneficiary actually "directs" the creation of marketing materials, or performs these duties himself. Further, without additional explanation, the AAO cannot determine what specific tasks the beneficiary would perform to engage in "direct[ing] execution" of marketing materials and therefore cannot determine whether this responsibility would entail qualifying managerial or executive responsibilities. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Therefore, the

beneficiary's duties associated with the development and implementation of marketing materials cannot be considered to be primarily qualifying managerial or executive duties.

The petitioner indicated that the beneficiary allocates an additional 20 percent of his time to "creat[ing] and implementing a strategic marketing plan using established market and competitive research techniques and analysis," and "develop[ing] objectives, programs, and procedures for marketing activities," and 10 percent of his time to "conduct[ing] season promotional review, evaluation and provid[ing] reports to the President, and "manag[ing] scheduled mailings for all marketing programs. The petitioner did not, however, define the beneficiary's "objectives" and "programs" or indicate how or through whom the beneficiary "manages" scheduled mailings and what qualifying duties this would entail. Furthermore, the job description provided on the I-129 petition indicated that the beneficiary designs strategies and test plans to increase website traffic, sales, and customer lifetime value, and identifies and assembles marketing information, duties which appear to be more akin to those of a marketing analyst than those of an employee who manages the petitioner's marketing activities. 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).

Therefore, although the petitioner provided a breakdown of how the beneficiary's time will be allocated, the petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. As discussed further below, the petitioner employed only three employees other than the beneficiary as of the date of filing. There is no mention in the record of any other employees who perform any duties related to the petitioner's marketing function, other than the beneficiary. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties associated with the petitioner's marketing activities.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

The record suggests that the beneficiary likely exercises oversight over the petitioner's marketing function by preparing the marketing budget and developing strategies. However, as the sole employee charged with performing any marketing duties, it is reasonable to assume, and has not been shown otherwise, that the beneficiary is performing all other marketing functions, including conducting market research, devising marketing plans, contacting advertisers, and performing any public relations tasks. Such a conclusion is supported by the petitioner's initial organizational chart, which shows the beneficiary as a staff employee, with no subordinates, and identifies open positions for an advertising coordinator, a public relations representative and marketing representative in the petitioner's sales and marketing department. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that

preclude him from functioning in a primarily managerial or executive role. Again, 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. at 604. The petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

Counsel asserts on appeal that CIS "should not adjudicate this Petition based solely on the fact that the Beneficiary currently supervises two employees," but instead should look at the "totality of the business operations." Upon review, the director did not deny the petition based solely on the number of employees supervised by the beneficiary. The director reviewed the job description submitted with the initial petition, which included a number of non-managerial duties, and also observed that the petitioner did not employ other employees to perform the marketing activities that the petitioner claimed he "managed." 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.*

At the time of filing, the petitioner was a five-year-old import company that claimed to have a gross annual income of nearly \$4 million. The firm employed a president, the beneficiary, as a product marketing specialist, and two other employees later identified as an office manager and account and finance employee. The petitioner did not submit evidence that it employed any subordinate staff members who would perform many of the actual day-to-day, non-managerial operations of the company, including, most conspicuously, routine marketing, sales, purchasing and import-related duties. 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, a president, an office manager performing primarily administrative duties, and an accounting and finance employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner claims that the company hired additional employees subsequent to the filing of the petition, and indicates that it intends to expand its operations and hire additional employees in the future. In addition, counsel asserts on appeal that the petitioner "has been precluded from hiring its professional staff in the United States until Beneficiary has been transferred to the U.S. subsidiary." In light of the fact that the beneficiary had been employed by the petitioner in the United States for three years at the time the petition was filed, this assertion is not persuasive. Evidence of hiring that occurred subsequent to the filing of the petition, or assertions that the company anticipates an expansion in its staffing or operations in the future

cannot be considered in this proceeding. 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).

In this matter, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. The organizational chart submitted with the initial petition did not show any employees who would work under the beneficiary's supervision. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties associated with the petitioner's marketing function so that the beneficiary may primarily engage in managerial duties. The record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy or manage an essential function of the company. Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a qualifying managerial capacity as defined at section 101(a)(44)(A) of the Act., 8 U.S.C. § 1101(a)(44)(A). Even though it appears that the enterprise is in a preliminary stage of organizational development nearly five years after its establishment, the petitioner is not relieved from meeting the statutory requirements.

Nor has the petitioner substantiated its claim that the beneficiary would be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The position offered to the beneficiary, as described in the initial filing, did not meet any of the criteria for employment in an executive capacity.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

The AAO will also address the issue of whether the petitioner established the existence of a qualifying relationship between the United States and foreign entities as required by 8 C.F.R. § 214.2(l)(3)(i). In his decision, the director observed deficiencies and inconsistencies in the evidence submitted to substantiate the claimed parent-subsidiary, and counsel briefly addresses the director's observations on appeal. Upon review of the evidence submitted, the petitioner has not demonstrated that it has a qualifying relationship with its claimed foreign parent company.

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;

\* \* \*

(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.

On the L classification supplement to Form I-129, the petitioner indicated that the foreign entity, [REDACTED] owns 51 percent of the petitioner’s stock, with the remainder of the stock owned by the petitioner’s president, [REDACTED]. The petitioner submitted its articles of incorporation, dated October 13, 1999, which indicate that the company is authorized to issue one hundred thousand shares of stock of no par value, and copies of two stock certificates. Stock certificate number two for 9,800 shares was issued to [REDACTED] on October 31, 1999. The certificate states on its face that the petitioner is authorized to issue 1,000 shares of common stock. Stock certificate number three for 10,200 shares was issued to [REDACTED] October 31, 2000. The certificate has been altered to show that the petitioner is authorized to issue 100,000 shares of common stock.

The petitioner also provided its 2002 and 2003 IRS Forms 1120, U.S. Corporation Income Tax Return, which both show at Schedule E and at Schedule K line 5 that the [REDACTED] owns 100 percent of the company’s stock. The value of the company’s common stock is stated as \$208,160 at Schedule L, Line 22, on both years’ tax returns.

Finally, the petitioner submitted minutes of a meeting of the board of directors of the foreign entity dated March 13, 2000, in which the foreign entity’s board resolved to enter into a joint venture with the petitioning

company “by investing US \$1.02 laos in the equity of the company.” The resolution indicates that the foreign entity’s chairman and managing director would serve as directors in the “joint venture” in which 51 percent of the shares would be held by the foreign entity.

In his November 4, 2004 request for evidence, the director noted that the petitioner’s Forms 1120 identify the petitioner’s president as its sole owner and requested additional evidence to clarify the inconsistency and to substantiate the claimed parent-subsidiary relationship between the petitioner and the foreign entity. The director specifically requested: (1) the petitioner’s articles of incorporation that have been date stamped by the appropriate state official; (2) copies of all stock certificates (front and back) issued to the present date; (3) a copy of the U.S. company’s stock ledger showing all stock certificates issued to the present date including total shares of stock sold, names of shareholders, and purchase price; (4) a copy of the U.S. company’s Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts; and (5) evidence that the parent company has paid for its interest in the U.S. company in the form of copies of original wire transfers from the parent company, canceled checks, deposit receipts, etc. detailing monetary amounts for the stock purchase.

In response, the petitioner claimed that the foreign entity owns 51 percent of its stocks, and submitted a letter from its accountant who stated: “It has been brought to our attention that ownership of [the petitioning company] has been erroneously reported on Schedule E, Form 1120. [REDACTED] a foreign parent company) owns 51 % and [REDACTED] owns 49%.” The petitioner submitted a bank statement dated November 30, 2000, and highlighted receipt of a wire transfer from “[REDACTED]” in the amount of \$101,980 on November 1, 2000. The petitioner also provided a Notice of Transaction Pursuant to Corporations Code Section 25102(f), which shows an offering of \$101,980 in exchange for money. The Notice of Transaction is not dated.

The petitioner resubmitted a copy of stock certificate number two for 9,800 shares issued to [REDACTED] on October 31, 1999. The petitioner submitted a copy of stock certificate number one issued to the foreign entity on October 31, 1999. This stock certificate indicates on its face that it is authorized to issue 1,000 shares of common stock. The petitioner did not re-submit the previously provided stock certificate number three issued to the foreign entity for the same number of shares, and dated exactly one year later. The petitioner’s stock transfer ledger indicates that the foreign entity purchased 10,200 shares for \$101,980 on October 31, 1999, and [REDACTED] purchased 9,800 shares for 98,000 on October 31, 1999.

In his February 11, 2005 decision, the director acknowledged receipt of the letter from the petitioner’s accountant regarding the claimed error on the petitioner’s tax returns. The director noted that the petitioner had failed to provide evidence of an attempt to correct the oversight with the Internal Revenue Service, but did not specifically enter a determination that the petitioner had failed to establish the claimed qualifying relationship.

On appeal, counsel for the petitioner asserts that the director “places far too much weight on the listing of [REDACTED] as 100% owner of the U.S. entity on Schedule E of the Form 1120,” and failed to consider the other evidence submitted to demonstrate that the foreign entity owns a majority interest in the petitioner.

Upon review, the petitioner has not established the existence of a qualifying relationship between the U.S. and foreign entities. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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

Given the discrepancies noted with respect to the petitioner's income tax returns, the petitioner's stock certificates alone were not sufficient to establish the claimed parent-subsidary relationship between the petitioner and the foreign entity. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(1)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

There are several inconsistencies and unexplained discrepancies in the petitioner's evidence that prohibits a conclusion that the foreign entity is the majority shareholder of the U.S. company. First, as noted by the director, the petitioner did not adequately resolve the discrepancy found in the petitioner's 2002 and 2003 income tax returns at Schedules E and K, which indicate that the company is wholly owned by an individual. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As discussed below, the evidence submitted to establish the foreign entity's purchase of the petitioner's stock and resulting ownership interest in the petitioner is not credible. Further, it was reasonable for the director to expect the petitioner to make a good faith effort to correct the acknowledged errors by filing amended tax returns with the Internal Revenue Service. There is no evidence that the petitioner has subsequently done so.

Although the petitioner submitted a Notice of Transaction and evidence that it received a wire transfer from the foreign entity, the AAO notes that the Notice of Transaction is not dated and identifies ██████████ as the issuer, leading the AAO to question its validity. The petitioner did not provide a copy of the original wire transfer from the foreign entity or evidence of stock purchase agreements as requested by the director. Again, 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. at 165. The record contains a board resolution from the foreign entity referencing a joint venture with the petitioner and intent to invest in the U.S. company, but the record does not contain a joint venture agreement, board resolutions, or any other documents referencing the stock purchase by the foreign entity. Without additional supporting documentation, the AAO cannot conclude that the wire transfer that appears on the petitioner's bank statement was related to the purchase of the petitioner's stock.

Finally, most damaging to the petitioner's claims is its submission of copies of two different stock certificates purportedly issued to the foreign entity. As noted above, the petitioner initially submitted a copy of stock certificate number three issuing 10,200 shares to the foreign entity on October 31, 2000. In response to the director's request for evidence, the petitioner submitted its stock certificate number one issued to the foreign entity on October 31, 1999, and a stock transfer ledger indicated that only two certificates had been issued, to the foreign entity and to ██████████ on October 31, 1999. 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, supra*. In light of the fact that the petitioner submitted a board resolution from the foreign entity indicating that it agreed to invest in the petitioning company in March 2000, and claims to have received payment for the stocks issued in November 2000, the stock certificate and stock transfer ledger indicating that the foreign entity was an original shareholder in the petitioning company when it was formed in October 1999 is not credible. 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).

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. The AAO notes that the foreign entity is a publicly traded Indian company with a published annual report. The foreign entity's 2003-2004 annual report does not reference the petitioner among its subsidiaries or related parties. The petitioner has not provided credible evidence of the number of shares issued or the ownership of those shares, and has thus not established the claimed parent-subsidiary relationship between the foreign and U.S. entities. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The AAO notes that CIS previously approved L-1A nonimmigrant petitions filed on behalf of the beneficiary. Each nonimmigrant petition has a separate record of proceeding with a separate burden of proof; each individual petition must stand on its own merits. *See* 8 C.F.R. § 103.8(d). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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).

Based on the lack of evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the prior approvals and denying the instant petition requesting an extension of the beneficiary's status. The director is instructed to review the prior nonimmigrant petition approval for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.