

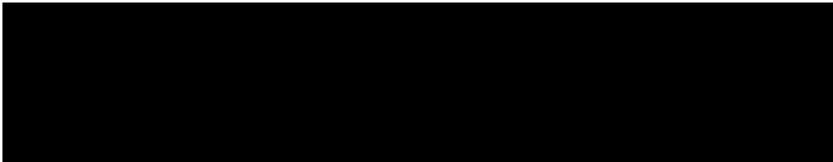


U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

D7



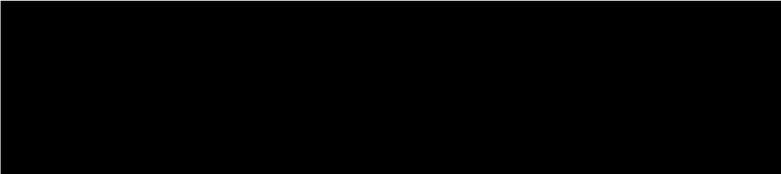
File: WAC 06 091 50156 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

COURTESY COPY MAILED TO:



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, Chief
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 chief financial officer and general manager 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, a California corporation, states that it is a marketing, business development and manufacturing company. The petitioner claims to be a subsidiary of Acma Ltd., located in Singapore. The petitioner has employed the beneficiary in L-1A status since January 2004 and now seeks to extend his status for two additional years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity; or (2) that the U.S. company is a qualifying organization doing business in accordance with the regulations.

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, the petitioner asserts that the U.S. company was established in 1994 and continues to be in good standing despite suffering a business downturn in 2004. The petitioner asserts that it is redeveloping its markets and business networks and continues to require the services of a senior executive and manager from its parent company to operate the U.S. business. The petitioner submits a brief and documentary 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 matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity under the extended petition.

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 nonimmigrant petition was filed on January 30, 2006. The petitioner indicated on Form I-129 that it had two employees and gross annual sales of \$2,000,000. In an attached statement, the petitioner provided the following description of the beneficiary's role as chief financial officer and general manager of the U.S. entity:

Business Development (Time Spent: Continuous)

- Explore, analyze and execute decision[s] on the development of business markets and potentials in the United States and within North America.
- Negotiate and execute business contracts with customers' management on new business projects and order expansion.
- Execute business strategies to meet Group's business objectives and enhance business markets and revenues.
- Advise the Group on business markets in the United States and provide business directions for global operation.

Corporate Management (Time Spent: Continuous)

- Execute and manage the corporate affairs of U.S. business in meeting its corporate goals.
- Review and execute tax planning and tax compliance with consideration of the Group's fiscal policy.
- Involve in legal representation and contract management of business projects.
- Undertake the role of statutory officer pursuant to the California Corporation Code in the capacity of Chief Financial Officer and Corporate Secretary.

Investment and Financial Planning (Time Spent: Periodic)

- Review and execute of investment strategies and financial planning for the Group to enhance businesses in the United States with interlink to the Group's global operations.
- Explore investment opportunity for the Group to further expand its U.S. business.

Corporate Governance and Statutory Compliance (Time Spent: Periodic)

- Review and execute corporate governance in determining compliance to statutory laws and meeting Group policies.
- Review and advise on corporate information compliance with integration to the Group's global information network.

On February 6, 2006, the director issued a request for evidence, instructing the petitioner to submit the following: (1) an organizational chart for the U.S. company, clearly identifying the beneficiary's position and all employees under the beneficiary's supervision by name, job title, job duties, educational level, annual salaries/wages and immigration status; (2) a more detailed description of the beneficiary's duties in the U.S., including the percentage of time spent on each of the listed duties; (3) copies of the U.S. company's payroll

summary, Forms W-2 and W-3, evidencing wages paid to employees; and (4) copies of the U.S. company's state quarterly wage reports for the last eight quarters.

In a response dated April 27, 2006, the petitioner re-submitted the job description recited above. The petitioner provided copies of its state quarterly wage reports and IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2005, indicating that the beneficiary is the only employee on the company's payroll. In addition, the petitioner provided a copy of the beneficiary's Form W-2, Wage and Tax Statement, for 2005.

The director denied the petition on May 11, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the petitioner provided a vague description of the beneficiary's position which suggests that beneficiary's duties are primarily comprised of marketing tasks which do not fall under the statutory definitions of managerial or executive capacity. The director further noted that as the beneficiary is the U.S. company's sole employee, it is reasonable to determine that he will be performing many operations of the day-to-day business. The director also emphasized that the U.S. company appears to have been inactive since 2004, and thus the claimed managerial and executive duties "are not justified." In addition, the director found insufficient evidence to establish that the beneficiary would manage a function of the petitioning company.

On appeal, the petitioner acknowledges that the petitioner was affected "by the US economy slowdown" in 2004 and 2005 and as a result "has reduced its manpower and pursues low cost operation until its efforts to regenerate revenue fully materialized." The petitioner emphasizes that it has the support of its parent company and continues to require "a senior executive and manager from its parent company who knows the business to operate its US business."

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial capacity under the extended 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.*

As noted by the director, the position description submitted by the petitioner was quite vague and nonspecific, and failed to identify the actual duties to be performed by the beneficiary on a day-to-day basis. The petitioner indicated that the beneficiary would "execute and manage the corporate affairs," review and execute corporate governance" and "information compliance," "undertake the role of statutory officer," and "review and execute investment strategies" and "tax planning and tax compliance." 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

Further, the more concrete duties identified in the position description suggest that the beneficiary is directly involved in the marketing, promotion and sales of the petitioner's services to U.S. customers. The petitioner indicated that the beneficiary will "negotiate and execute business contracts with customers' management on new business projects and order expansion"; "execute business strategies to . . . enhance business markets and revenues"; "explore investment opportunity"; and be involved in "contract management on business projects." Considering the petitioner's statements that the primary purpose of the U.S. company is to market the design and manufacturing services of its foreign affiliates, develop business in the U.S., and take manufacturing orders, and given that the beneficiary is the U.S. company's sole employee, it is reasonable to conclude that he is primarily engaged in marketing, sales, and requirements-gathering duties that do not fall under the statutory definition of managerial or executive capacity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the petitioner indicates that the U.S. company requires the services of an experienced manager or executive, the petitioner did not specify what qualifying duties the beneficiary would perform on a day-to-day basis. The fact that the beneficiary is the sole employee of the U.S. office and has been given a managerial job title is insufficient to meet the petitioner's burden to establish that the beneficiary's actual duties are primarily managerial or executive in nature. While the beneficiary would evidently exercise some discretion over the U.S. office as an officer of the company and its only employee, the petitioner is required to establish that his actual duties are primarily at the managerial or executive level. 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 prove 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 petitioner's initial position description suggested that the beneficiary, while having general authority over the U.S. company, would perform primarily non-qualifying duties related to sales and marketing, and did not contain sufficient detail to establish that the beneficiary's employment is in a primarily managerial or executive capacity.

Accordingly, the director requested additional evidence to establish the beneficiary's eligibility for the benefit sought, including a detailed position description, a list of all duties to be performed on a day-to-day basis, and the percentage of time the beneficiary would devote to each specific job duty. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Here, the evidence requested was critical, given the deficiencies of the initial position description. In response, the petitioner re-submitted the same inadequate job description, and failed to provide any indication as to how the beneficiary's time would be divided between managerial and non-managerial duties. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's

description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, on appeal, counsel for the petitioner does not even acknowledge the director's finding that the position description was inadequate and overly vague to establish the beneficiary's claimed employment in a managerial or executive capacity. The petitioner's failure to submit the evidence requested by the director is sufficient grounds for dismissal of the appeal.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

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 USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As noted by the director, the evidence of record did not establish that the U.S. company was doing business on a consistent basis as of the date the petition was filed, or that the company employed any direct or contract employees to relieve the beneficiary from performing the non-managerial and non-executive operations of the company on a day-to-day basis.

While it is true that a beneficiary employed by a small company or even as the sole employee of a company can qualify for L-1A classification, such petitioning companies are not exempt from establishing that the beneficiary will perform primarily managerial or executive duties. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. Here, the petitioner has not met that burden.

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.* In this case, the petitioner has not established that the beneficiary has a subordinate level of managerial employees working under his direction, or that he could reasonably devote the majority of his time to focusing on the broad goals and policies of the organization. As the sole employee of the company, the beneficiary would necessarily be required to perform all operational and administrative tasks inherent to operating the business on a day-to-day basis, and it is evident that these tasks would require the majority of the beneficiary's time, and thus prohibit him from performing primarily managerial or executive duties.

Nor does the record establish that the beneficiary will be employed in a managerial capacity, as the beneficiary has not been shown to primarily manage an essential function of the organization, or to primarily manage a staff of managerial, supervisory or professional employees. *See* section 101(a)(44)(A) of the Act.

Based on the foregoing discussion, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner is a qualifying organization doing business in the United States.

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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines doing business as:

The regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner indicated on Form I-129 that the U.S. company is engaged in marketing, business development and manufacturing, with gross annual income of approximately \$2 million. The petitioner submitted copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 2002 through 2004. The petitioner's gross receipts or sales were in excess of \$10 million in 2002, nearly \$5 million in 2003, and \$0 in 2004. The petitioner did not submit any evidence of business activities or evidence of the company's financial status for 2005 or 2006.

On February 2, 2006, the director requested additional evidence to establish that the U.S. company is currently doing business, including: (1) copies of the petitioner's most recently filed income tax returns that were submitted to the Internal Revenue Service; and (2) copies of the company's bank statements for the past year; and (3) copies of the company's major sales invoices identifying the gross sales amount reported on the latest tax return. The director also requested a copy of the petitioner's lease agreement and photographs of the inside and outside of the petitioner's business premises.

In a response dated April 27, 2006, the petitioner re-submitted copies of its 2003 and 2004 IRS Forms 1120, and a copy of Form 7004, Application for Automatic 6-month Extension of Time to File Certain Business Income Tax for 2005. The petitioner provided copies of its bank statements for 2005, which show no deposit activity, no check activity, and no other additions except for two wire transfers from the parent company in the amount of \$21,000. Finally, in response to the director's request for major sales invoices, the petitioner provided copies of approximately eleven quotations submitted to potential customers between December 2004 and September 2005. The petitioner did not submit evidence that any of the quotations were accepted or that any payments were made to the U.S. company.

The petitioner also submitted a copy of its lease agreement, signed on April 1, 2006, which provides petitioner with a "Corporate Identity Program," including "up to eight hours of conference room and/or workstation access per month," use of a mail and fax service, and a telephone answering service.

The director denied the petition on May 11, 2006, concluding that the petitioner had failed to establish that the U.S. company is a qualifying organization doing business in the United States as required by the regulations. The director emphasized the lack of business activity reflected in the petitioner's 2004 income tax return and 2005 bank statements, and noted that absent a legal document such as the most recent income tax return, the copies of quotations submitted are insufficient to demonstrate that the U.S. company is doing business. The director also noted that the lease agreement submitted indicates that the company does not have adequate business premises from which to conduct business, as it allows for only eight hours of office usage per month.

The director observed that the lease agreement was signed subsequent to the filing of the petition, and the record did not contain evidence that the petitioner had any physical premises as of the date of filing.

On appeal, the petitioner asserts the following:

- [The petitioner] has been doing business for the past 12 years in the United States. The parent company had invested substantially in [the petitioner] since its inception in 1994.
- Despite incurring business losses for many years, the Petitioner has continued to pay statutory taxes in California and Arizona.
- Since todate [sic], [the petitioner] has continued to transact monthly banking activities with its banker in the US for incoming funds and is paying over US\$100,000 in banking charges annually.
- [The petitioner] since its inception in 1994 has generated revenue around US[\$]3 million to US\$5 million annually, until in year 2004 and 2005 where the company was affected by the US economy slowdown, its customers shifting production overseas, its customers reducing production capacity, and its customers undertaking reconstruction. In this situation, [the petitioner] has reduced its manpower and pursues low cost operation until its efforts to regenerate revenue fully materialized. Its [sic] will depend on its parent company. . . to financial supports its scale down activities.
- Being established for the past 12 years, [the petitioner] still has the fundamental support of its parent company. . . in its efforts in enhancing business networks and institute [sic] business strategies to meet the global competition and continue doing business with the US industry. [The petitioner] has continuous networking and business contacts with US companies....
- [The petitioner] is not having its presence of an agent or office of the foreign parent company. The corporation was set-up as a legal US entity with the business objectives to generate sustainable revenue, develop growing markets, as well as achieving returns to the stockholders. For the past 12 years of existence, [the petitioner] has undergone many business and economic challenges and for certain years, especially in 2004, it was a difficult period for consolidation. . . .

The petitioner also addresses the "Corporate Identity Agreement" questioned by the director, noting that the "flexible small office environment. . . was adopted by the petitioner to maintain office efficiency of space and running costs."

Upon review, the petitioner's assertions are not persuasive. Although the petitioner has characterized its recent business operations as a "slowdown," the petitioner has not adequately explained how the company's gross sales figure dropped from \$10 million to zero over the course of two years, if the company is in fact continuing to conduct business in a regular, systematic, and continuous manner. The AAO recognizes that the petitioner filed an extension for its 2005 corporate tax return and therefore the document was not available for submission in response to the director's request for evidence. However, the petitioner's failure to provide any evidence of recent business activities or the company's financial status, such as a year-end financial report for 2005, cannot be excused. 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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Contrary to the petitioner's statements on appeal, the petitioner's banking statements for 2005 do not indicate that the company is regularly receiving any incoming funds. As noted above, it appears that the company received two wire transfers from its parent company during 2005; no other deposits were reflected in the records. There is no evidence that the U.S. company paid any rent, utilities or other company expenses during 2005, as the bank statements do not reflect any withdrawals for these purposes. As noted by the director, the copies of price quotations submitted for 2005 are insufficient to establish that the company is doing business as required in the regulations. The petitioner has not submitted additional evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

The AAO acknowledges that CIS previously approved an L-1A petition filed by the petitioner on behalf of this beneficiary. The prior approval does 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). The record of proceeding makes it clear that the petitioner has undergone a significant change in circumstances since the initial petition was filed in 2003, at which time the company was generating revenues of nearly \$5 million and paying salaries and wages to employees. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous petition approval by denying the instant petition.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.