



U.S. Citizenship  
and Immigration  
Services

D7



File: EAC 08 166 52598 Office: VERMONT SERVICE CENTER Date: **DEC 03 2009**

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)

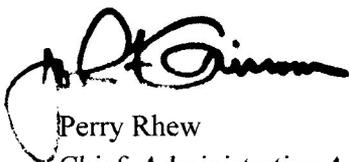
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).



Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa and dismissed the petitioner's subsequent motion to reconsider. 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 "Executive 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 is a New York corporation engaged in the import and wholesale of precious stones and jewelry. The petitioner states that it is a subsidiary of Friends International, located in India. The petitioner has employed the beneficiary in L-1A status since July 2005 and now seeks to extend his status so that he may serve as executive manager for two additional years.

On August 12, 2008, the director denied the petition on two independent and alternative grounds, concluding that the petitioner did not establish: (1) that the beneficiary would be employed in the United States in a primarily qualifying managerial or executive capacity; and (2) that the petitioner and the foreign entity have a qualifying relationship. The petitioner subsequently filed a motion to reconsider, which the director dismissed in a decision dated November 10, 2008, without disturbing his original decision.

On appeal, counsel for the petitioner disputes the director's findings and asserts that the beneficiary will be employed in a primarily executive capacity. Counsel reiterates the beneficiary's duties and those of his claimed subordinate employees, and asserts that all requirements for approval have been met. 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 this matter is whether the petitioner established that the beneficiary would be employed by the United States entity in 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 13, 2008. The petitioner stated on Form I-129 that the beneficiary is employed as the executive manager of its four-person company and "is taking care of sales, purchase marketing of precious [*sic*] stones, hire fire employees, management."

In a letter dated May 5, 2008, counsel described the beneficiary's duties as follows:

[The beneficiary] is full time employee and is supervising the hiring, firing of all senior level personnel. The beneficiary will spend time to locate buyers and sellers. The beneficiary will also be responsible for ongoing client servicing activities.

[The beneficiary] has been continuously working with the US entity in Business Development in the capacity of marketing manager and Business Development and projects of prospect development and client management. His duties are primarily concerned with all of Project development and marketing of products. The Beneficiary supervises business research & marketing, created marketing strategy and managed firm wide PR. The beneficiary is familiar with US systems since he is continuously working since 2005 and is indulging in sales, marketing of precious, semi precious gems, stones and diaomonds [*sic*] etc. . . . He has worked to maintain, ongoing business relationships, and management strategies.

Counsel stated that the petitioner has hired the following staff:

Manager Business development: This department is helping [the petitioner] to direct development of business in the US.

Personal secretary/Administration Assistant: This department is taking care of the general administration/ negotiating with clients/ Answering phone calls/ arranging meetings etc.

Accounting: This department is taking care of the accounts, prepare monthly statements, prepare yearly profit and loss account and it will also be responsible for internal auditing.

The director issued a request for additional evidence on June 13, 2008, in which he advised the petitioner that the initial evidence did not demonstrate that the petitioner would be employed in a primarily managerial or executive capacity. The director noted that the petitioner did not establish that the beneficiary functions at a senior level in the organization other than in position title, or that he will be involved in the supervision and control of subordinate supervisory, managerial or professional employees who will relieve him from performing the services of the company.<sup>1</sup>

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<sup>1</sup> After noting these deficiencies, the director went on to request additional evidence relating to the beneficiary's employment with the foreign entity. The director did not request any specific evidence pertaining to the beneficiary's duties in the United States or the staffing structure of the U.S. entity.

In a response dated July 23, 2008, counsel further described the beneficiary's duties in the United States as follows:

Main duties are primarily concerned with all of [the petitioner's] Project development and marketing of products. The Beneficiary is supervising business research & marketing, developing marketing strategy and managing the business. Beneficiary is working full time to maintain ongoing business relationships, and management. [The beneficiary] has powers to hire or fire employees in the US organization. The position is an "Executive Position." [The beneficiary] primarily directs the management of the organization by exercising wide latitude in discretionary decision-making, establishing goals and policies of the organization and receives only general supervision or direction of the organization from the Indian parent company. [The beneficiary] is also responsible for implementing the organization's policies on a day-to-day basis, directs and/or participates in the development and recommendation of policies, procedures, rules, and regulations for the effective operation of US Organization.

Counsel indicated that the beneficiary's subordinates include the following personnel:

[REDACTED] is assisting [the beneficiary] to analyze, locate buyers, sellers of precious and semi-precious stones in the US and abroad.

[REDACTED] is assisting [the beneficiary] in Sales, Purchase and marketing of products.

[REDACTED] travels to locate new buyers in the US

[REDACTED]

The petitioner's response to the RFE included an organizational chart for the U.S. company. The chart depicts the beneficiary as "marketing manager" supervising an account analyst [REDACTED], an accountant [REDACTED] and a sales assistant [REDACTED]). The chart indicates that the sales assistant supervises the packing and material employee.

The director denied the petition on August 12, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director found insufficient evidence to establish that the beneficiary would function at a senior level within the organization's hierarchy other than in position title, or that he would supervise and control a subordinate staff of supervisory, managerial or professional employees. The director also noted that "the nature of your business is not such that it would require workers who have professional-level expertise," and determined that the beneficiary's proffered salary of \$38,000 is "incongruous with that of an employee who is actually managing other bona fide managers or professionals."

The petitioner subsequently filed a motion to reopen and reconsider. In a brief dated September 5, 2008, counsel for the petitioner reiterated a position description that was previously provided for the beneficiary,

and stated that the beneficiary's subordinates include an account/business analyst [REDACTED] a sales assistant, an accountant, a packaging and material employee, and a sales executive [REDACTED].

On November 10, 2008, the director dismissed the petitioner's motion pursuant to 8 C.F.R. § 103.5(a)(4), finding that the petitioner failed to provide new facts or state a reason for reconsideration of the adverse decision.

On appeal, counsel reiterates the beneficiary's duties "are clearly involving major executive decision on day-to-day basis," and notes that the beneficiary is "responsible for marketing, developing marketing strategy and managing the business." Counsel asserts that executives whose duties include executive-level public relations and lobbying are not disqualified from L-1A classification and that the beneficiary's duties are "indisputably way beyond" such tasks.

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. While the AAO finds that the director's adverse determinations were warranted based on the evidence of record, it is noted that the director's underlying analysis, in part, was flawed, as the director issued an adverse finding on the basis of the beneficiary's salary. The AAO notes, however, that a beneficiary's salary is an admissibility factor and not a criterion to be used in determining his or her prospective employment capacity. The director's finding with regard to the latter is not supported by any statute, regulations or precedent decision.

Further, the director based the decision, in part, on a finding that the beneficiary's subordinates are not professionals, and based on a finding that the petitioner's business would not require the services of professional workers. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Therefore, a beneficiary need not supervise professionals in order to qualify as a manager or executive.

Notwithstanding the director's reasoning, the director properly found insufficient evidence to establish that the beneficiary would be engaged in primarily managerial or executive tasks. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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(1)(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 addition, the definitions of executive and managerial capacity each 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).

Despite multiple opportunities to provide the detailed description of the beneficiary's duties required by the regulations, none of the submitted job descriptions address the specific managerial or executive job duties to be performed by the beneficiary. The statements made by the petitioner in the initial filing suggested that the beneficiary would perform some combination of qualifying and non-qualifying duties. The petitioner stated on Form I-129 that the beneficiary "is taking care of sales, purchase, marketing of precious stones," duties which appear to be non-qualifying, and also responsible for hiring and firing employees and "management." The petitioner further indicated that the beneficiary "will spend time to locate buyers and sellers," "be responsible for ongoing client servicing activities," and that he has been "indulging in sales, marketing of precious, semi precious gems." The petitioner noted that the beneficiary is "primarily concerned with all of Project development and marketing of Products." The petitioner did not explain how the beneficiary's sales, product marketing and client servicing activities would rise to the level of managerial or executive duties. 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).

The AAO acknowledges that the petitioner indicated that the beneficiary will "supervise business research & marketing," create marketing strategy, manage public relations and perform client management duties. However, the petitioner simultaneously stated that the beneficiary would perform non-managerial duties associated with each of these functions, and did not clearly indicate which tasks would be delegated to lower-level staff and which non-qualifying duties would be performed by the beneficiary directly. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

In response to the RFE, the petitioner added that the beneficiary "primarily directs the management of the organization by exercising wide latitude in discretionary decision-making, establishing goals and policies of the organization and receives only general supervision or direction of the organization from the Indian parent company." The petitioner indicated that the beneficiary "is responsible for implementing the organization's policies on a day-to-day basis," and "directs and/or participates in the development and recommendations of policies, procedures, rules and regulations." These statements merely paraphrase the statutory definition of executive capacity and do not add any additional clarity to the job description initially provided. 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 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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks such as sales, marketing and customer service, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. See, e.g. *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

In this case, the record contains conflicting and uncorroborated claims regarding the number and types of employees working under the beneficiary's supervision. At the time of filing, in May 2008, the petitioner stated that it employs a total of four employees, including the beneficiary, a "manager business development," a personal secretary/administrative assistant, and an accounting employee. In August 2008, in response to the RFE, the petitioner stated that it employs the beneficiary, a business analyst, an assistant marketing manager, a sales executive and a packing and materials employee. The petitioner assigned different job titles to the same employees in an attached organizational chart. The employee referred to as a sales executive is identified as an accountant on the organizational chart, while the assistant marketing manager is identified as a sales assistant. The person identified as a "business analyst" in the petitioner's letter does not appear on the organizational chart, while another individual is identified as an "account analyst." On motion and on appeal, counsel has provided additional employee lists in which the employees' names and job titles now coincide with the information provided on the organizational chart, and a fifth subordinate, a sales executive, has been added.

The AAO cannot determine based on the conflicting information provided how many employees actually worked for the petitioner as of May 2008 when the petition was filed or what positions they filled. 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). Here, the petitioner provided no explanations regarding its various employee lists, and no documentary evidence of its staffing levels in 2008.

Furthermore, 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). At the time of filing, the petitioner indicated that it had a total of four employees and that the subordinate employees included an accounting employee, a secretary/administrative assistant, and a manager, business development. The petitioner has not identified who held these positions nor described the duties they performed.

Furthermore, as noted above, the petitioner initially stated that the beneficiary himself is "taking care of sales, purchasing, marketing of precious stones," and the petitioner did not claim to employ sales, marketing or purchase staff as of May 2008. 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). As noted above, 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, but rather added new generic duties to the job description.

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

Here, due to the discrepancies discussed above, the petitioner has not established that the beneficiary is primarily acting as a personnel manager. As it has not been established how many or what types of employees the beneficiary actually supervised at the time of filing, it cannot be concluded that the beneficiary is primarily engaged in the supervision of managerial, supervisory or professional employees.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must provide a detailed job description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner has not claimed that the beneficiary manages an essential

function of the petitioning organization, nor does the evidence support such a finding. As discussed, the petitioner has not provided a detailed description of the beneficiary's duties or the proportion of his time allocated to managing a function or functions of the organization.

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.*

As discussed above, the only executive duties attributed to the beneficiary are those which counsel directly paraphrased from the statutory definition of "executive capacity." *See* section 101(a)(44)(B) of the Act. Descriptions which do not provide any detail or explanation of the beneficiary's actual duties are not probative. On appeal, counsel states that the beneficiary's duties are "clearly involving major executive decisions on day-to-day basis," but once again, neither counsel nor the petitioner have provided a comprehensive description of the beneficiary's duties or examples of what he actually does on a day-to-day basis. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Overall the evidence of record suggests that the beneficiary exercises discretion over the U.S. company, but participates in both managerial and non-managerial aspects of the petitioner's sales, marketing, purchasing and other operational functions. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive operational duties. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, as discussed above, the petitioner has not provided sufficient evidence that it employs a subordinate staff who would relieve the beneficiary from performing non-qualifying duties, particularly given its initial claimed staffing structure, which includes no marketing, sales, or purchasing staff. In sum, the petitioner's arguments primarily fail on an evidentiary basis. The lack of a detailed description of the beneficiary's actual duties, considered in conjunction with the petitioner's failure to document the employment of the claimed subordinate staff that would relieve the beneficiary from performing day-to-day

activities of the company, precludes a finding that the beneficiary would be performing primarily managerial or executive duties under the extended petition. For this reason, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that the U.S. and foreign entities have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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) *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.

The petitioner stated on Form I-129 that it is a subsidiary of "[REDACTED]" located in India. The petitioner indicated that the Indian parent company owns 51 percent of the petitioner's shares. In its letter dated May 5, 2008, the petitioner stated that Friends International purchased 102 of the petitioner's 200 shares in 2005.

The petitioner did not submit any primary documentary evidence of the ownership of the U.S. company, such as copies of the petitioner's stock certificates, stock ledger, by-laws, or articles of incorporation. However, the petitioner did submit copies of the U.S. company's IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 2005 and 2006. Both tax returns indicate at Schedule E and Schedule K that the petitioning company is wholly owned by an individual, [REDACTED].

In the RFE issued on June 13, 2008, the director advised the petitioner that the initial evidence did not establish that the petitioner and foreign entity have a qualifying relationship. The director also requested evidence to establish that the foreign entity has been doing business as defined in the regulations, for the previous year.

In response, the petitioner submitted a number of invoices and export documents issued by Friends International between January and August 2007.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner and foreign entity have a qualifying relationship. The director emphasized that the petitioner did not address this issue in its response to the RFE. The director further found that the petitioner failed to establish that the foreign entity is presently engaged in the regular, systematic and continuous provision of goods and/or services.

On motion, the petitioner submitted additional evidence of the foreign entity's business activities, including invoices and shipping documents from 2007 and evidence of a major sales transaction in August 2008. As noted above, the director found that the petitioner did not meet the requirements for a motion to reopen or reconsider and dismissed the motion.

On appeal, the petitioner submits copies of previously submitted evidence with respect to the foreign entity's business activities. The evidence submitted on appeal also includes a copy of the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2007. According to information provided at Schedule E and Schedule K, the petitioning company is wholly owned by [REDACTED].

Upon review, the petitioner has not established that it has a qualifying relationship with the foreign entity, Friends International. The AAO finds that the petitioner has submitted sufficient evidence to establish that the foreign entity, Friends International is doing business; however, the record remains devoid of evidence to corroborate the claimed parent-subsidary relationship between the foreign entity and the U.S. petitioner.

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, USCIS is unable to determine the elements of ownership and control.

While the petitioner claims that the foreign entity owns 102 out of the U.S. company's 200 issued shares, the petitioner has submitted no documentary evidence in support of this claim. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the petitioner's claim that it is majority-owned by an Indian company is contradicted by the information contained in the U.S. company's corporate tax returns for the years 2005, 2006 and 2007. As noted above, according to the information reported on the Forms 1120, the petitioner is wholly owned by an individual, [REDACTED]. 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.* at 582. The record does not contain any evidence of the foreign entity's ownership so it cannot be determined whether the two companies may have an affiliate relationship based on common ownership by a common individual or parent company.

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

The AAO acknowledges that the beneficiary was previously granted L-1A status for employment with the petitioning company. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

While USCIS previously approved a petition for L-1A status filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an extension of the original visa petition based on a reassessment of the beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). If a previous nonimmigrant petition was approved based on the same unsupported assertions and conflicting evidence that are contained in the current record, the approval would constitute material and gross error on the part of the director. Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approval by denying the present request to extend the beneficiary's status.

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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Despite any number of previously approved petitions, USCIS does not have the authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.