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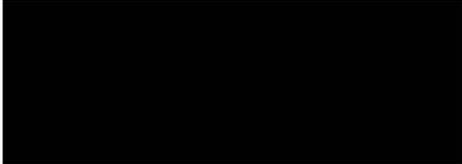
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

D7



File: WAC 08 143 54013 Office: CALIFORNIA SERVICE CENTER Date: SEP 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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the nonimmigrant petition and 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 beneficiary's employment 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 established in 2002, operates a flooring, cabinetry and remodeling business. It claims to have a qualifying relationship with AL Khalsa Aluminum Glass and Décor Contracting and AL Khalsa Carpentry, located in United Arab Emirates. The beneficiary has been employed as the petitioner's managing director and chief executive officer since April 2003 and the petitioner now seeks to extend his L-1A status for two additional years.

The director denied the petition on two separate grounds, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in a primarily managerial or executive capacity; and (2) that the U.S. maintains a qualifying relationship with a foreign entity.

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 asserts that the petitioner established by a preponderance of the evidence that the petitioner and beneficiary are eligible for the requested extension of status. Counsel contends that the director erred by issuing a request for additional evidence in this matter, and by failing to defer to three prior L-1A approvals granted to the beneficiary for the same position with the petitioner. Counsel requests that the instant petition be approved "as a matter of equity." Counsel submits a lengthy 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 addressed by the director is whether the petitioner established that beneficiary will be employed 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 petitioner filed the nonimmigrant petition on April 16, 2008. The petitioner indicated on Form I-129 that it had three employees as of the date of filing. In a letter dated April 11, 2008, the petitioner stated that the beneficiary, as managing director, "is occupying the highest managerial position in the US office," and performs the following duties:

- (1) Planning and organization purchasing and distribution;
- (2) Formulation of policies, developing and implementing short and long range goals of the company's developmental plan;
- (3) Manage the day to day operations of the subsidiary company;
- (4) Hire or fire employees and independent contractors;
- (5) Managing compliance with scheduling needs and creation and administration of standards for work quality;
- (6) Determination and implementation of investment of policy and financial plan;
- (7) Negotiating and contracting with vendors and customers;
- (8) Develop business relations with suppliers;
- (9) Establishing purchasing and sale channels;
- (10) Signing sale contracts;
- (11) Handling and solving commercial disputes; and
- (12) Coordination with the parent company in UAE and reviewing daily international material prices.

The director issued a request for additional evidence on September 10, 2008, in which she instructed the petitioner to submit, *inter alia*: (1) the total number of employees working at the U.S. office; (2) a more detailed description of the beneficiary's duties; (3) an organizational chart for the U.S. company; (4) job descriptions for all U.S. employees supervised by the beneficiary; (5) copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, and state quarterly wage reports filed by the petitioner for all four quarters of 2007 and the first two quarters of 2008; and (6) copies of IRS Forms W-2 issued by the petitioner in 2007. The director also requested additional evidence to establish the nature of the petitioner's business and the types of products and services it provides.

In a letter dated November 19, 2008, the petitioner provided the following description of the beneficiary's duties:

- Direct and coordinate financial/budget activities to fund U.S. operations, maximize investments, and increase efficiency.
- Deal with offshore company officials and staff members to discuss budget, marketing & manufacturing issues, coordinate activities, and resolve product output and delivery problems.
- Oversee U.S. operations to evaluate performance of company and staff in meeting business objectives and to determine areas of potential cost reduction, program improvement or policy change.
- Direct, plan and implement policies, objectives, and activities of U.S. operation to ensure continuing operations, to maximize returns on investments, and to increase productivity.
- Direct and coordinate with Finance manager, Purchase Manager and project supervisor.

- Negotiate and approve contracts and agreements with suppliers, contractors, and other organizational entities.
- Handle and solve disputes with suppliers, contractors, and other Organizational entities
- Hire or fire employees and independent contractor, assign or delegate responsibilities to them.
- Coordinate with the parent company in UAE;

he petitioner submitted an organizational chart showing that the beneficiary supervises a purchasing manager [REDACTED], a finance manager/secretary [REDACTED], and a projects supervisor [REDACTED]. The chart shows two workers under the projects supervisor, [REDACTED] and [REDACTED]. The petitioner provided the requested job descriptions for all positions identified on the organizational chart.

The petitioner also provided evidence of wages paid to employees since 2007, including copies of its IRS Forms 941 and W-2, and California quarterly wage reports. The evidence shows that the beneficiary and his spouse were the only employees working for the petitioning company in 2007. The petitioner employed a total of five employees during the first quarter of 2008. However, the petitioner reported only three employees for the month of April 2008, the month in which the petition was filed, and four employees for the months of May and June 2008. None of the submitted evidence reflects any payments to the purchasing manager. It appears that the staffing as of the date of filing included the beneficiary, the secretary/finance manager, and the project supervisor.

The petitioner also submitted additional evidence documenting the nature of the U.S. company's business activities. The records shows that the company is engaged in kitchen and bath remodeling, specializing in custom-made cabinets and flooring.

The director denied the petition on December 5, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. In reviewing the submitted organizational chart and payroll records, the director noted that the petitioner had not submitted evidence of wages paid to the purchasing manager, and further noted that the beneficiary's spouse, [REDACTED], has not had authorization to work in the United States since April 2006. The director further found that the job description provided for the beneficiary is not sufficient to establish that he is relieved from performing many aspects of the day-to-day operations of the business. The director concluded that the petitioner failed to demonstrate that the beneficiary would be primarily managing a subordinate staff of professional, managerial or supervisory personnel, or that he would manage an essential function of the company.

On appeal, counsel for the petitioner asserts that USCIS has approved every L-1A petition previously filed by the petitioner on behalf of the beneficiary, and emphasizes that the director has not explained why there was a *sua sponte* re-adjudication, nor articulated a material change, changed circumstance or new material information that would warrant denial of this third request for an extension. Counsel asserts that, in the absence of such explanation, the director should have deferred to the three previous adjudicator's approvals, rather than denying the instant petition for "subjective reasons." Counsel specifically refers to a 2004 USCIS memorandum to support his assertion that it is USCIS policy that prior approvals should be given deference in matters relating to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts. *See* Memorandum of William R. Yates, Associate Director for Operations, USCIS: "The Significance of a

Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity" (April 23, 2004)("Yates memorandum"). The memorandum provides that exceptions to this policy should be made where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *Id.* Counsel asserts that the instant petition involves the same parties and underlying facts and that none of the above-referenced exceptions to USCIS policy apply. Counsel requests that the AAO grant the extension "as a matter of fairness."

In support of the appeal, the petitioner submits copies of the three Forms I-129, Petition for a Nonimmigrant Worker, that were previously filed on behalf of the beneficiary. The petitioner also submits an affidavit from the beneficiary, who states that he has been performing the same duties with the U.S. company throughout his L-1 employment. The petitioner also provides a letter from [REDACTED], who states that he is employed by the petitioner as a purchasing officer, along with evidence of wages paid to [REDACTED] during the months of November 2008, December 2008, and January 2009.

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

The petitioner's initial description of the beneficiary's duties offered little insight into what specific tasks he performs on a day-to-day basis. Several of the listed duties merely paraphrased the statutory definitions of managerial and executive capacity. For example, the petitioner stated that the beneficiary is responsible for "formulation of policies," "developing and implementing short and long range goals," and "managing the day-to-day operations" of the company." 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).

Furthermore, it is unclear what specific qualifying managerial tasks would be involved in "planning and organization of purchasing and distribution," "establishing purchasing and sales channels," "signing sales contracts," and "negotiating and contracting with vendors and customers." The petitioner does not employ any sales staff and, as discussed further below, has not established that it actually employed a purchasing officer or manager at the time the petition was filed, or any employees who are responsible for providing customers with estimates for their projects. Therefore, it is reasonable to conclude that the beneficiary himself is directly responsible for purchasing materials for the petitioner's showroom and for customer projects, as well as performing duties associated with the sales of the petitioner's products and services, rather than merely planning or organizing such activities. Many of the purchase invoices in the record identify the beneficiary as the person placing orders for purchases, and the documentation submitted further suggests that the beneficiary has been responsible for providing estimates for proposed customer projects. Such duties would be in line

with the beneficiary's stated responsibility for negotiating contracts with customers. 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).

In response to the directors' request for a more detailed description of the beneficiary's duties, the petitioner submitted a job description that was both shorter and more nonspecific than that provided at the time of filing. 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). 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, while removing other duties entirely.

For example, rather than elaborating upon the initial job description, the petitioner removed all references to the beneficiary's involvement in any sales and purchasing activities or customer interactions. The petitioner also added that the beneficiary has responsibility for coordinating manufacturing and other activities with "offshore company officials," however, the extensive evidence in the record indicates that the petitioner purchases its materials from local suppliers in the United States and there is no evidence that the company has any business dealings with its claimed parent or affiliate company abroad. Finally, the petitioner indicated that the beneficiary is responsible to "oversee U.S. operations," and to "direct, plan and implement policies, objectives and activities of U.S. operation." Again, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Therefore, despite the multiple position descriptions provided, the petitioner has failed to provide a detailed, consistent account of what the beneficiary primarily does on a day-to-day basis as the managing director of the petitioner's kitchen and bath remodeling and cabinetry business. 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. at 1108.

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). The fact that the beneficiary manages a business 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, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's

day-to-day operations and has the appropriate level of decision-making authority, the petitioner has failed to show that his actual duties will be primarily in a managerial or executive capacity.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (CIS) 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, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

At the time of filing, the petitioner claimed to employ three employees. The petitioner's state and federal tax records confirm that the petitioner did in fact have only three employees during the month of April 2008, when the petitioner was filed. The employees paid in April 2008 include the beneficiary, his spouse, and the project supervisor. It appears that [REDACTED] a "worker," may be employed on an intermittent basis, as he received wages in the months preceding and following the filing of the petition. The AAO acknowledges that the petitioner claimed to employ a purchasing manager and a second worker as of November 2008 when it responded to the request for evidence. However, 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).

Furthermore, as noted by the director, USCIS records indicate that [REDACTED] who is claimed to hold the positions of finance manager and secretary, has not been authorized by USCIS to work in the United States since April 2006 and has not filed an application for employment authorization since that time. The petitioner has not addressed [REDACTED] employment status on appeal. 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).

Although the beneficiary's job description refers to his responsibility for hiring contractors, the record does not contain documentary evidence corroborating the petitioner's use of independent contractors to carry out its business activities, and no payments to contractors are evident based on a review of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2007.

Therefore, despite the managerial and supervisory job titles given to the beneficiary's subordinates as of November 2008, the totality of the record does not support a conclusion that the beneficiary supervised a subordinate staff of supervisors or managers as of April 2008, and the petitioner does not claim that the subordinates are professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of remodeling kitchens and/or administrative duties. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, and he cannot qualify as a "personnel manager" pursuant to section 101(a)(44)(A)(ii) of the Act.

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 furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish 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. In this matter, the petitioner has neither claimed nor provided evidence that the beneficiary manages an essential function. As discussed above, the petitioner has not clearly described the beneficiary's job duties. The fact that the beneficiary manages a business 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 record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization.

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, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, 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).

At the time of filing, the petitioner was a five-year-old company engaged in the operation of a kitchen and bath remodeling, flooring and cabinetry business. The petitioner has not established how one project supervisor, one intermittent "worker," and one secretary are able to perform the non-managerial tasks associated with the business such that the beneficiary is not engaged in the day-to-day operations of sales, marketing, purchasing, or other administrative and operational functions. In fact, the petitioner has not established that the beneficiary has consistently been relieved from participating in directly providing the services of the company. As noted above, the beneficiary and his spouse were the only employees of the company throughout 2007. As the petitioner has not documented payments to any sub-contractors, it appears that the beneficiary himself may have provided the cabinet and flooring installation services. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as managing director and two to three subordinates. 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 AAO acknowledges that the beneficiary has held L-1A status for five years, and that his most recent approval was granted in April 2006. The AAO also acknowledges the petitioner's claim that the beneficiary's role and responsibilities within the company have remained unchanged throughout his employment. However, as noted above, the evidence shows that the beneficiary and his spouse (who had no employment authorization from USCIS), were the petitioner's only employees for at least an entire year, and as recently as a few months prior to the filing of the petition. Given the service-oriented nature of the petitioner's business, this evidence could reasonably suggest either a substantial change in circumstance, or raise questions regarding the approvability of prior petitions that may have been based on similar facts. 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). Accordingly, the AAO finds that the director's close analysis and detailed request for evidence were appropriate in light of the referenced memorandum and the petitioner's evidentiary burden. USCIS records indicate that the petitioner was never issued an RFE in any prior nonimmigrant proceeding, so it does not appear that the director requested evidence in this matter that was previously provided and reviewed for sufficiency.

While USCIS previously approved multiple petitions for L-1A status filed on behalf of the beneficiary, the prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of beneficiary'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 insufficient evidence that is contained in the current record, the approvals 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 approvals by denying the present request to extend the beneficiary's stay.

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 USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). USCIS memoranda merely articulate internal guidelines for USCIS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

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).

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign entity. 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) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner indicated on Form I-129 that it is an affiliate of Al Khalsa Aluminum Glass & Décor Contracting, located in Sharjah, United Arab Emirates. In its letter dated April 14, 2008, counsel for the petitioner stated that the petitioner "is 100% owned by the parent companies Al Khalsa Aluminum, Glass and Décor Contracting and Al Khalsa Carpentry." Counsel stated that the two foreign companies are owned and managed by the same person, and share the same business premises, staff and equipment. Counsel further indicated that Al Khalsa Carpentry's financial information is incorporated into the financial reports for Al Aluminum Glass and Décor Contracting. In a letter dated April 11, 2008, the petitioner stated that the beneficiary is the owner of both foreign entities.

The petitioner submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, which indicates at Schedule K that the beneficiary is the company's sole shareholder. According to information provided at Schedule L, the company's issued common stock is valued at \$10,000.

The petitioner submitted audited balance sheets for Al Khalsa Aluminum, Glass & Décor Contracting for the years ended on December 31, 2006 and 2007. The company is described as a limited liability company owned by one or more partners. However, the petitioner did not submit documentation to establish the ownership and control of the company. The AAO notes that there is no reference to "Al Khalsa Carpentry" in the notes accompanying the balance sheets.

In the RFE issued on September 10, 2008, the director requested copies of the petitioner's stock certificates, stock ledger, articles of incorporation, Notice of Transaction Pursuant to Corporations Code Section 25102(f), and evidence that the foreign entity has paid for its shares in the U.S. entity in the form of canceled checks or wire transfer receipts.

In response, counsel for the petitioner stated that the petitioner is "100% owned by Al Khalsa Aluminum, Glass and Décor Contracting and Al Khalsa Carpentry," and indicated that Al Khalsa Carpentry paid for the stock ownership.

The petitioner submitted a copy of its stock certificate number 100, issuing 10,000,000 shares of stock to Al Khalsa Aluminum, Glass and Décor Contracting on September 5, 2002. The stock transfer ledger indicates that the petitioner received eight money transfers totaling \$81,332.67, between September 2003 and December 2004 as consideration. The petitioner also submitted copies of wire transfer receipts issued by the petitioner's bank indicating that Al Khalsa Carpentry transferred the funds to the U.S. company.

In addition, the petitioner submitted a copy of its articles of incorporation filed with the California Secretary of State on August 21, 2002, which indicate that the company is authorized to issue 1,000,000 shares of common stock.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner and the foreign entity have a qualifying relationship. The director, acknowledging the petitioner's response to the RFE, noted that "[s]ince the payments, made over a period of more than a year, do not correspond to the date of transfer of shares, the petitioner has not established that an affiliate relationship exists between the two companies."

On appeal, the petitioner submits evidence, which it claims was submitted in support of a previous L-1 petition. The evidence includes a letter dated February 1, 2003, in which the beneficiary states that he is the sole owner of Al Khalsa Aluminum Glass & Decor Contracting and Al Khalsa Carpentry. The newly submitted evidence also includes a professional license issued to the beneficiary on August 28, 1990, which states that he is licensed to operate a manual carpentry business under the trade name Al Khalsa Carpentry in the United Arab Emirates.

The petitioner also provides a signed statement dated January 30, 2009, in which the beneficiary once again states that he is the sole owner of both foreign entities. The beneficiary states:

The stock certificates were issued in 2002 and the transfer occurred later in 2003 and 2004. Though the transfer of funds was initially intended to be parallel to the issuance of the stock certificates, it was delayed as the money could be used more efficiently in UAE and was not urgently required in the U.S. at that time. Since I was the owner of both companies I did not deem it to be of any consequence.

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

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (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 director addressed the issue of whether the petitioner established that its shareholder actually paid for its ownership interests in the U.S. entity, the AAO notes that there are other discrepancies and omissions which further undermine the petitioner's claims of a qualifying relationship with a foreign entity.

The petitioner has submitted a stock certificate indicating that Al Khalsa, Aluminum Glass and Décor Contracting was issued 10,000,000 shares of the company's stock in September 2002. However, the company's articles of incorporation indicate that the petitioner is authorized to issue only one million shares of stock. The petitioner has not submitted evidence that the company amended its articles of incorporation to authorize the issuance of nine million additional shares of stock.

The petitioner claims that Al Khalsa Carpentry paid in excess of \$81,000 for the 10,000,000 shares of stock between September 2003 and September 2004. However, the petitioner has not submitted evidence to establish that the funds transferred had any relation to the issuance of stock to Al Khalsa Aluminum Glass and Décor Contracting. As noted by the director, the dates of the transfers do not coincide with the issuance of the stock. The claim that the new U.S. company did not require any funding prior to September 2003 is not persuasive, particularly given that the petitioner was required to show evidence of the size of the U.S. investment at the time it filed a new office petition in February 2003. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Furthermore, the petitioner's 2007 tax return indicates at Schedule L that the value of the company's issued stock is \$10,000, while the petitioner's stock ledger indicates that the company received \$27,700 in exchange for its issued stock.

Furthermore, the petitioner did not submit any documentary evidence to establish the relationship between the two foreign entities. The beneficiary has stated that he owns both companies, and counsel indicates that the two companies share a premises, staff, equipment and financial records. The evidence submitted shows that the beneficiary established Al Khalsa Carpentry as a sole proprietorship in 1990. However, the record contains no evidence of the ownership of Al Khalsa Aluminum Glass and Décor Contracting. The company's balance sheets indicate that it was established as a limited liability company owned by one or more partners. The petitioner's and counsel's unsupported assertions that the two foreign entities are affiliates are insufficient. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 Obaighena*, 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). The claim that Al Khalsa Carpentry paid for the other foreign entity's ownership interest in the petitioning company must be supported by some documentation of the relationship between these two companies. The RFE specifically instructed the petitioner to explain the source and reason for all funds not originating with the foreign company.

Finally, the petition's Form 1120, U.S. Corporation Income Tax Return, indicates at schedule K that the beneficiary is its sole owner of the company's issued shares. This information directly conflicts with the information contained on the petitioner's stock certificate. As discussed above, the petitioner has not supported its claim that the beneficiary owns, directly or indirectly, all three of the companies involved.

The AAO does not discount the possibility that the petitioner has a qualifying relationship with a foreign entity. However, 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, there are sufficient deficiencies and unexplained inconsistencies in the submitted evidence to warrant an adverse finding. For this additional reason, the appeal will be dismissed.

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.