



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

D7

DATE: **DEC 08 2012** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:  
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. 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 status as an 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, an Illinois corporation, operates a supermarket. It states that it is a subsidiary of Khushee Distributors, located in India. The petitioner has employed the beneficiary in the position of managing director since July 2006 and now requests a three year extension of his L-1A status.

The director denied the petition concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; and (2) that it maintains a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's conclusions were contrary to the evidence submitted and therefore, erroneous. Counsel asserts that the beneficiary is employed by the U.S. entity in an executive capacity and that he is the sole owner of both the U.S. and foreign entities, thus establishing the required qualifying relationship.

#### I. THE LAW

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.

## II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The first issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a primarily managerial or executive position 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.

#### A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 14, 2010. The petitioner indicated that the beneficiary will continue to serve as managing director of the U.S. company, which states that it operates a supermarket with 17 employees and gross annual income of \$1.5 million.

In a letter dated July 1, 2010, the petitioner provided a lengthy description of the beneficiary's duties. Briefly, the petitioner stated that the beneficiary would allocate his time as follows:

- Plan, direct or coordinate the operations of the company - 15%
- Financial/Budgeting - 20%
- Business Development/Identify New Business/Strategy/Marketing - 25%
- Purchases/Pricing - 15%
- Day to day management - 15%

The petitioner stated that it operates a 7,500 square foot grocery store, [REDACTED] that offers a full line of groceries and fresh meat, produce, deli and bakery items. In addition, the petitioner indicated that the company is planning to acquire another supermarket in Illinois under the beneficiary's leadership. The petitioner stated that the beneficiary, as managing director, "is assigned to our Consulting, Wholesale, Marketing & Sales and Distribution operations," and is "in-charge of our projects, Marketing, Business Development, Administration and Finance."

The petitioner's initial evidence included an employee list identifying 16 employees, including three full-time employees and 13 part-time employees who work between 10 and 32 hours per week. The list includes the positions of president/managing director (the beneficiary), a general manager, an office manager/head clerk, a supervisor, an assistant supervisor, five cashiers, a butcher, a "butcher and deli" employee, and four stocking and cleaning employees. The petitioner provided a very brief description of duties for each position.

The petitioner provided a copy of its Illinois Form UI-3/40, Employer's Contribution and Wage Report, for the first quarter of 2010. The report shows that the petitioner paid 14 of the 16 workers from the employee list, as well as three workers who did not appear on the employee list. Five of the employees received total wages of less than \$800 during the three month period.

The petitioner submitted a "management organization chart" for the company which indicates that the beneficiary's direct subordinate is the general manager, who in turn supervises the office manager/head clerk and the supervisor. The petitioner provided position descriptions for the general manager and the office manager/head clerk positions. The petitioner indicated that the general manager is responsible for day-to-day operations, managing staff, assigning specific duties, monitoring prices, and working with the office manager on hiring, salary review and termination. The petitioner stated that the office manager/head clerk is

responsible for managing shifts, interviewing and hiring staff, inventory, payroll, accounting and ensuring quality in customer service.

The director issued a request for additional evidence (RFE) on July 22, 2010. The director instructed the petitioner to submit: (1) a more detailed and specific description of the beneficiary's duties; (2) a more detailed organizational chart for the U.S. company; (3) a brief description of job duties, educational level, annual salaries/wages, immigration status and source of remuneration for all employees working under the beneficiary's supervision; and (4) copies of the company's state quarterly wage reports for the second quarter of 2010.

In response to the RFE, the petitioner provided the following position description for the beneficiary:

Ensure and be responsible for new business development and expansion of existing services within the organization.

The beneficiary formulates business and investment strategies for the petitioner. He sets objectives for the petitioner, made the decision to change the short-term and long-term goals and investment objectives of the petitioner.

Plan, direct and coordinate activities, through subordinate managerial personnel, activities of the business and selling lines of merchandise in departments: The beneficiary formulates pricing policies for the sale of merchandise, and implements the policies set forth.

Coordinates activities of non-merchandising department, such as purchasing, credit, accounting and advertising with merchandising departments to obtain optimum efficiency of operations with minimum costs in order to maximize profits.

Develops and implements, through subordinate managerial personnel, policies and procedures for store and departmental operations and customer, personnel and community relations.

Approves contracts negotiated with suppliers of merchandise, or with other establishments providing security, maintenance, or cleaning services.

Reviews financial statements and departmental sales activity report to measure activities that require additional sales promotion, clearance sales or other sales procedures in order to turn over merchandise and achievement profitability of store operations and merchandising objectives.

To summarize, the beneficiary's duties included overseeing personnel, developing a marketing strategy, overseeing financial goals and budget, and overall responsibility of performance and profitability of the company. The beneficiary's additional future

responsibilities included overseeing total management of the company development including expansion of the company, budgets and business negotiations and formulating business strategies. The beneficiary exercises wide latitude in discretionary decision-making.

The petitioner stated that the beneficiary's direct reports are the general manager and the "office/store manager/head clerk." The petitioner provided revised position descriptions for both positions as follows:

General Manager: The general manager is more like operations manager who is involved in managing four categories: Merchandising, Store Operations, Accounting and Promotion. Merchandising duties involves [sic] buying and selling; Store Operations includes hiring personnel and receiving goods; General Manager involves in setting pricing policies to maintain profitability and notify the beneficiary of concerns or problems. Directly supervise store manager and department manager and indirectly oversee other workers. Engage and interact with customers to create a positive shopping experience. Establish relationship with producers for direct store delivery. Develop strategy for the allocation of shelf space within departments and in-store merchandising.

Office/Store Manager/Head Clerk: In charge of implementing the policies and strategies developed by the upper management. Monitors shifts. Proper completion and maintenance of all store office functions and the training of Front End Sales Assistants on customer service procedures and sales office accountability. Maximize sales through excellent customer service and minimize shrink through proper utilization of Standard Practice. Responsible for supervision of Produce department and sales-cash department. Involve in hiring and training of sales associates. Maintain Front End Standard Practice of all Front End accounting services: Register Pickups, Till Counts, Loans, Safe Counts, Deposits, Deposit slip verification, returned check payments. Adhere to all company guidelines, policies and standards practices.

The petitioner stated that it has a five-level supervisory hierarchy:

- Level 1: President/Managing Director (the beneficiary)
- Level 2: [REDACTED] - General Manager
- Level 3: [REDACTED] Office/Store Manager/Head Clerk
- Level 4: [REDACTED] Supervisor/Produce Manager and [REDACTED] Supervisor/Chief Cashier
- Level 5: [REDACTED] Stocking In-charge.

The petitioner submitted an organizational chart depicting this structure. The chart indicates that [REDACTED] supervises six stocking and cleaning employees and [REDACTED] supervises four cashiers. On the organizational chart, [REDACTED] is listed as "Asst. Supervisor/Butcher," while another individual, [REDACTED] is identified as "Meat Manager/Packing/Butcher." The chart includes a total of 19 employees.

The petitioner submitted a copy of its Illinois Form UI-3/40 for the second quarter of 2010, which indicates that a total of 18 employees worked for the company and earned total wages of approximately \$40,000. Half of the employees earned less than \$900 in total wages for the quarter. Finally the petitioner submitted an expanded employee list that includes each person's job titles, duties, hours, education, hourly wages or salary, and immigration status.

The director denied the petition on September 15, 2010 concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that the beneficiary's duties are described in vague and nonspecific terms and may be "more indicative of an employee who is performing the tasks necessary to provide a service or to produce a product." The director further determined that the petitioner failed to establish that the beneficiary would primarily supervise a subordinate staff comprised of managers, supervisors or professionals, or that he would manage an essential function of the organization.

On appeal, counsel asserts that the beneficiary qualifies as both a manager and an executive. Addressing the beneficiary's executive duties, counsel asserts that the beneficiary "directs the management of a major component of the organization," i.e., the petitioner's supermarket; "establishes the goals and policies of the organization," and "exercises wide latitude in discretionary decision making" with little or no direction. Counsel contends that the facts supporting the beneficiary's executive role "are completely on point" with a finding in an unpublished AAO decision.

Counsel further asserts that, while the beneficiary's role is "clearly and more of an executive one," he also qualifies as a manager as he 'oversees the operations of the business rather than handles any day to day activities." Counsel emphasizes that the petitioner provided evidence of a multi-tier organizational structure that clearly elevates the beneficiary's position above that of a first-line supervisor of non-professional personnel.

#### B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner 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.*

The petitioner initially submitted a vague and non-specific description of the beneficiary's duties which failed to establish the nature of the tasks he performs on a day-to-day basis within the context of the petitioner's business. For example, the petitioner stated that the beneficiary oversees "businesses or departments concerned with production, pricing, sales/distribution," "coordinates all activities related to the effective and efficient operation and distribution facilities/contractors" and "coordinates and works with organizational

official on day to day activities involving creation of overall metrics." The petitioner also stated that the beneficiary is "assigned to our Consulting, Wholesale, Marketing & Sales and Distribution operations." These duties are poorly defined and appear to be inconsistent with the beneficiary's role as the managing director of a company that operates a single retail grocery store. The petitioner's description of the beneficiary's duties should be reasonable in light of the nature and scope of the petitioner's business. The actual duties themselves 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).

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner indicated that the beneficiary is responsible for formulating business strategies and implementing them through subordinate managers, planning directing and coordinating the departments of the business through subordinate managerial personnel, approving contracts negotiated with suppliers of merchandise and services, and business development and expansion. While such duties are clearly more germane to the petitioner's business in comparison to those described at the time of filing, the description was still generalized in terms of detailing what the beneficiary actually does on a day-to-day basis. 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).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the AAO does not doubt that the beneficiary possesses the appropriate level of authority over the U.S. operation, the lack of specificity raises questions as to the beneficiary's actual responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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). 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)(1)(ii)(B)(3).

At the time of filing, the petitioner stated on the Form I-129 that it has 17 employees. The initial evidence included an employee list naming three full-time employees (including the beneficiary), and 13 part-time employees including five cashiers, four stocking/cleaning employees, one butcher and one butcher/deli employee. The petitioner indicated that it has one assistant supervisor who works 10-15 hours per week, one part-time supervisor who works 27-29 hours per week, one full-time office manager/head clerk and one full-time general manager.

In response to the request for evidence, the petitioner claimed 19 employees and indicated that its employees include a produce manager/supervisor (previously identified as a supervisor), a senior cashier/supervisor (previously identified as a cashier), a meat manager/packing/butcher (previously identified as "butcher and deli"), and an "incharge stocking" employee who was not identified on the initial employee list. In describing its hierarchy, the petitioner stated that it has a total of five levels of supervision senior to the stocking and cashier employees. The petitioner also provided two significantly different position descriptions for each of the company's full-time employees, the general manager and the office manager/head clerk, changing the latter's job title to include "store manager." This discrepancy is material because the petitioner's claim that the beneficiary is relieved from performing non-qualifying duties depends, in part, on the types of duties performed by the beneficiary's direct subordinates, who are claimed to be the first-line managers of the company. 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).

The petitioner provided no explanation for any of these revisions to its personal structure and the associated responsibilities of its employees. 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 managerial position. Further, 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'r 1978). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Therefore, the AAO will base its analysis of the petitioner's staffing levels and structure on the organization as it was described at the time of filing.

The petitioner operates a 7,500 square foot grocery store that is claimed to include a meat/butcher department, deli, produce department, and perhaps a bakery department. At the time of filing, the petitioner claimed a total of nine part-time cashiers and stockers, one part-time butcher, one part-time butcher/deli employee, and a part-time supervisor whose duties are primarily comprised of "weighing wrapping, labeling, customer service." The petitioner also indicated that half of its staff works as few as 10 to 20 hours per week. The

petitioner did not claim to have department managers or supervisors for the individual departments or employees engaged in purchasing inventory or otherwise working in most of these departments. Further, while the petitioner has not provided operating hours for the business, it is reasonable to assume that a supermarket is open seven days per week for at least 10 hours on Monday through Saturday. The petitioner has not established how this mostly part-time staff, with the duties described, is able to carry out the non-managerial, non-supervisory aspects of operating the store on a day-to-day business, such that the office manager, general manager and the beneficiary would be free to engage primarily in the claimed supervisory and managerial duties.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are primarily performing the duties of supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the petitioner's supermarket. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

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 clearly describe 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. Further, as the petitioner has not submitted a sufficiently detailed description of the beneficiary's duties, the record does not support a finding that the beneficiary's actual duties are primarily managerial in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner claims that the beneficiary will be managing director of the U.S. office. 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-day 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.* While the petitioner states that the

beneficiary will be responsible for establishing the goals and policies of the U.S. operation, the petitioner has not demonstrated that he would be relieved from involvement in the day-to-day operations of the enterprise in light of the structure of the company as described at the time of filing. The evidence of record fails to demonstrate that the beneficiary would be employed in an executive capacity other than in position title.

Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational, administrative and first-line supervisory tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

Although the petitioner indicates that it is in the process of purchasing a second grocery store, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Here, due to the petitioner's failure to provide a detailed description of the beneficiary's actual duties and the amount of time he allocates to specific tasks, and based on the petitioner's inconsistent descriptions of its organizational structure, the AAO cannot conclude that the beneficiary performs primarily managerial or executive tasks. Accordingly, the appeal will be dismissed.

## II. QUALIFYING RELATIONSHIP

The second issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's claimed foreign employer. 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 (1)(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[.]

\* \* \*

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

\* \* \*

(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 stated on the Form I-129 that the U.S. company is wholly owned by [REDACTED] beneficiary's former employer in India.

The petitioner submitted a copy of the U.S. company's articles of incorporation filed with the Illinois Secretary of State on April 14, 2006. According to its articles of incorporation, the company is authorized to issue 1,500 shares of common stock and proposed to issue 1,000 shares in exchange for \$10.00.

The petitioner also submitted a copy of a stock certificate issued by the petitioning company. The stock certificate indicates that [REDACTED] issued 1,500 shares of stock to [REDACTED] on June 1, 2006. The certificate has a date, "4/14/2006," in the field where the stock certificate number should be recorded.

With respect to the foreign entity, the petitioner submitted a letter dated April 10, 2009 from the foreign entity's current managing director [REDACTED]. He states that the beneficiary is the sole owner of [REDACTED] in India, which in turn owns 100% of the shares of the U.S. company.

In addition, the petitioner provided a [REDACTED] Registered Certificate of Establishment indicating that the beneficiary registered as an employer doing business as [REDACTED] in October 2004. The petitioner provided a copy of the beneficiary's Income Tax Department Acknowledgement for assessment year 2007-8, dated June 17, 2007. The petitioner also submitted the beneficiary's Indian tax return for 2006-7.

Finally, the petitioner's initial evidence included a copy of the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2009. The Form 1120, at schedules E and K, identifies the beneficiary as the sole shareholder of the U.S. company. At Schedule L, the petitioner indicated that the value of its issued common stock is \$1,000.

In the RFE issued on July 22, 2010, the director requested that the petitioner provide additional evidence to establish that the U.S. and foreign entities have a qualifying relationship. Specifically, the director requested: (1) copies of all of the U.S. company's stock certificates issued to the present date; (2) a copy of the U.S. company's stock ledger showing all stock certificates issued to date including total shares of stock sold, names of shareholders and purchase price; (3) a copy of the minutes of the meeting for the U.S. company that lists the stockholders and the number and percentage of stocks owned; and (4) evidence to show that the foreign parent company has in fact paid for its interest in the U.S. entity. The director requested the original wire transfers, copies of cancelled checks, deposit receipts or other evidence detailing monetary amounts for the stock purchase.

In a letter dated August 30, 2010, addressing the director's request for evidence relating to the foreign entity's purchase of the U.S. company's stock, counsel stated:

Please find the wire made in August 2006 to the corporation. [REDACTED] known to the beneficiary, had loaned money to the corporation initially due to extensive delays and the process involved in transferring the money. The same was repaid to him in the year 2008.

The petitioner provided a letter from [REDACTED] who states that he knew the beneficiary as a businessman in India and was aware that he came to the United States in 2006 in order to start operations here. [REDACTED] further states:

During conversations I understood that he had a business opportunity in USA, which requires \$30,000.00. I understood that he was informed that it is time consuming to do the money

transfer from India. I offered to pay the amount, which he accepted after hesitation. . . . I wired the said amounts to his account on May 15, 2006 two times in the amount of \$15,000.00.

In the year 2008, the said amount was returned to me in full.

The petitioner submitted a copy of the company's [REDACTED] statement for the month of May 2006 which shows two incoming wire transfers in the amount of \$15,000 received on May 15, 2006.

With regard to the stock ownership of the petitioning company, counsel emphasized that the beneficiary "owns 100% of the stock of the US Company and the Indian company." Counsel further explained:

The stock certificate sent along with the petition was issued in error (issued more than the authorized shares of 1000 and not in the correct format) to the foreign corporation. The same was not recorded in the corporate books as it was immediately corrected to issue 500 shares each to [REDACTED] and [REDACTED] 50% each and the beneficiary holding 100% in the foreign company. The total authorized shares of the corporation are 1000 shares. The office Manager by mistake sent the same along with the company documents at the time of filing the petition and we request you to kindly excuse the error. [REDACTED] transferred his shares to the beneficiary in 03/2007 and currently the beneficiary holds 1000 shares, which is 100% of the authorized shares of the company.

The petitioner submitted a copy of three stock certificates. Stock certificate no. 1 indicates that 500 shares were issued to [REDACTED] on November 30, 2006. This certificate is cancelled and indicates that these shares were transferred on March 7, 2007. Stock certificate no. 2 indicates that 500 shares were issued to the beneficiary on November 30, 2006. Finally, stock certificate no. 3 indicates that 500 shares were issued to the beneficiary on March 7, 2007.

The director denied the petition concluding that the petitioner failed to establish that the U.S. and foreign entities are qualifying organizations. The director's finding was based on the petitioner's failure to establish that the claimed shareholder actually contributed the money to purchase the company's common stock. In addition, the director found that the petitioner provided contradictory evidence which further confuses the company's stock issuance claims. The director noted that, despite the petitioner's initial claims that the company is wholly owned by [REDACTED], the stock certificates submitted in response to the RFE indicate that the beneficiary owns the U.S. company. Finally, the director determined that the \$30,000 in wire transfers from [REDACTED] represents "a personal loan to [the beneficiary]" and not funding from the claimed foreign parent company.

On appeal, counsel asserts that the petitioner "clearly qualifies as a subsidiary of the foreign company." Counsel states that the beneficiary owns 100% of the authorized shares of the company, and notes that the petitioner erred in providing a cancelled certificate that states the foreign company owns 1,500 shares of the

petitioner. Counsel states that the original owners of the company were [REDACTED] and the beneficiary, and that the beneficiary has been the petitioning company's sole owner since March 7, 2007.

Upon review, the petitioner has not established that the petitioner and the foreign entity have a qualifying relationship.

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'r 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.

Here, there are a number of inconsistencies and omissions in the record which raise questions regarding the existence of the claimed qualifying relationship.

First, the AAO will address the unnumbered stock certificate dated June 1, 2006, issuing 1,500 shares of stock to [REDACTED]. Counsel asserted in response to the RFE that the certificate was never recorded in the corporate books and was "immediately corrected" because the petitioner was never authorized to issue 1,500 shares and because the original shareholders were actually the beneficiary and [REDACTED]. However, the petitioner's articles of incorporation do in fact state that the company is authorized to issue 1,500 common shares. Further, the AAO notes that the company's stock certificate numbers 1 and 2 were issued to the beneficiary and [REDACTED] on November 30, 2006, thus undermining the claim that the initial stock certificate was immediately cancelled and never recorded. Finally, USCIS records indicate that the petitioner filed its "new office" petition on behalf of the beneficiary on July 11, 2006 [REDACTED]. Assuming that the petitioner submitted the required evidence of its qualifying relationship with the foreign entity in support of that petition, it is reasonable to assume that the initial approval was based on the stock certificate issued to [REDACTED] which the petitioner now claims was never valid. 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).

Further, this information is critical, as the beneficiary's ownership of only 50 percent of the stock of the U.S. entity would have been insufficient to establish a qualifying affiliate relationship at the time the new office petition was filed. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). The petitioner would have been required to submit additional evidence to establish that the beneficiary actually controlled the U.S. entity based on his 50 percent ownership. In addition, the petitioner's claim that the beneficiary initially owned only half of the U.S. entity contradicts the petitioner's statement that "100% stock of US entity are owned by the foreign entity is a solid fact from the first day the U.S. entity was established."

Second, the record does not contain the meetings of the relevant shareholders meetings or other corporate documentation addressing the initial issuance of stock in June 2006, the subsequent November 2006 issuance, or the claimed transfer of stock from [REDACTED] to the beneficiary in March 2007. All meeting minutes in the record post-date the claimed March 2007 transfer of ownership. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Finally, the AAO emphasizes that the regulations specifically allow the director to request additional evidence in appropriate cases. See 8 C.F.R. § 214.2(I)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The director found that the evidence of record, namely the statement from [REDACTED] and evidence of wire transfers totaling \$30,000 to the petitioner's account in May 2006, did not clearly establish that the beneficiary actually paid for his claimed ownership interest in the U.S. company. The petitioner has not addressed this finding on appeal and simply states that the evidence of record clearly establishes the claimed qualifying relationship. The AAO disagrees and concurs with the director that the petitioner did not provide sufficient corroborating evidence related to the claimed loan from [REDACTED]. Moreover, even if the AAO were satisfied that the funds [REDACTED] claims he provided could be traced to the beneficiary, the petitioner indicates that the beneficiary acquired only a 50 percent interest in the U.S. company in 2006. The petitioner has not documented the consideration offered by the beneficiary to acquire the remaining 50 percent interest in the company in 2007. 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 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

It is further noted that the petitioner has not submitted any evidence to establish that the beneficiary's foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). A sole proprietorship is a business in which one person personally owns all of the assets, personally owes all the liabilities, and operates the business in his or her personal capacity. Black's Law Dictionary 1520 (9th Ed. 2009). As the beneficiary claims to be the owner and sole proprietor of the foreign business, the beneficiary's extended temporary presence in the United States raises the question of whether the foreign business continues to do business abroad. The petitioner did not submit any evidence indicating that the foreign entity continued to do business as of July 2010 when the petition was filed.

Collectively, the inconsistencies and omissions addressed herein raise questions regarding the existence of the required qualifying relationship between the petitioner and the foreign entity. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner has not submitted evidence on appeal to overcome the director's decision. Accordingly, the appeal will be dismissed.

### III. PRIOR APPROVAL AND CONCLUSION

The AAO acknowledges that the beneficiary was previously granted L-1A status in order to open a new office in the United States and subsequently granted an extension of that status. It must be emphasized that 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 prior L-1A petitions 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). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). For example, if USCIS determines that there was material error, changed circumstances, or new material information that adversely impacts eligibility, USCIS may question the prior approval and decline to give the decision any deference.

If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are 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 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 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).

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 any 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. 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.