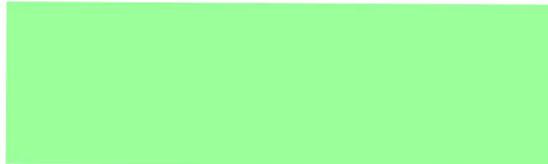


(b)(6)

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

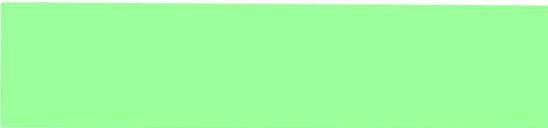


DATE: **AUG 08 2013** Office: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

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 classify the beneficiary 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 petitioning employer is a corporation established in the State of Washington in 2009.<sup>1</sup> It claims to be a subsidiary of [REDACTED] located in South Korea. The petitioner states that both companies are involved in cosmetic manufacturing and distribution. The petitioner seeks to employ the beneficiary as an Executive Overseas Director for a period of two years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary was employed abroad in a position that was managerial, executive, or involving specialized knowledge. Further, the director found that the beneficiary would not be employed in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erred in finding that the beneficiary's position abroad was not in a specialized knowledge capacity. Additionally, counsel contends that the director erred in finding that the beneficiary would not act primarily in an executive or managerial capacity in the United States.

## 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 entity or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

## II. The Issues on Appeal

### A. Foreign Employment in a Specialized Knowledge Capacity

The first issue to be addressed is whether the petitioner established that the beneficiary has been employed abroad in a specialized knowledge capacity.

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<sup>1</sup> The [REDACTED] is identified as the petitioner on the Form I-129 and filed this petition on behalf of the [REDACTED]. All mentions of "the petitioner" in this decision refer to the importing U.S. employer, [REDACTED].

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The petitioner states that it is a network marketing company that sells functional foods and cosmetics developed by [REDACTED] a quasi-governmental South Korean entity. The petitioner states that the foreign entity's gross annual income exceeded \$126 million in 2011 and that it employs 30 employees.

The petitioner stated that the beneficiary works for the foreign entity in a specialized knowledge capacity as an executive overseas director. In support of the I-129 Petition for a Nonimmigrant Worker, the foreign entity offered the following explanation of the beneficiary's current position in South Korea and the position's specialized nature:

[The beneficiary's] most recent position with [the foreign entity] is as Executive Overseas Director. In this position, he had full responsibilities including: registration and compliance with Food and Drug Administration, audits and compliance with the Federal Trade Administration, registration and compliance with the U.S. Patent and Trademark Office, marketing decisions, sales goals, promotion of the product lines, handling distribution systems and training staff, and developing new markets. [The beneficiary's] experience and knowledge in these areas will be essential to the successful promotion of [petitioner] products in the United States. This experience, through which [the beneficiary] developed his specialized knowledge of [petitioner's] product line, makes him the only viable candidate for the U.S. position to serve as the Executive Overseas Director for the product line existing and entering the U.S. market. Without the specific and invaluable knowledge developed by [the beneficiary] as Executive Overseas Director in Korea, a person with general marketing or business expertise could not adequately fill the position in question.

The petitioner indicated that the beneficiary has special knowledge of the company's products, which are described as "FDA approved and patented herbal remedies," including lotions, toothpaste, shampoo, body cleanser and other household items. The petitioner stated that the beneficiary must have the knowledge needed to ensure the correct marketing positioning, proper promotion of the products' key characteristics, and proper handling and distribution scheduling in light of the production methods and capabilities.

The petitioner also submitted a certificate of patent registered with [REDACTED] by [REDACTED] related to a natural extract "involving color improvement techniques for food, medication, and cosmetics." The petitioner provided documentation indicating that that the [REDACTED] holds a patent for an herbal composition in the European Union and the United States. The petitioner did not explain how these patents are relevant to its claim that the beneficiary possesses specialized knowledge.

The petitioner further submitted evidence that the beneficiary received a [REDACTED] from [REDACTED] in South Korea. Additionally, the petitioner documented that the beneficiary completed the following training courses: "Health Functional Food Training" at the Korea Health Functional Food Association in November 2011; "Qualification on Logistics Management Administrator" at the [REDACTED] in November 1999; and "ISO/TS 16949:2002 Internal Inspector Training Course" offered by the [REDACTED] in June 2006. Lastly, the petitioner provided a resume for the beneficiary that indicated that he has worked for the foreign entity for approximately 16 months at the time the petition was filed. The resume also reflected that prior to his current employment with the foreign entity, the beneficiary worked for 16 years in the automotive industry specializing in "logistics, purchasing, material management and operating ERP & VAN system."

The director issued a request for evidence (RFE) asking that the petitioner to submit additional evidence related to the beneficiary's foreign employment. Specifically, related to the beneficiary's asserted specialized knowledge capacity abroad, the director requested that the petitioner submit: (1) a more detailed description of the beneficiary's duties abroad, including the percentage of time required to perform the duties; and (2) a listing of the beneficiary's primary duties that involve specialized knowledge and an indication of why others have not acquired this special or advanced level of knowledge in the company's equipment, system, product, technique, research, service and or processes and procedures; and (3) an explanation and evidence to show how the knowledge involved with the position is different from others employed by the petitioner or others employed in similar positions in the industry.

The director also advised the petitioner that if it was claiming that the beneficiary worked abroad in a managerial or executive capacity, it should submit a more detailed description of his duties, information regarding the number and types of positions he supervised, and a detailed organizational chart for the foreign company.

In a response letter, the petitioner provided the following description of the beneficiary's specialized knowledge:

The beneficiary also has specialized knowledge of [the petitioner's] complex multi-level marketing and compensation plan. The petitioner currently has over one million active members throughout the world. [The company's] multi-level compensation plan [sic] based on down lines and recruiting distributors, thereby expanding the overall organization. 44% of gross sales are re-distributed among the active service members by way of point value system derived from [the petitioner's] unique logarithm. There are class sequences and conditions comprised of accumulation of PV. A score is derived from various dealerships and agents. Multi matching bonus is distribution ranges based on criteria grades. Mastership has prerequisites from special agent to managers to distributors. Finally, promotions can be defined under timeline and position.

Further, the petitioner provided the following duties for the beneficiary's current position as executive marketing director, including percentages of time spent on each task:

- Incorporating and implementing [the petitioner's] complex multi-marketing and unique logarithm compensation platform - [5 hrs.]
- Oversee international marketing and expansion - [5 hrs.]
- Registration and compliance with FTA and FDA - [4 hrs.]
- Communicate with distributors in delivering excellent quality products - [5 hrs.]
- Engage in sales strategy to create an environment with which the team will learn, grow and deliver to their peak capability - [5 hrs.]
- Educating the dynamics of [the petitioner] marketing plan - [5 hrs.]
- Work closely with marketing to develop and implement future leadership – [5hrs.]
- Forecast regional trends to gather feedbacks - [1.5 hrs.]
- Successfully building relationships and customer support - [4 hrs.]
- Navigate the company to reach out to partners - [1.5 hrs.]

The petitioner also submitted a two-page document that provided details related to its multi-marketing and compensation plan, including tiers of "multi-matching bonuses," levels of "Mastership and Masters' Bonuses," and "Mastership Promotion and Incentives." However, the petitioner did not provide specific explanations of these tiers, levels and promotion levels. Lastly, the petitioner provided a 2012 catalog of its products listing various vitamins, herbal supplements, creams, cosmetics, and detergents, among other products. The catalog indicates that customers purchase a membership into the petitioner program in order to purchase these various health and beauty products.

As noted, the director ultimately denied the petition, concluding that the petitioner had failed to establish that the beneficiary was employed abroad in a position that involved specialized knowledge. The director reasoned that the beneficiary's job description was insufficient to conclude that the beneficiary worked in a

specialized knowledge capacity with the petitioner. The director further found the evidence submitted insufficient to establish that the beneficiary was employed in managerial or executive capacity.

On appeal, counsel asserts that the director erred in concluding that the beneficiary did not work in a specialized knowledge capacity abroad. Counsel maintains that the beneficiary worked in a specialized knowledge capacity based on his knowledge of the petitioner's multi-level marketing and compensation plan and repeats the explanation of this process submitted in response to the director's RFE.

Counsel has not raised any objection to the director's finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The AAO, therefore, considers these issues to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary is employed in a specialized knowledge capacity abroad as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

In visa petition proceedings, the burden is on the petitioner to establish eligibility. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* The director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

In order to establish eligibility, the petitioner must show that the individual's prior year of employment abroad was in a position involving specialized knowledge. 8 C.F.R. § 214.2(l)(3)(iii). The statutory definition of specialized knowledge at Section 214(c)(2)(B) of the Act is comprised of two equal but distinct subparts. First, an individual is considered to be employed in a capacity involving specialized knowledge if that person "has a special knowledge of the company product and its application in international markets." Second, an individual is considered to be serving in a capacity involving specialized knowledge if that person "has an advanced level of knowledge of processes and procedures of the company." *See also* 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner may establish eligibility by submitting evidence that the beneficiary and the proffered position satisfy either prong of the definition. In the present case, the petitioner's has not specified the prong upon which the beneficiary's specialized knowledge is based.

As both "special" and "advanced" are relative terms, determining whether a given beneficiary's knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge against that of others in the petitioning company and/or against others holding comparable positions in the industry. The

ultimate question is whether the petitioner has met its burden of demonstrating by a preponderance of the evidence that the beneficiary's knowledge or expertise is advanced or special, and that the beneficiary's position requires such knowledge.

In the present case, the petitioner has not provided sufficient supporting documentation to establish that the beneficiary possesses specialized knowledge of the company's products and their application in international markets or that he has an advanced knowledge of the company's processes or procedures. The petitioner asserts that the beneficiary holds specialized knowledge of the petitioner's multi-level marketing and compensation plan. However, the petitioner has not adequately explained this process as necessary for the AAO to understand the process and determine whether the beneficiary's claimed knowledge of the plan is special or advanced. The petitioner has submitted a two-page document outlining various tiers of "multi-matching bonuses," levels of "Mastership and Masters' Bonuses," and "Mastership Promotion and Incentives," but fails to provide explanations of the relevancy of these concepts. Further, the petitioner submits patents held by [REDACTED] but does not explain the relevancy of these patents to the petitioner or the beneficiary.

United States Citizenship and Immigration Services (USCIS) cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge. Here, the petitioner's has failed to specifically and consistently identify the nature of the beneficiary's claimed specialized knowledge. For instance, at the time of filing, the petitioner stated that the beneficiary held specialized knowledge of the company's product line, but when responding to the RFE and on appeal, the petitioner states that the beneficiary's specialized knowledge is based upon his understanding of the company's multi-level marketing and compensation plan. Additionally, the petitioner provided evidence of various trainings completed by the beneficiary, two of which were completed before his employment with the petitioner, but none of the offered trainings relate to the beneficiary's claimed specialized knowledge of the company's multi-level marketing and compensation plan. 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 AAO does not doubt that the beneficiary's multi-level marketing and compensation plan is complex. However, complexity alone does not establish knowledge as specialized, as any professional in a technical field might otherwise qualify as holding specialized knowledge. As noted above, a comparison of a beneficiary's knowledge against that of others within the petitioning company or others holding comparable positions within the industry is critical to determining whether such knowledge is special or advanced. Indeed, the director suggested the petitioner submit explanation and evidence as to how the beneficiary's knowledge was different from others employed by the petitioner or others employed in similar positions in the industry. However, the petitioner did not provide sufficient explanations and supporting documentation to compare the beneficiary's knowledge to that of his peers within, and outside, the petitioner as necessary

to distinguish his knowledge as uncommon. For instance, the petitioner did not explain whether the plan held by the petitioner is proprietary, whether knowledge of the plan was closely held within the petitioner's organization, or how long it took the beneficiary to acquire knowledge of the plan.

In fact, the evidence of record suggests that another similarly experienced employee could readily acquire knowledge of the compensation plan after a relatively short period of time, considering that the beneficiary has worked for the foreign entity for only 16 months and has no prior experience in the petitioner's industry. As noted by the beneficiary's resume, the vast majority of his experience is in the automotive industry specializing in "logistics, purchasing, material management and operating ERP & VAN system." As such, the AAO finds it likely that another employee could readily gain knowledge of the petitioner's multi-level marketing and compensation plan, and that other employees within the organization have gained this knowledge. In fact, the U.S. organizational chart provided for the petitioner indicates that at least three of the beneficiary's six proposed U.S. subordinates hold knowledge of the petitioner's multi-level marketing and compensation plan, suggesting that others within the foreign employer must also hold comparable knowledge. Therefore, without sufficient explanation and evidence to compare the beneficiary's knowledge against that of his peers within, and outside, the company, USCIS cannot determine whether the beneficiary's knowledge is special or advanced. 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)).

For the reasons discussed above, the petitioner has not established that the beneficiary has been employed abroad in a specialized knowledge capacity. For this reason, the appeal must be dismissed.

**B. Employment with the U.S. employer in a managerial or executive capacity:**

The next issue to be discussed is whether the petitioner established that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as

promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The director concluded that the petitioner failed to establish that the beneficiary is primarily employed in a managerial or executive capacity as defined by the Act. Upon review of the petition and the evidence, and for the reasons discussed herein, the AAO concurs with the director's decision that the petitioner has not established that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

The petitioning U.S. employer was established in 2009 and claims eight (8) full-time employees and annual revenue in excess of \$7 million.

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). In support of the Form I-129, Petition for a Nonimmigrant Worker, the petitioner submitted the following job duty description for the beneficiary's proposed position of executive overseas director:

[The beneficiary] will provide supervision and operational control of the business. He will coordinate the administrative department for shipment and sale of [company] products. [The beneficiary] will maintain operational control of the business. Identify and implement business solution and standards to company service level. Monitor legal, corporate and regulatory procedures to ensure adequate business practice. Communicate

with headquarter [sic] and revise process ensuring compatibility. Select qualified candidates for open positions within the department. Process quarterly sales report for upper management. Conduct export and import compliance checks. Oversee U.S. patent/trademark application for [petitioner] products. In addition, [the beneficiary] will use his discretion and authority in identifying and cultivating new information sources, and developing strong and mutually beneficial relationships with potential business clients in the United States. Furthermore, [the beneficiary] is expected to oversee the establishment of training programs and materials for [the petitioner's] personnel. He will also conduct presentations and customized training sessions when needed for current and prospective clients.

In the RFE, the director requested that the petitioner provide a more detailed description of the beneficiary's duties in the United States, including the percentage of time to be spent on each duty on a weekly basis. In response, the petitioner provided the following listing of duties for the beneficiary with the U.S. employer including hours spent on each task on a weekly basis:

- Incorporating and implementing [the petitioner's] complex multi-marketing and unique logarithm compensation platform - [5 hrs.]
- Registration and compliance with the Food and Drug administration and the Federal Trade Administration as well as International export/import compliance - [5 hrs.]
- Product development and patent registration - [5 hrs.]
- Educate staff on [the petitioner's] product line - [5 hrs.]
- Conduct seminars throughout the United States and oversee the expansion of new markets - [10 hrs.]
- Monitor sales within 50 States and process quarterly sales report - [5 hrs.]
- Forecast regional trends to gather feedbacks - [1.5 hrs.]
- Successfully building relationships and customer support - [5 hrs.]
- Navigate the company to reach out to partners - [1.5 hrs.]

As noted, the director specifically requested a more detailed description of the beneficiary's duties in the RFE, but this evidence was not provided by the petitioner. While the petitioner added the number of hours the beneficiary would allocate among 10 areas of responsibility, the position description submitted in response to the RFE is no more specific than that provided in support of the petition, and added new general duties to the original description.

Further, as noted by the director, 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. For instance, many of the duties described by the petitioner are so overly general that they provide little probative value as to the beneficiary's actual day-to-day activities, such as "product development," "forecast[ing] regional trends to gather feedbacks," and "successfully building relationships

and customer support" and "navigat[ing] the company to reach out to partners." Further, the petitioner did not provide specifics, examples, or supporting documentation necessary to corroborate the duties referenced in the beneficiary's job duty description. Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Here, while the beneficiary will hold an "executive director" job title, the beneficiary's duties as generally described in the record are more consistent with the performance of day-to-day operational tasks and not qualifying managerial or executive duties. The petitioner indicates that the beneficiary will implement the company's multi-marketing and compensation platform, "conduct seminars," "forecast regional trends to gather feedback," "build relationships and customer support," perform unspecified duties related to "product development and registration," "monitor sales," "educate staff on products" and ensure compliance with FDA, FTA and import-export regulations. None of these duties, as described, clearly falls within the statutory definition of managerial or executive capacity. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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).

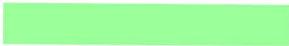
The petitioner submitted an organizational chart indicating that the beneficiary will be the senior employee in the company with the following subordinate staff: (1) a marketing and education team comprised of a seminar director and marketing coordinator; (2) a product development and compensation team comprised of a manager and a manager assistant; and (3) a customer support and administrative team comprised of an administrator and a customer support employee. However, the vague position description provided for the

beneficiary does not indicate what percentage of time, if any, he will allocate to the supervision and control of subordinate personnel, nor does it indicate that he will be responsible for personnel decisions. Further, there are several duties attributed to the beneficiary which overlap with the duties of the other staff. For example, the petitioner indicates that the seminar director, like the beneficiary, will "conduct seminars," the manager will "explain the compensation plan to customers and agents," and the marketing coordinator will provide training on the company's patented products. The evidence submitted is insufficient to establish that the beneficiary will be employed primarily as a personnel manager. Moreover, none of the beneficiary's subordinates on the U.S. organizational chart are focused on duties related to the beneficiary's responsibility for performing registrations and compliance with the Food and Drug Administration and the Federal Trade Administration, international export/import compliance and patent registration. The petitioner also initially stated that the beneficiary will "coordinate the administrative department for shipment and sale" of company products, but the administrative department, based on the limited information provided in the organizational chart, is not responsible for the shipment and sale of goods. The limited information provided does not adequately explain the division of work within the company or clearly indicate how the beneficiary would be relieved from performing non-managerial functions.

On appeal, counsel's only assertion is that the beneficiary's position should be established as primarily managerial or executive since the beneficiary is replacing a current executive director who was previously approved as an L-1A nonimmigrant intracompany transferee. The AAO does not find counsel's assertion convincing. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. 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). If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 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 petition 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).

In conclusion, the petitioner has not established that the beneficiary will act in a managerial or executive capacity with the petitioner as defined by the Act. For this additional reason, the appeal must be dismissed.



**C. Qualifying Relationship:**

Beyond the decision of the director, the petitioner has not established that there is a qualifying relationship between the U.S. and foreign entities, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

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[.]

\* \* \*

(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 . . .

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 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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 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.

In the present matter, the petitioner asserts that the U.S. employer is a subsidiary based upon [REDACTED] 100% ownership of both entities. In support of the petition, the petitioner submitted a stockholder's list for the foreign entity dated February 8, 2012 which indicates that the company is owned by four separate stockholders, each holding 50,000 shares of the petitioner's 200,000 outstanding shares. As such, the record prior to the director's RFE did not establish that the two companies were under the same ownership and control. The director asked in the RFE that the petitioner specifically address this apparent discrepancy. The petitioner responded as follows:

Ownership structure of [the foreign entity] is as follows: [REDACTED] and his family own all shares of the company. [REDACTED] owns 25%, [REDACTED] owns 25%, and [REDACTED] each own 25% of the company. [REDACTED] owns 100% of [REDACTED]

Based on the foregoing, the petitioner failed to establish a qualifying relationship between the U.S. and foreign entities. As noted, the petitioner contends that the foreign entity owns the U.S. company. However, the record does not indicate that the foreign entity has any ownership interest in the petitioning company. As such, the petitioner has not established that the two companies have a parent- subsidiary relationship.

Further, the petitioner has not corroborated its initial claim that the same individual, [REDACTED] wholly owns both companies, such that the petitioner could establish an affiliate relationship. In fact, as directly asserted by counsel in response to the director's RFE, the foreign entity is owned by four separate members of the [REDACTED] and the U.S. petitioner only by the aforementioned [REDACTED]. Therefore, the entities are not owned by the same parent or individual, or by the same group of individuals each owning the owning and controlling approximately the same share or proportion of each entity. The familial relationship between the [REDACTED] does not constitute a qualifying relationship under the regulations. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family"). Moreover, absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same individual controls both entities. 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).

Lastly, the petitioner does not assert, and the record does not support, that the U.S. employer is a branch office of the petitioner. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). The U.S. petitioner is established as a separate legal entity and not a division or office within the foreign entity's organization.

Therefore, the petitioner has not established a qualifying relationship between the petitioner and the U.S. employer as defined by the regulations. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

### III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.