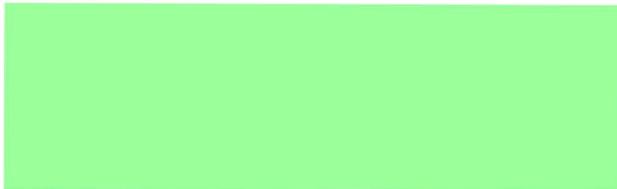




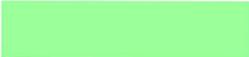
U.S. Citizenship  
and Immigration  
Services

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DATE: **APR 28 2014**

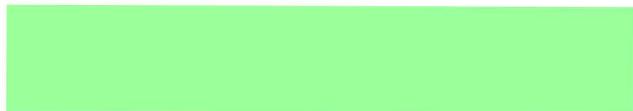
Office: CALIFORNIA SERVICE CENTER

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

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 L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Missouri limited liability company, is a farm industry consulting company. The petitioner claims to have a qualifying relationship with [REDACTED] (Ltd.) located in South Africa. The petitioner currently employs the beneficiary in the capacity of chief executive officer (CEO) and president and seeks to extend his L-1A status for a period of three years.<sup>1</sup>

The director denied the petition, concluding that the petitioner did not establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

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 states that the director's decision was arbitrary, capricious, against the weight of the evidence, and inconsistent with previous United States Citizenship and Immigration Service (USCIS) decisions involving the same facts and parties. Counsel contends that the beneficiary will be employed in an executive capacity.

### 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.

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<sup>1</sup> An extension of stay may be authorized in increments of up to two years. See 8 C.F.R. § 214.2(l)(15)(ii).

- (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.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

## II. The Issues on Appeal

### A. Managerial or Executive Capacity (United States)

The sole issue addressed by the director is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity in the United States.

#### 1. Facts

The petitioner states that it provides farming business and management solutions to clients, including such topics as input recommendations, machinery efficiency, custom hire services, hiring and training input for labor, and profitability analysis. In support of the Form I-129, the petitioner stated that the beneficiary provides "overall vision and direction to [the foreign entity] and [the petitioner] as part of his global plan to provide a plan of "precision farming" to its farming clients in South Africa and the United States." The Form I-129 indicates that the petitioner has two employees and a 2011 Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income demonstrates that the petitioner earned \$124,534 in income.

In support of the Form I-129, the petitioner explained the beneficiary's duties as CEO and president as follows:

- Direct and coordination the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency. (80%)
- Analyze operations to evaluate performance of the company in meeting objectives, and determine areas of potential cost reduction, program improvement, policy change. (80%)
- Direct, plan, and implement policies, objectives, and activities of the business to ensure continuing operations *vis a vis* global operations, to maximize returns on investments, and to increase productivity. (80%)
- Prepare budgets, including those for funding and implementation of programs. (80%).
- Negotiate or approve contracts and agreements with clients, suppliers, distributors, federal and state agencies, and other organizational entities. (80%)
- Review reports submitted by staff members to recommend approval or to suggest changes (80%).
- Appoint department heads or managers and assign or delegate responsibilities to them and implement corrective action plans to solve organizational or departmental problems. (80%)
- Represent company and promote their objectives at official functions, or delegate representatives to do so. (20%)

- Prepare and present reports concerning activities, expenses, budgets, government statutes and rulings, and other items affecting business or program services. (20%)

The petitioner stated that its other employee, the consultant director/general manager is responsible for the day-to-day operations of the company, including the following: preparing financial and operational reports based on production figures and farm management practices; contracting with farmers or independent owners for raising of crops or for management of crop production; producing crops and livestock and conferring with buyers to arrange sales; evaluating financial statements and making budget proposals; performing soil analysis to determine types and quantities of fertilizer needed; purchasing machinery, equipment and supplies; maintaining and operating machinery and performing physical work; directing and coordinating farming work; performing post-harvest activities; inspecting orchards and fields to determine maturity dates or to estimate crop damage; hiring, training and supervising client's farm workers; and examining equipment, reading inspection reports and conferring with customers to locate and diagnose malfunctions.

The petitioner submitted an organizational chart depicting the beneficiary as CEO/President, overseeing the consultant director, who in turn supervises "Consultant (independent contractor)" and "Client Employees." The chart shows an "admin" employee, also a contractor, reporting to the beneficiary.

The petitioner also provided letters from two clients, [REDACTED] LLC and [REDACTED] in support of the Form I-129. [REDACTED] manager at [REDACTED] stated that the petitioner provides consulting services to their pheasant raising operation. Ms. [REDACTED] stated that her company has a need for a specialized consultant year round to deal with seasonal staff, preparatory work for the next season and ongoing management. She also indicated that her company approaches the beneficiary "from time to time" with respect to management team and billing issues, but that the farm works with the beneficiary's subordinate, Ms. [REDACTED] on a day-to-day basis. She stated that Ms. [REDACTED] is "in charge of the day-to-day operations and management of a project, our staff, and any temporary contract labor she gets from time to time to help on certain projects."

Mr. [REDACTED] stated that he owns and operates a cow/calf operation and also farms wheat, corn, sunflowers and soybeans. He states that he utilizes the petitioner's knowledge and recommendations to enhance his crop production and profits. Specifically, Mr. [REDACTED] states that the petitioner provides "crop input recommendations, machinery efficiency, custom hire services, hiring and training input for labor and profitability analysis." Mr. [REDACTED] indicated that he deals with the beneficiary "on contract issues and payment whereas we deal with [REDACTED] and any contract labor she hires from time to time to execute on the contract with our day-to-day issues." Mr. [REDACTED] also stated that Ms. [REDACTED] "manages some of our staff in accordance with our agreement and reports to [the beneficiary], who in turn meet[s] with me from time to time to make suggestions."

The director issued a request for evidence (RFE). The director requested that the petitioner submit a duty description specifying the beneficiary's typical managerial duties, including the percentage of time he spends on each task. The director further requested a detailed organizational chart identifying all

employees by name, copies of the petitioner's state quarterly wage reports for the last quarter of 2012 and first quarter of 2013, and payroll summaries.

In response, the petitioner indicated that the beneficiary would "have the responsibility of managing and overseeing the entire operation of the company, and for ensuring the successful deployment of the [petitioner's] operations in the United States," including "establishing long-range objectives" and "specifying strategies." The explanation of the beneficiary's duties stated in part:

As the face and voice of our company, [the beneficiary] is in daily contact with our clients in reporting to them on issues and recommendations for improvement in their farming systems and proficiency of the same. He convinces new clients to use our services and with his farming consulting knowledge he is able to keep even disgruntled clients happy.

The duty description also indicated that the beneficiary meets daily with the petitioner's other full-time employee, the consultant director, to "discuss strategy and recommendations for improvement to provide feedback to clients and identify complex problems and review related information to develop and evaluate options and implement solutions." The petitioner stated that the beneficiary regularly reviews and interprets reports drafted by the consultant director to "identify the underlying principles, reasons, or facts of information by breaking down information or data into separate parts." The petitioner further explained that the beneficiary: handles the budget, controls resources, and oversees program and policy implementation; supervises and directs the activities of the consultant director and manages the client's managers and their subordinate employees; and recruits and hires new employees to supplement the growth of the petitioner and as necessary to provide services to his clients. Finally, the petitioner stated that the beneficiary has the authority to enter into all contracts, select potential actions necessary to manage company operations, maximize returns, and increase sales, and that he handles all complaints, disputes, grievances or conflicts relevant to the company.

The petitioner's response to the RFE also included revised versions of the aforementioned letters from its clients. In the revised letter from [redacted] Ms. [redacted] stated that they "have given Mr. [redacted] full authority to manage all our employees, hire and fire staff/management as part of his service to us" and indicated that "we basically see him as the president of our farm and our role as the Board of Directors." In the revised letter from Mr. [redacted] he stated that "[the beneficiary] has the right to hire and fire any of my staff/managers in accordance with our agreement to make us more profitable." Notably, these revised letters by Ms. [redacted] and Mr. [redacted] were not signed.

Finally, the petitioner submitted a revised organizational chart reflecting that the beneficiary has two direct subordinates, [redacted] Consultant Director and [redacted] Administrative Employee. Further, the organizational chart indicated that Ms. [redacted] oversees two "client management team[s]."

The director denied the petition on July 14, 2013, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director found that the beneficiary's job description reflects that he primarily performs non-qualifying duties consistent with the direct provision of goods and services. The director also noted that the petitioner

had failed to identify the percentage of time the beneficiary spends on his various tasks, as requested. Finally, the director concluded that the petitioner failed to demonstrate that its organizational structure is sufficient to elevate the beneficiary to a position beyond that of a first-line supervisor of non-professional employees.

On appeal, counsel states that the director's decision was arbitrary, capricious, against the weight of the evidence, and inconsistent with previous USCIS adjudication of the matter. Counsel states that USCIS has previously approved L-1A nonimmigrant petitions, and a multinational manager or executive immigrant petition, for the beneficiary based upon the same facts. Counsel asserts that the law requires that USCIS give deference to these previous approvals. Counsel further states that the record demonstrates that the beneficiary primarily performs qualifying executive duties, and that it has submitted percentages of time the beneficiary devotes to his tasks, contrary to the conclusions of the director. Counsel notes that the beneficiary duties are similar, if not identical to, the duties listed for an executive in the U.S. Department of Labor's Occupational Outlook Handbook. Further, counsel emphasizes that the beneficiary may qualify as an executive even if he is the sole employee of the petitioner and based upon the petitioner's employment of independent contractor subordinates.

## 2. Analysis

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

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

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, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, despite the request of the director. On appeal, counsel states that the petitioner submitted the percentages of time the beneficiary devotes to his various duties. However, the petitioner failed to provide percentages in response to the director's request. In fact, in support of the Form I-129, the petitioner submitted duties with percentages amounting to 520%, thereby limiting their probative value. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as having daily contact with clients to resolve issues and make recommendation to improve their farming systems, convincing new clients to use the petitioner's services, using consulting knowledge to keep clients happy, providing feedback to clients in order resolve complex problems, and reviewing information, evaluating options, and implementing

solutions for clients, are not managerial or executive duties as defined in the statute, but are consistent with the direct provision of the petitioner's consulting services. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Indeed, to the extent the petitioner references duties of an executive or managerial nature, the petitioner has not provided sufficient detail or supporting documentation. For instance, the petitioner stated that the beneficiary is responsible for overseeing the company's budget, program and policy implementation and improvement, entering into binding contracts, recruiting and hiring new employees, and resolving disputes and conflicts. However, the petitioner has not corroborated the beneficiary's primary performance of these qualifying duties with sufficient detail and supporting documentation regarding the petitioner's budget, the beneficiary's budgetary decisions, programs or policies implemented or improved by the beneficiary, copies of contracts which the beneficiary executed or negotiated, specific employees hired or to be hired by the beneficiary, or disputes and conflicts the beneficiary has resolved. It is reasonable to expect that the petitioner would have submitted some of these specifics given that the beneficiary has been working in his current capacity since 2009. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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). 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)).

Beyond the required description of the job duties, United States Citizenship and Immigration Service (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company'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 business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Counsel asserts on appeal that the beneficiary qualifies as an executive by noting that the beneficiary's duties are similar, if not identical to, the duties listed for an executive in the U.S. Department of Labor's Occupational Outlook Handbook.

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.*

The petitioner has not demonstrated that the beneficiary qualifies as an executive. A petitioner cannot meet the burden of establishing that a beneficiary acts in a qualifying executive capacity by vaguely comparing the beneficiary to a generic description of an executive provided in the Department of Labor's Occupational Outlook Handbook. The petitioner has not established that the petitioner engages sufficient employees or independent contractors to demonstrate that the beneficiary is more than a first line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). On appeal, counsel contends that the beneficiary acts as more than a first line supervisor due to his supervision of Ms. [REDACTED] who oversees independent contractors and clients' employees, and based upon Ms. [REDACTED]'s professional qualifications. However, the management or oversight of employees outside of the petitioner's organization by either the beneficiary or his supervisory cannot be considered qualifying managerial or supervisory duties. Here, such tasks are part of the consulting services the petitioner offers to its clients. The employees of the petitioner's clients are not the employees of the petitioner and do not contribute to the petitioner's consulting business.

Regardless, the record does not identify the clients' employees or any specifics of projects, hiring and firing decisions made on the part of the petitioner, or include other supporting documentation to substantiate the claimed level of control over its clients' employees. 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)). Indeed, the original letters submitted by Ms. [REDACTED] and Mr. [REDACTED] in support of the Form I-129 stated that the petitioner has only incidental supervision and control over its employees, whereas the revised letters submitted on appeal reflect an enhanced level of authority on the part of the petitioner and the beneficiary. For instance, Mr. [REDACTED] indicated in the revised letter that the beneficiary has full executive control over his farm, in apparent contradiction to his previous assertions that he was only acting in an advisory capacity. Further, the revised letters from Ms. [REDACTED] and Mr. [REDACTED] are not signed by their purported authors, leaving question as to these assertions. 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).

Additionally, the petitioner has not submitted any written contracts or agreements, invoices, or other evidence to clarify the exact nature of the services it provides to its clients. Further, the petitioner has not explained whether it directly employs independent contractors to fulfill contracts for its clients, or whether these contractors are hired by the clients based upon the petitioner's recommendations. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner has not provided evidence of any payments to independent contractors other than its attorney and its accountant.

The letters of the clients substantiate the conclusion that the beneficiary is primarily engaged in the provision of services, or other non-qualifying operational duties, through his regular service related

meetings with these clients, his handling of billing issues, and his claimed hiring and firing of farm staff, contrary to the petitioner's claims that the beneficiary delegates all operational duties to Ms. [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner has also not demonstrated that the beneficiary has professional subordinates to qualify him as more than a first line supervisor of non-professional employees. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In the present matter, the petitioner submits an expert opinion of [REDACTED] indicating that Ms. [REDACTED] s twenty-one years of experience in the animal science field qualify her as having the equivalent of a Bachelor of Science in animal science.

USCIS focuses on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree or its equivalent by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree in animal science is actually necessary to perform the duties attributed to the Consultant Director, which include maintaining and operating machinery, performing physical work, purchasing equipment and supplies, analyzing soil, and inspecting orchards and fields. The job description contains a single passing reference to livestock.

The AAO does not doubt that the beneficiary will exercise wide discretionary authority over the petitioner's consulting business. However, a beneficiary cannot qualify as an executive under the statute simply because they have an executive title, because they "direct" the enterprise as the sole managerial employee, or through vaguely comparing them to a generic explanation of an executive from the Department of Labor's Occupational Outlook Handbook. The petitioner has not submitted sufficient detail regarding the beneficiary's claimed direction of management or establishment of goals and policies to substantiate his primary performance of these duties. In fact, the beneficiary's duties, and the record generally, include many examples of his performance of non-qualifying operational duties which indicate that he, along with his subordinate, directly provide the petitioner's consulting services. The petitioner has not established that the beneficiary is able to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. Therefore, the petitioner has not established that the beneficiary will act in a qualifying executive capacity.

The petitioner submitted an expert opinion from [REDACTED], Ph.D., Director of Graduate Studies from the [REDACTED]. Dr. [REDACTED] asserts that the beneficiary acts, and will act, in a qualifying managerial capacity, whereas the petitioner has repeatedly maintained that the beneficiary qualifies as an executive. The opinion also references the beneficiary's supervision of employees subordinate to the consultant director, but as previously discussed, the petitioner has not demonstrated with sufficient evidence the existence of these employees. Likewise, the opinion notes the beneficiary's responsibility for hiring and firing of employees, but the record includes few examples of his performance, or proposed performance, of this duty. Indeed, the opinion merely repeats the statutory definition of "managerial capacity" and concludes without specific examples or evidence, that the beneficiary acts in a qualifying managerial capacity.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795. Furthermore, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As Dr. [REDACTED] opinion was based on the same vague description of job duties submitted at the time of filing, and not the totality of the evidence reviewed by the AAO, it has limited probative value.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

In the present matter, the petitioner has not substantiated that it has sufficient personnel to service two major clients without the beneficiary's significant involvement in operational duties. For instance, the petitioner has only demonstrated that it has one full-time consultant, Ms. [REDACTED] to provide services to two major clients who assert that they require the full-time management of their farms by the petitioner. As such, with the evidence presented, it is not clear how Ms. [REDACTED] is able to perform all tasks required by both of the petitioner's clients, including various manual tasks such as maintaining equipment, purchasing seeds, finding buyers for crops, and other physical work which is included in the petitioner's description of her duties. Further, the petitioner vaguely references that Ms. [REDACTED] hires client employees to perform these tasks, while also asserting that she directly performs these duties. In sum, the petitioner has provided a contradictory and insufficiently supported picture of how the petitioner is able to

provide substantial farm management services to its two clients without the significant involvement of the beneficiary in the provision of these services.

Lastly, throughout the record and on appeal, counsel contends that this office is obligated by law to give deference to the director's previous approval of both previous L-1A intracompany transferee visas and a Form I-140 Immigrant Petition for Alien Worker petition. The director's decision does not indicate whether he reviewed the prior approvals. Each petition filing is a separate proceeding with a separate record and a separate burden of proof. 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 petitions were approved based on the same evidence contained in the current record, as noted by counsel, the approval would constitute an 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 prior approvals may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would not be reasonable 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 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). Therefore, despite the assertions of counsel, this office is not required to give deference to the prior immigrant or nonimmigrant petition approvals.

In conclusion, for the foregoing reasons, the petitioner has not established that the beneficiary will be employed in a qualifying executive or managerial capacity. For this reason, the appeal must be dismissed.

### **B. Qualifying Relationship**

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(i). 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 a letter submitted in support of the Form I-129 petition, the petitioner asserted that it is a branch office of the foreign entity. The petitioner submitted an operating agreement dated February 1, 2008 which stated that "[the petitioner] shall be considered a subsidiary of [the foreign entity] to be wholly owned by the [foreign entity]." The operating agreement included an Exhibit A which reflecting the following member interests: (1) [the foreign entity] - 50% and (2) [the petitioner] - 50%. The record includes another operating agreement also dated February 1, 2008, identical in most respects to the above-referenced agreement, except that it states, "[the petitioner shall be considered a subsidiary of [the foreign entity] to be wholly owned by [redacted] and [the beneficiary]." The petitioner's IRS Forms 1065 from 2010 and 2011 indicated that the petitioner was owned by two members, [the beneficiary] and Ms. [redacted] each owning and controlling 50% of the entity. In response to the director's RFE, the petitioner stated that it is an affiliate of the foreign entity. The petitioner did not specify, or submit evidence, to demonstrate ownership in the foreign entity.

Based on the foregoing evidence, this office cannot determine whether the petitioner has a qualifying relationship with the foreign entity. First, the petitioner has not demonstrated that the petitioner is a branch office of the foreign entity, as it has not submitted evidence to establish that the petitioner exists as a separate legal entity. If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). If the claimed branch is incorporated in the United States, USCIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

After analyzing the evidence, it cannot be determined whether the petitioner and the foreign entity qualify as affiliates as the petitioner has not set forth, or submitted supporting evidence to demonstrate, the ownership in the foreign entity. Indeed, the petitioner has submitted conflicting operating agreements, thereby leaving question as to the actual ownership in the petitioner. Therefore, without a definitive statement as to ownership in the foreign entity, or sufficient supporting evidence of ownership in the petitioner, it cannot be determined whether they are under common ownership and control as necessary to qualify the entities as parent and subsidiary, or as affiliates.

Additionally, the record as presently constituted does not include evidence that the foreign entity is doing business as necessary to establish it as a qualifying organization consistent with 8 C.F.R. § 214.2(l)(1)(ii)(2). The regulations define doing business as the regular, systematic, and continuous provision of goods or services. See 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The petitioner provided a letter dated July 12, 2012 from General Manager [redacted] indicating that he took over the management and day-to-day operations of the foreign entity and that he reports to the beneficiary and Ms. [redacted] on all foreign entity issues. However, the petitioner has not submitted any evidence to demonstrate the foreign entity's current provision of the goods and services in a regular and consistent manner, beyond providing one invoice dated August 31, 2011 and bank statements which fail to demonstrate the provision of goods and services on the part of the foreign entity.

For the foregoing reasons, the petitioner has not established that it has a qualifying relationship with the foreign employer. For this additional reason, the petition cannot be approved.

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.