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U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 10 2008

WAC 05 220 50089

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized in the State of California in January 1990. It states that it is engaged in the development of data storage technology. The petitioner seeks to employ the beneficiary as its business development director.

The director denied the petition on January 16, 2008 on three separate and alternative grounds. The director determined that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner; (2) that the U.S. company has a qualifying relationship with the beneficiary's previous foreign employer; or, (3) that it has the ability to pay the beneficiary's proffered salary of $117,000 per year.

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 erred in her assessment of the beneficiary's employment capacity and the qualifying relationship between the petitioner and the beneficiary's previous employer. Counsel further explains that the petitioner has in fact been paying the beneficiary the proffered salary, but it has changed the method in which it pays him. Counsel submits a brief in support of the appeal.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 immigrant petition was filed on August 4, 2005. The petitioner stated on Form I-140 that the U.S. company employs five employees and that it seeks to employ the beneficiary as its business development manager, based at its San Diego, California office. Where asked to provide a non-technical description of the position, the petitioner indicated that the beneficiary would "oversee company's turnaround, supervision of the company's software upgrade and operations in addition to establishing the printing division in the United States branch."

The director issued a request for additional evidence on June 19, 2007. The director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties in the United States; (2) a detailed organizational chart for the U.S. company depicting its managerial hierarchy and staffing levels as of August 4, 2005; (3) job titles and a brief description of job duties for all employees under the beneficiary's supervision; and (4) copies of the petitioner's California Forms DE-6, Quarterly Wage Reports, for the last two quarters of 2005, all four quarters of 2006, and the first two quarters of 2007.

In a response dated September 1, 2007, the petitioner included the following description of the beneficiary's duties:

> [The beneficiary] is the director and Secretary/Treasurer of [the petitioning company]. [The beneficiary] has vast knowledge of International Business and entrepreneurship, his main area of activity has been Computer hardware and software development, shipbuilding, printing and land development. . . [The beneficiary] is responsible for formation and investment and managing member [sic] of [the] following active entities:
>
> Gold Canyon Development LLC,
> Misfits Development LLC
> Stagecoach Valley Development LLC,
> I-50 Plaza LLC, Dayton Plaza LLC,
> Sparksvillage LLC,
> 11,000 Reno Highway Fallon LLC,
> Wendover Project LLC,
> Big Spring Ranch LLC,
> Nevada Land & Water Resources LLC,
>
> [The beneficiary] is responsible for business development, software development and day to day activities of the companies and subcontractors.

The petitioner submitted an organizational chart for the U.S. company, but neither the beneficiary's name nor his position title are identified on the chart. The positions listed include a chairman of the board, a board of advisors, a chief executive officer, a secretary/treasurer, an engineering vice president, a research & development vice president, a production vice president, a sales vice president, a marketing director, a chief financial officer, and a legal/administrative department.

In an attachment to the organizational chart, the petitioner noted that it the company was incorporated as a Nevada corporation in October 2004, and that it nominated a new president in October 2006, who reports to the beneficiary. Counsel stated that the Nevada company is 100 percent owned by the California-based petitioner, and is involved in land and mineral development and mining activities. The petitioner provided profiles of various employees who are claimed to be employed by the Nevada company, but did not provide an organizational chart for this company. The employees listed include a president, two managers, a processing mill manager, a mine site manager, and a geologist. The petitioner indicated that the petitioner would pay the employees either directly or "in accordance with a memorandum of understanding with Three Stones Management, LLC" which is described as a Nevada limited liability company managed by Orin Hampton, the company's president.

The petitioner provided the requested California Forms DE-6 for the last two quarters of 2005, all quarters of 2006 and the first quarter of 2007. All of the submitted Forms DE-6 indicate that the beneficiary is the sole employee of the company. The petitioner did not provide any evidence of wages paid or evidence of any other payments made to the claimed employees of the Nevada corporation, nor did it provide any evidence of payments made to any employees listed on the submitted organizational chart for the California company.

The petitioner also submitted a document entitled "Organization Information" for the Nevada company, which indicated that the corporation would be participating in precious metal mining operations, and participating as a financing entity for one or more mining projects at a time. The document indicates that, in mining properties in which the company is the sole owner or major stockholder, the company's corporate officers and appointed managers would oversee the daily operations of the specific projects. As secretary/treasurer, the beneficiary's role is to "oversee all corporate business as it applies to the secretary treasurer's duties."

The petitioner also submitted copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for the 2005 and 2006 tax years. In 2005, the petitioner reported no assets and $100,000 in gross receipts. It paid $54,000 to the beneficiary and no other wages. In 2006, the petitioner reported no assets or receipts and it paid the beneficiary $24,000.

On January 16, 2008, the director denied the petition, concluding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director observed that the petitioner had provided a vague and nonspecific description of the beneficiary's duties that failed to demonstrate what the beneficiary does on a day-to-day basis. The director further noted that none of the employees who appeared on the petitioner's organizational chart were listed on the petitioner's payroll records, and that the petitioner had failed to establish that it employs anyone other than the beneficiary.

On appeal, counsel for the petitioner notes that, given the given the current economy in the United States, small businesses like the petitioner have to "adjust their layout" and thus "many functions of small companies are performed by the executives. Counsel emphasizes that the beneficiary was in fact granted L-1A status to work for the petitioning company and should therefore be considered a multinational manager.

Counsel further describes the beneficiary's position as follows:

> The company has many departments and subdivisions who work on contracts and as a result of his position, the beneficiary manages these departments. Within that capacity, he has the authority to hire, discharge, control workload, supervise and manage their employees. The company operates on various projects and depending on the needs of each project, the beneficiary hires and supervises the proper employees to handle the project. . . .
>
> * * *
>
> Furthermore, the beneficiary is authorized to directly supervise, hire, fire, recommend actions and functions in his senior level capacity within the organizational hierarchy and with respect to the functions managed in 2006 has hired:
>
> President
> Manager
> Manager
> Processing Mill Manager
> Mine Site Manager
> Geologist
> [redacted]
>
> As individual professionals, these people are responsible for their own taxes with a percentage of income from the operation of the company.
>
> Similarly, the beneficiary exercises discretion over [the petitioner's] day-to-day operations, including, but not limited to the supervision of all employees who are professionals hired for the project.

Counsel's assertions are not persuasive. Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has not provided a detailed description of the beneficiary's duties, nor has it provided a consistent account of the nature of his responsibilities. At the time the petition was filed, the petitioner indicated that the beneficiary would be working in San Diego, California as the business development director of a data management technology development company, which was claimed to have five employees. The petitioner described the beneficiary's duties in vague terms, noting that he would be responsible for overseeing the company's turnaround, supervising the company' "software upgrade and

operations," and establish a "printing division." This description offered little insight into what managerial or executive duties the beneficiary would perform 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).

Accordingly, the director requested that the petitioner provide a detailed description of the beneficiary's duties and instructed the petitioner to "be specific" in explaining the beneficiary's role within the company. The petitioner's response was not only excessively vague, but also appeared to relate to the beneficiary's duties for a separate company, a Nevada corporation with the same name as the petitioner. There is no documentary evidence in the record to support the assertion that the Nevada corporation established in 2004 has any relationship to the California corporation established in 1990. The Nevada corporation appears to have been established to finance silver and gold mining projects, and it is unclear from the record how it operates, whether it has employees, or even whether it is doing business as that term is defined in the regulations. Based on the evidence in the record, the Nevada company had its first board meeting in October 22, 2006, more than one year after the filing of the instant petition. The record does not contain any payroll or tax documentation for this company, and it is not referenced as a related company on any of the California corporation's tax documentation.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not established that the beneficiary's duties with the Nevada company should be considered in determining whether he would be employed in a primarily managerial or executive capacity for the petitioning company.

Furthermore, on appeal, counsel asserts that the beneficiary hired the claimed employees for the Nevada company in 2006. The instant petition was filed in August 2005. Therefore, even if the petitioner had established that the Nevada company is a subsidiary of the petitioning company, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Furthermore, when asked to clarify the beneficiary's duties subsequent to the filing of the petition, the petitioner indicated that he is responsible for forming, investing in and serving as a managing member of a number of limited liability companies. The petitioner further stated that the beneficiary is "responsible for business development, software development and day to day activities of the companies and subcontractors." The petitioner provided no further information or documentation regarding the various limited liability companies the beneficiary is claimed to manage, or their employees or subcontractors. Furthermore, according to the Nevada company's corporate documentation, all daily business is overseen by the president of the company, while the beneficiary's role is limited to "corporate business as it applies to the secretary/treasurer's duties."

Overall, the record contains no clear, detailed or consistent description of the beneficiary's duties and therefore it cannot be concluded that he would be employed in a primarily managerial or executive capacity.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Beyond the required description of the job duties, 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.

Here, the petitioner initially claimed to employ a total of five workers at the time of filing, but did not submit evidence confirming payments to these workers, or provide an organizational chart. In response to the director's request for evidence related to the petitioner's staffing levels, the petitioner submitted an organizational chart which lists a total of nine managerial employees (exclusive of board members) working for the California-based data storage technology company. However, as noted above, the organizational chart did not include the beneficiary's name or identify his proposed position of "business development director." Although the beneficiary's name does not appear on the organizational chart, the submitted California Forms DE-6 for the California company show that the beneficiary is the only salaried employees, and no evidence of wages paid to the individuals listed on the organizational chart has been provided. 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).

On appeal, counsel only references the beneficiary's authority with respect to the employees of the Nevada company, so the record remains devoid of any evidence or explanation regarding the organizational structure of the California company, or the beneficiary's placement within that that company's hierarchy. Although it appears that the California company is paying the beneficiary a salary, there is no other evidence to suggest that he has been or would be working for that company. Furthermore, as discussed above, while the petitioner now claims that that the beneficiary would manage all employees of the Nevada company, the record does not contain evidence documenting the employment of the claimed employees, nor is there any evidence that the Nevada company is even related to the California-based petitioner. The record also contains no evidence that the Nevada company is doing business, and the tax returns for the U.S. company show extremely limited business activity.

Overall, the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity fails on an evidentiary basis. The petitioner has not adequately described the beneficiary's duties, and the supporting evidence fails to support a finding that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel, or that he would manage an essential function of the petitioning company. Given the paucity of the evidence submitted, it is impossible to discern the nature of the beneficiary's duties, the number of workers employed by the petitioning company, or the scope of the company's activities at the time the petition was filed. Accordingly, the petitioner has not established that the

beneficiary would be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the U.S. company has a qualifying relationship with the beneficiary's 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. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) 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.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *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.

The petitioner claims to be a subsidiary of Emfaco, S.A. a Swiss company. At the time of filing, the petitioner submitted the following documents:

- A Written Consent of Shareholder issued by Emfaco S.A., dated September 21, 2004, which identifies Emfaco as the sole voting shareholder in Optima Technology Corporation, a California corporation, and gives consent and approval for the beneficiary to act as the sole director of the corporation.
- A printout from the California Secretary of State's California Business Portal, which indicates that the petitioning company was incorporated in California on January 16, 1990 and remains active.
- The Corporate Charter for Optima Technology Corporation, a Nevada corporation established on October 11, 2004.

- The Articles of Incorporation for Optima Technology Corporation (Nevada), and an initial list of officers for this corporation.

The petitioner also submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2003, along with Form 5472, Information Return of a 25% Foreign Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business. The petitioner's 2003 corporate tax documentation identifies Emfaco, S.A. as the owner of 87.92 percent of the California corporation's stock. The tax return shows that the company has six shareholders, and that it has issued common stock valued at $1,007,500.

In the request for evidence issued on June 19, 2007, the director requested additional evidence to establish that there is a qualifying relationship between the U.S. and foreign entities. Specifically, the director requested that the petitioner submit: (1) evidence of ownership for the foreign entity; (2) proof of stock purchase for the U.S. entity to show that the foreign entity actually paid for the U.S. entity, including original wire transfers; (3) copies of U.S. bank statements to corroborate the transfer of funds from the foreign parent company to the U.S. entity, detailing monetary amounts for the stock purchase; (4) a copy of the U.S. company's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts for stock issued; (5) a copy of the U.S. company's annual report and Form 10-K, if applicable; (6) minutes of the meeting for the U.S. company that lists stock shareholders and the number and percentages owned by each; (7) copies of all of the U.S. stock certificates issued to date; (8) a copy of the U.S. company's stock ledger showing all stock certificates issued to the present date, including total shares of stock sold, names of shareholders and purchase price; (9) a copy of the U.S. company's articles of incorporation; and (10) a detailed list of owners of the U.S. company.

In a response dated September 1, 2007, counsel explained that the foreign entity was established in Switzerland in 1961, and that that all of its issued shares are currently held by Mr. [redacted]. The petitioner explained the foreign entity's relationship with the U.S. entity as follows:

> Since July 1997 EMFACO S.A. is holder of 710,526 voting shares "all voting shares" of Optima Technology Corporation a California Corporation incorporated in January 1990 under corporate number 1565687 in California which is also 100% holder of all voting stocks of Optima Technology Corporation a Nevada Corporation registered under C27410-2004 in Carson City, Nevada on October 11 2004.

The petitioner provided the following documentation in support of its claim that the U.S. entity is a subsidiary of the foreign entity:

1. A copy of the petitioner's original Articles of Incorporation filed with the California Secretary of State on January 16, 1990, which indicate that the company is authorized to 1,000,000 shares of common stock.
2. A copy of a Certificate of Amendment of the Articles of Incorporation filed on May 7, 1990, which indicates that the company is authorized to issue 900,000 shares of voting stock and 100,000 shares of nonvoting stock, and that no shares had been issued as of that date.

3. A copy of the by-laws for the U.S. company.
4. A copy of an Amendment to the Articles of Incorporation dated October 6, 1997, which amended Article IV to indicate that the corporation is authorized to issued 9,000,000 shares of voting common shares and 1,000,0000 nonvoting common shares. The document also indicates that the total number of outstanding shares of the corporation is 720,526.
5. A Written Consent of Sole Shareholder dated August 1, 1997, endorsed by [redacted] of Emfaco, S.A., in which [redacted] was appointed the sole director of the company and the amended to the articles of incorporation was authorized.
6. A list of owners/stockholders for the U.S. company which indicates that, as of July 30, 2007, 710,526 voting shares are held by Emfaco, S.A.. The list identifies 9 owners of nonvoting shares, and indicates that only one of these shareholders paid for his shares. The list indicates that a total of 819,666 voting and nonvoting shares have been issued, and the total capital investment is $1,085,026. A document that was essentially identical to this shareholder list was submitted as the petitioner's "stock ledger."
7. A copy of the petitioner's stock certificate number 1 indicating that Emfaco S.A. was issued 710,526 shares of the company's voting common stock on December 16, 1997.
8. A partial copy of the petitioner's stock certificate number 1 indicating the issuance of 57,642 shares to on December 16, 1997
9. A partial copy of the petitioner's stock certificates number 2 indicating the issuance of 15,000 shares to [redacted] on December 16, 1997.

With respect to the director's request for evidence that the foreign entity paid for its ownership in the U.S. company, counsel provided the following explanation:

> The funds for stock purchase were paid by wire transfer from Banque de Depots, Rue de Rhone, 94 case Rive 242,1211 Geneve 3, Account Number [redacted] to First Interstate Bank of California in Newport Beach, California, both banks do not exist anymore since they were acquired by other banks years later.

Counsel stated that the petitioner does not have access to its old files due to "litigation and removal of previous management and legal proceedings against them." Counsel also asserted that the petitioner was not required to file a Notice of Transaction pursuant to Corporation Code 25102(f) because the purchaser of the petitioner's stock had a "preexisting business relationship with the offeror."

The petitioner submitted a letter from C.P.A., who stated that his firm has served as the independent accountant for the petitioner since 1990. He states that according to his records, the company has filed a Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation Engaged in a U.S. Trade or Business," since the petitioner was acquired by Emfaco, S.A., a Swiss company.

Finally, the petitioner provided an overview of the company's history, noting that the beneficiary was one of the founders and original majority investor and owner, along with two other individuals, from February 1990 until June 1997, at which time he sold his interests to Emfaco S.A.

The director denied the petition, concluding that the petitioner had failed to establish that there is a qualifying relationship between the foreign entity and the U.S. company. The director acknowledged the evidence submitted in response to the request for evidence, but found that the documentation was insufficient to corroborate the petitioner's claims that the foreign entity owns the U.S. petitioner. The director noted that the petitioner's stock ledger did not include the issuance date for the stock certificates issued, and further noted that the petitioner failed to submit copies of is Notices of Transaction, wire transfer receipts and U.S. bank statements to corroborate the wire transfers, and had thus not established that the alleged foreign parent company actually paid for the shares of stock issued. Further, the director noted a discrepancy between the value of the petitioner's common stock as stated on the petitioner's tax return, and the value of the issued stock indicated on the petitioner's stock ledger and list of owners. The director concluded that the petitioner had failed to provide unerring and concise evidence to substantiate the claim of a qualifying relationship between the foreign and U.S. entities.

On appeal, counsel for the petitioner notes that the issue of whether there is a qualifying relationship between the U.S. and foreign entities was raised when the petitioner filed an L-1A nonimmigrant petition on behalf of the beneficiary, and the petition was ultimately approved. Counsel asserts that the relationship between the two companies remains the same and should not be at issue in the instant matter.

Counsel notes that originally, three voting shares were issued in 1992, and subsequently, in February 1997, the voting shares of [redacted] and [redacted] were acquired by the petitioning company. Counsel states that although the stock certificates of these individuals were cancelled, "the difference of $62,474 remained as additional capital in the corporation." Counsel emphasizes that the documentation submitted showed that one of the nonvoting shareholders paid $140,000 for his shares in the company. Counsel stated that this new information should account for any perceived discrepancy with respect to the value of the petitioner's issued stock.

With respect to the director's finding that the petitioner did not document how the foreign entity paid for its shares in the petitioning company, counsel explains that "the sale of shares to Emfaco S.A. in 1997 was done in an unusual circumstance in Geneva, Switzerland between Buyer and Seller without [the petitioner's] involvement. Therefore, the bank statements do not reflect this transaction and the company records are not kept for over 11 years after it was completed."

Upon review, counsel's assertions are not persuasive. The petitioner has not submitted sufficient evidence to establish the alleged parent-subsidiary relationship between the United States and foreign entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). 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.

Contrary to counsel's assertions on appeal, the petitioner has not adequately documented the ownership and control of the United States entity. While the petitioner's stock certificate number one shows on its face that the foreign entity owns 710,526 of the voting shares of the petitioner's stock as of December 1997, the authenticity of this document must be called into question.

The petitioning company was established in January 1990, and the petitioner claims that the company was originally owned by the beneficiary and two other individual shareholders. On appeal, counsel for the petitioner confirms that voting shares were issued by the company in 1992, and that two stock certificates were subsequently cancelled in approximately February 1997. Given the petitioner's claim that three stock certificates were previously issued by the company following its incorporation in the early 1990s, it is unclear how the petitioner can present a stock certificate "number one" issued in December 1997. It is reasonable to believe, and has not been shown to be otherwise, that the petitioner's stock certificate number one would have been issued to one of the three original individual shareholders of the company. The evidence suggests that there are multiple versions of the company's stock certificates.

This is a glaring inconsistency in the record, and the petitioner has made no attempt to account for the complete absence of evidence related to the original ownership structure 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann*

Bakery Shop, Inc. v. Nelson, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Furthermore, as noted by the director, the petitioner failed to provide many items that were specifically requested, such as a copy of the company's stock ledger showing all stock certificates issued and their dates of issuance, Notices of Transactions Pursuant to Section 25102(f), and evidence that the foreign entity did in fact paid for its alleged interest in the United States company. The petition must be denied for this reason. 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).

In addition, counsel and the petitioner have provided contradictory explanations as to why the petitioner is unable to document the claimed monetary transfer between the foreign and U.S. entities. In response to the request for evidence, counsel stated that such evidence could not be provided because the foreign and U.S. banks through which the wire transfer was processed no longer exist. On appeal, counsel states that the transaction took place through "an unusual circumstance" between the buyer and seller, without the petitioner's involvement, and therefore the company's bank statements would not reflect the transaction. Counsel further states that company records are not kept for 11 years. Again, 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.

If, as claimed by the petitioner, the beneficiary did sell his majority interest in the U.S. company directly to the foreign entity in 1997 for nearly one million dollars, it is simply not credible that there would be no documentary evidence of this transaction in either the foreign entity's, the U.S. entity's or the beneficiary's own records, even 11 years after the fact. The explanation that such documentation is no longer available is not sufficient. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* Where a record does not exist, the petitioner must submit an original written statement from the relevant government or other authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. **§ 103.2(b)(2)(ii).**

Counsel's statement that the issue need not be considered due to the beneficiary's prior approval for L-1A nonimmigrant classification is also not sufficient. In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Each petition is a separate adjudication and a separate record of proceeding. If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the records of nonimmigrant proceedings are not combined with those previously filed by the same petitioner.

The record contains no documentary evidence of the beneficiary's initial ownership in the petitioning company. As noted above, although the petitioner claims that the beneficiary was originally the majority owner of the company when it was established in 1990, its records reflect that it first issued a stock certificate

in December 1997, to the foreign entity. Since counsel now claims that voting shares of the company were issued in 1992, and that the beneficiary sold his shares directly to the foreign entity in 1997, the petitioner is obligated to establish that the beneficiary owned the shares and that he did in fact transfer them to the foreign entity. The petitioner has submitted no corroborating documentary evidence to support this version of events. 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.

In sum, the evidence supporting the petitioner's claim that it is a subsidiary of the foreign entity is limited to the stock certificates number one issued to the foreign entity, which, as discussed above, has extremely limited probative value. Beyond that, the petitioner relies on its corporate tax returns, which do in fact identify the foreign entity as the owner of the majority of the U.S. company's stock. However, there is no evidence that any of the tax returns have actually been filed with the Internal Revenue Service, and their probative value, in light of all of the discrepancies discussed above, is also limited. The petitioner has not substantiated its claimed qualifying relationship with the foreign entity. For this additional reason, the petition may not be approved.

The third and final issue addressed by the director is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of $117,000.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The director reviewed the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for the 2002, 2003, 2005 and 2006 years, and noted that the total wages paid by the company in any year never exceeded $54,000. The director further noted that the beneficiary was paid only $54,000 in 2005, the year in which the petition was filed, and only $24,000 in 2006. The director concluded that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner asserts that the U.S. company's "method of payment changed during the past few years solely because of the economical trend." Counsel asserts that the beneficiary's IRS Form 1040, Individual Tax Return, shows that he earned $390,944 in Business Income and $54,000 in wages in 2004. Counsel further states that in 2005, the beneficiary received $54,000 in salary and $100,000 in "debt payment." Counsel states that between 2002 and 2007, the beneficiary has received total payments of $758,782, or an average of $126,413.66, as "salaries and benefits" each year.

Upon review, petitioner has not established that it has the ability to pay the beneficiary the proffered annual salary of $117,000.

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did employ the beneficiary as an L-1A nonimmigrant intracompany transferee at the time the petition was filed; however, the petitioner paid him a salary of only $54,000 in 2005. Although counsel claims that the beneficiary received $100,000 in "debt payment," this payment has not been documented, nor has counsel explained why such payment should be deemed equivalent to a salary payment for the purposes of determining whether the petitioner has the ability to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on August 4, 2005, the AAO must examine the petitioner's tax return for 2005. The petitioner's IRS Form 1120 for calendar year 2005 presents a net taxable income of $0. The petitioner could not pay a proffered wage of $117,000 from this income, nor would this amount be sufficient to make up the difference between the beneficiary's wage at the time of filing and the proffered wage.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

In this case, the petitioner's net current assets are valued at $0, which is also insufficient to pay the beneficiary's proffered salary. The petitioner has not established its ability to pay the proffered wage of $117,000. Counsel's assertion that the beneficiary has received, on average, payments from the petitioner in excess of the proffered wage over a five-year period is not persuasive. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Furthermore, the petitioner must establish eligibility at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Any payments received by the beneficiary in the years 2002 through 2004 have no bearing on an analysis of this issue. For this additional reason, the petition cannot be approved.

Finally, although not addressed by the director, it is noted that the petitioner has not provided evidence that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year in the three years preceding his entry to the United States as a nonimmigrant, as required by 8 C.F.R. § 204.5(j)(3)(i)(B). The record as presently constituted contains no description of the beneficiary's duties while employed by the foreign entity and therefore, it cannot be concluded that he was employed in a managerial or executive capacity. For this additional reason, the petition must be denied.

The AAO recognizes that CIS previously approved an L-1A nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary. In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii). The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch,* 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava,* 724 F. Supp. at 1103.

Furthermore, 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. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

Finally, 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

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.