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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 01 2005
SRC 04 137 50970

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:

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, Director
Administrative Appeals Office

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

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 under the laws of the State of Texas that is operating a The petitioner seeks to employ the beneficiary as its director of administration.

The director denied the petition concluding that the petitioner had not established that the beneficiary had been employed abroad OR would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel claims that the director failed to review and consider the complete record prior to her denial of the petition. Counsel contends that the beneficiary would not be employed in the United States as a first-line supervisor, but rather in a primarily managerial capacity in which she would supervise two managerial employees. Counsel claims that while employed abroad, the beneficiary supervised supervisory and managerial employees. Counsel submits a letter in support of these claims on 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 or 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, which 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.

The AAO will first consider the issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> (i) Directs the management of the organization or a major component or function of the organization;
>
> (ii) Establishes the goals and policies of the organization, component, or function;
>
> (iii) Exercises wide latitude in discretionary decision-making; and
>
> (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the instant immigrant petition on April 14, 2004, noting that in addition to the company's fifteen employees, the beneficiary would be employed as the organization's director of administration. In an undated letter submitted with Form I-140, the petitioner explained that despite the "economic turmoil" in the United States and Latin America, which may have otherwise inhibited commencing business in the United States, the beneficiary restructured the petitioner's business objective and entered into an agreement to purchase a [redacted] he petitioner stated that the beneficiary "currently supervises the

mployees and will continue to seek additional opportunities and employees for future expansion of this new branch of the corporation." The petitioner noted in its letter and on Form I-140 that the beneficiary would receive an annual salary of $36,000. The petitioner also submitted its quarterly taxable wage report for the quarter ending December 31, 2003.

On March 23, 2005, the director issued to the petitioner a notice on intent to deny. In her notice, the director indicated that the record was insufficient to demonstrate the beneficiary's eligibility as a multinational manager or executive. The director consequently requested that the petitioner provide an explanation of whether the beneficiary's position in the United States would "primarily entail the goal setting, policy-making, executive-level decision-making and managerial/executive oversight of the U.S. company or a major component or function of it," as well as whether the beneficiary would supervise managerial, supervisory, or professional employees. The director also requested a copy of the petitioner's organizational chart identifying each employee, their job title, and job duties.

Counsel responded in a letter dated April 21, 2005, in which he identified the beneficiary's position in the United States company as the "president and general manager." Counsel explained that the beneficiary's responsibilities in this position included:

> [T]he overall operation of the business, setting corporate policy and goal[s], overseeing personnel matters, and identifying investment opportunities. As such, [the beneficiary's] position is evidently a managerial one. She is ultimately responsible for the successes and losses of the company. All employees in her company report directly to her, including two supervisors who are degree professionals.

Counsel attached a list of the following job duties to be performed by the beneficiary:

1.	Attend via Teleconference weekly staff meetings with [the petitioner] & Venezuelan Company staff.	2.0
2.	Prepare budgets, and operating estimates for the Venezuelan corporation and U.S. subsidiary.	5.0
3.	Research and propose future investment projects.	5.0
4.	Evaluate work performance of employees	5.0
5.	Design and implement corporate policies to adjust to current goals	3.0
6.	Schedule and coordinate funds allocation	4.0
7.	Negotiate for the purchase and sale of investment businesses	6.0
8.	Coordinate, authorize, and supervise all investment development proposals both nationally and internationally.	3.0

9. Travel to and attend seminars and meetings throughout Latin America and U.S.	varies
10. Meet, interview, hire/fire incoming employees	6.0
[11.] Prepare & process necessary paperwork required for business	5.0
TOTAL AMOUNT OF HOURS	49.50

In this document, the beneficiary is referred to as the petitioner's "general manager" and "production manager."

Counsel also provided the petitioner's organizational chart, on which the beneficiary was identified as the president and general manager over the following subordinate employees: a manager, financial manager, assistant manager, administrative manager, supervising clerk, and ten part-time clerks. Counsel attached a brief statement of the job duties performed by the assistant manager, administrative manager, supervising clerk, and part-time clerks.

In a decision dated April 29, 2005, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director addressed a discrepancy in the beneficiary's job title, noting that the petitioner had not resolved whether the beneficiary would be employed as the director of administration or the president. The director also stated that the petitioner's response to the notice of intent to deny lacked a description "of the beneficiary's specific job duties." The director noted that the majority of the petitioner's employees worked on a part-time basis during the year 2003, and concluded that the beneficiary was likely performing "most of the day to day duties during this time." The director stated that the petitioner had not demonstrated "that the beneficiary's primary assignment has been or will be directing the management of the organization nor that the beneficiary has been or will be primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel, who relieve [her] from performing non[-]qualifying duties." Consequently, the director denied the petition.

The petitioner filed a timely appeal on May 31, 2005. In a letter attached to Form I-290B, counsel for the petitioner contends that the director "failed to adequately examine and review all evidence submitted in this case," and notes that documents referenced by the director as missing had actually been submitted with the petitioner's April 21, 2005 response. Counsel claims that the following responsibilities establish the beneficiary's employment in a managerial capacity:

- [The beneficiary] is the President and General Manager of the company, and as such, manages the overall operation and administration of same.
- [T]he Assistant and Administrative manager, who are both evidently managers, report directly to [the beneficiary].
- [The beneficiary] has the authority to hire and/or fire both lower-level and higher level employees of the company.

- Lastly, as your recently submitted letter conclusively recognizes, [the beneficiary] exercises discretion over the day-to-day operations of the company.

Counsel addresses the director's reference to the petitioner's staffing level, stating that the petitioner has rotating part-time employees so that the beneficiary has "at no point . . . engaged in lower-level tasks." Counsel also states that the beneficiary is not a first-line supervisor, as she presently supervises the assistant manager and administrative manager, "and is responsible for the overall management of the entire company." Counsel clarifies the beneficiary's title, stating "[the beneficiary] is in fact the President, General Manager, and General Director of the U.S. entity."

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

A petitioner is obligated to clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. Here, counsel's brief statement on appeal regarding the beneficiary's position does not adequately explain the inconsistent references made throughout the record to the beneficiary's title, nor does it address the difference in job responsibilities associated with the various positions. Also, counsel does not reconcile his claim on appeal that the beneficiary would be employed as the petitioner's president, with the statement in the January 10, 2001 letter from the foreign entity's director, in which he stated that as the petitioner's director of administration, the beneficiary would report to the company's president. 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).

In addition to the petitioner's inconsistent references to the beneficiary's title, the petitioner has not clarified whether the beneficiary would be engaged in primarily managerial job duties under section 101(a)(44)(A) of the Act, or primarily executive job duties under section 101(a)(44)(B) of the Act. Counsel fails to differentiate between "managerial capacity" and "executive capacity," stating in his April 21, 2005 letter that "[the beneficiary's] position is evidently a managerial one," yet submitting a statement of job duties that identifies the responsibilities as "executive." On appeal, counsel again references the beneficiary's position as "managerial in nature." The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. The petitioner has not satisfied this essential element herein.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). While the petitioner submitted a list of job duties, which, according to the assigned time allocations, would maintain employment of the beneficiary in a primarily executive capacity, the supplementary evidence does not corroborate the petitioner's claims. According to the petitioner, the beneficiary would be primarily involved in researching new investment avenues and expanding the petitioner's business, while implementing goals and procedures for the petitioner's present franchise. However, the petitioner has not established that the United States company's business has expanded beyond the operation of one [redacted] In other words, the petitioner has not offered evidence in support of its claim that the majority of the beneficiary's time would purportedly be spent expanding the United States business, including performing such executive responsibilities as "research[ing] and propos[ing] future investment projects," "negotiat[ing] for the purchase and sale of investment business," and supervising national and international investment developments. Rather, as correctly noted by the

director, it appears that the beneficiary is engaged in the non-qualifying functions associated with the operation of the restaurant. The petitioner noted that the beneficiary would be responsible for "preparing budgets and operating estimates," coordinating the allocation of funds, and preparing paperwork necessary for operating the While the petitioner represents that these non-qualifying job duties would occupy only 30% of the beneficiary's time, the record, as explained below, does not demonstrate that the petitioner would support the beneficiary in a primarily qualifying capacity. The AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Specifically, the evidence presented with regard to the petitioner's staffing levels is not credible, and therefore, does not support the employment of the beneficiary as a manager or an executive. The record does not contain evidence of the employment of the beneficiary's purported lower-level employees, which the petitioner identified as a manager, financial manager, assistant manager, administrative manager, supervising clerk and ten part-time clerks. The AAO notes that the petitioner did not provide a quarterly wage report for the period during which the present petition was filed. The "Employer's Quarterly State Report of Wages Paid to each Employee" for the quarter ending December 31, 2003 identifies three of the employees named on the petitioner's organizational chart: the administrative manager and two part-time clerks. The report does not name the remaining thirteen workers as employees of the petitioning entity. The AAO notes that an accompanying "Quarterly Wage Report," also dated December 31, 2003, identifies the assistant manager, administrative manager, supervising clerk and ten part-time clerks, however, it appears from the entries in the report that, while they were employed in 2003, their employment with the petitioner was likely terminated prior to the relevant period. The petitioner's "manager" and "financial manager" are not named as employees on either quarterly wage report. The petitioner has not clarified these relevant discrepancies. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

The correct staffing levels of the petitioning entity are essential to determining whether the beneficiary is supervising managerial, supervisory, or professional employees, or whether she is instead employed as a first-line supervisor. *See* 8 C.F.R. § 204.5(j)(2). Additionally, this information would assist in demonstrating whether the beneficiary is relieved from performing the non-qualifying functions associated with operating the Based on the evidence in the record, it does not appear that the petitioner's reasonable needs might plausibly be met by the services of the beneficiary, an administrative manager, and two part-time clerks. *See* § 101(a)(44)(C) of the Act (requiring that the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization be considered by Citizenship and Immigration Services (CIS) if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity). Absent additional evidence confirming the employment of the manager, financial manager, assistant manager, supervising clerk, as well as the employment of additional store clerks, the AAO cannot conclude that the beneficiary is not primarily performing the non-managerial and non-executive functions of the business.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next consider the issue of whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In the letter submitted with the immigrant petition, the petitioner noted that the beneficiary was previously employed by the foreign entity in the position of general manager. As no additional evidence regarding the beneficiary's foreign employment was submitted, the director issued a notice of intent to deny, dated March 23, 2005. In her notice, the director asked that the petitioner submit the following documentation in support of the beneficiary's foreign employment in a primarily managerial or executive capacity: (1) a detailed description of the duties and functions performed by the beneficiary, explaining how "[her] work primarily entail[ed] the goal setting, policy-making, executive-level decision-making and managerial/executive oversight of the foreign firm or a major component or function of the foreign firm"; (2) a list of the beneficiary's subordinate employees, including their names and job titles; and (3) an organizational chart of the foreign company identifying the beneficiary and those workers managed or supervised by the beneficiary.

Counsel responded in a letter dated April 21, 2005, noting that as president of the foreign company, the beneficiary "was the highest manager and/or executive of the company." An appended statement outlined the following "managerial/executive" job duties performed by the beneficiary in this position:

1.	Attend and head weekly supervisors and staff meetings.	2.0
2.	Review corporate, financial, and operating reports.	3.0
3.	Develop long and short term business plans in with [sic] projected growth and product demand.	5.0
4.	Prepare budgets, and operating estimates.	8.0
5.	Prepare marketing and pricing strategies to market service contracts and sale of products.	2.0
6.	Prepare and submit all sales and import tax returns to Venezuelan government for shipments received.	3.0
7.	Research and propose future investment projects.	5.0
8.	Design and implement corporate policies to adjust to current goals	3.0
9.	Meet, interview, hire/fire incoming employees	3.0
10.	Attend weekly Chamber of Commerce business meetings	3.0
11.	Review and authorize all corporate expenditures submitted by bookkeeper/accountant.	3.0
12.	Direct and manage all aspects of company's marketing and product development activities, primarily for financial services industry.	5.0

13. Review weekly corporate expense reports and bank reconciliation statements.	1.0
14. Review and authorize payroll distribution.	1.5
Total Amount of Hours	47.5

Counsel submitted a letter from the foreign entity's director dated January 10, 2001, which, presumably, was submitted with the petitioner's prior Form I-129, Petition for Nonimmigrant Worker. In the letter, the company's director stated that in the "executive" position of director of administration, the beneficiary had the following job responsibilities:

> Establishes the goals and policies of administration and oversees all the activities of administration, evaluates the work performance of the employees in the area of administration and is in charge of coordinating all the activities of administration with marketing. [The beneficiary] is responsible in reporting directly to the President of our company as its Director of Administration.

The attached organizational chart for the foreign organization did not specifically identify the beneficiary, but noted the position of president and the subordinate positions of general manager, assistant manager, and office manager. The organizational chart also reflected the employment of workers in its purchasing, sales, finance, administrative and human resources departments. The petitioner attached a brief statement of the job duties performed by each of the employees.

In her April 29, 2005 decision, the director concluded that the petitioner had not demonstrated that the beneficiary was employed abroad in a primarily managerial or executive capacity. The director stated that the beneficiary's assignment abroad "[was] comprised primarily of the daily productive tasks and first-line supervision of nonmanagerial, nonprofessional employees of the firm." The director also stated that the petitioner failed to "[provide] specific information about the employees supervised by the beneficiary at the foreign company." The director concluded that the beneficiary's foreign employment did not encompass primarily directing the management of the organization or primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel. The director further noted that the petitioner had not identified the beneficiary's replacement following her departure from the foreign entity. Consequently, the director denied the petition.

On appeal, counsel, specifically referencing an accounting assistant and two assistant managers, states that the beneficiary's "immediate subordinates [in the foreign company] were supervisors and/or managers." Counsel further states that following her transfer to the United States, the beneficiary was replaced by an individual who holds a degree in Business Administration. Counsel notes that "the volume of the foreign entity's business has not changed [since the beneficiary's transfer]."

Upon review, the petitioner has not demonstrated that the beneficiary was employed abroad in a primarily managerial or executive capacity.

The petitioner has not clarified the position in which the beneficiary was employed by the foreign entity. The record contains conflicting references to the beneficiary's employment as the "general manager," "president," "president/general manager," and "Director of Administration." Based on the foreign entity's organizational chart, the positions of president and general manager are separate. Therefore, the AAO cannot accept the proposition that the beneficiary occupied both positions. The petitioner has not, however, clarified whether the beneficiary was the foreign entity's president or general manager. It is essential for the petitioner to supply information differentiating between the two positions, as, according to the petitioner's description of the positions within the foreign entity, each encompasses different job duties. The petitioner has also failed to reconcile its claim of employing the beneficiary as the foreign entity's president with the statement in its January 10, 2001 letter that the beneficiary "is responsible in reporting directly to the President of our company as its Director of Administration." Clarification of the beneficiary's true position within the company is an essential preliminary step in demonstrating the beneficiary's employment as a manager or an executive. Without further clarification, the AAO cannot conclude that the additional information offered by the petitioner supports the beneficiary's employment abroad in a primarily managerial or executive capacity. Additionally, without clarification of the beneficiary's position, the AAO cannot determine the lower-level employees supervised by the beneficiary. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner has also failed to clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In the petitioner's statement describing the beneficiary's overseas job duties, it represents that the beneficiary's tasks are "managerial/executive." However, in his April 21, 2005 letter, counsel references the "managerial" job duties performed by the beneficiary. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. The petitioner has failed to satisfy this requirement.

Moreover, the petitioner's vague and general reference to tasks performed by the beneficiary fails to specifically identify her managerial or executive job duties. The petitioner noted that the beneficiary "direct[ed] long and short term business plans," "research[ed] and propos[ed] future investment projects," and "design[ed] and implement[ed] corporate policies to adjust to current goals." However, none of the evidence submitted identifies or explains the plans, projects, policies or goals of the foreign entity. 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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). Also, the record is devoid of evidence, such as business correspondence or contracts, demonstrating that the beneficiary was engaged in the managerial or executive tasks of investing and proposing investment projects. 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)).

Furthermore, the list of job duties performed by the beneficiary overseas does not substantiate the claim that the beneficiary was employed in a primarily managerial or executive capacity. Specifically, although the petitioner represented that the beneficiary was responsible for merely "review[ing]" business and weekly expense reports and bank reconciliation statements, the petitioner has not accounted for the completion of the reports and statements by any of its lower-level employees. Also, despite the beneficiary's purported responsibility of "direct[ing] and manag[ing] all aspects of [the] company's marketing and product development activities," the petitioner did not identify any subordinate employees who would perform the non-qualifying tasks associated with the petitioner's marketing and product development functions. The supposition that the beneficiary was solely responsible for performing the foreign entity's marketing functions is further supported by the petitioner's reference to the beneficiary's responsibility of "prepar[ing] marketing and pricing strategies to market service contracts and sale of products." According to the listed job duties, the beneficiary was also responsible for the non-qualifying tasks of preparing budgets, operating estimates and Venezuelan sales and import tax returns. The ancillary evidence in the record does not coincide with the percentages assigned to the related job duties or the proposition that the beneficiary was employed in a primarily managerial or executive capacity. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. The AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Counsel stresses on appeal that Citizenship and Immigration Services (CIS) previously approved classification of the beneficiary as an L-1A nonimmigrant manager or executive. It should be noted that, 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.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). 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 at 29-30 (recognizing that CIS approves some petitions in error).

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. 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 petitions were 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).

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated its ability to pay the beneficiary her proffered annual salary of $36,000 as required in the regulation at 8 C.F.R. § 204.5(g)(2). In 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 not establish that it had previously employed the beneficiary at a salary equal to or greater than the proffered salary.

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 April 14, 2004, the AAO must examine the petitioner's tax return for 2004. The record does not contain the petitioner's 2004 tax return. As a result, the AAO cannot determine whether the petitioner has the ability to pay the beneficiary her proffered wage. The AAO notes that the beneficiary's 2004 IRS Form W-2, Wage and Tax Statement, indicates that the beneficiary received a salary in the amount of $31,200, $4,800 less than her proposed salary. Accordingly, the petitioner has not demonstrated that it has the ability to pay the beneficiary her proffered salary. The petition will be denied for this additional reason.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.