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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 14 2005
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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.

Erin Hallas

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 California that is engaged in research, development, and marketing of intellectual properties and wireless products. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity or would be employed by the United States company in a primarily managerial or executive capacity.

On appeal, counsel claims that the director erred in both findings. Counsel states that the evidence submitted by the petitioner, albeit not necessarily the specific documentation requested by Citizenship and Immigration Services (CIS), demonstrates that the beneficiary's employment both overseas, as the general manager, and in the United States, as the company's president, is in an executive capacity. Counsel contends that while not a hybrid "manager/executive," the beneficiary would also qualify as a manager under the statutory definition of "managerial capacity." Counsel submits a comprehensive 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 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 was employed by the foreign 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-
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> (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-
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> (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
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> (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 December 29, 2003. In an appended letter dated December 10, 2003, the petitioner stated that the beneficiary worked for the foreign entity since 1991 in the positions of "general manager of the automated manufacturing plant" and "general manager for business development and product research and development" for the company's digital video and multimedia division. The petitioner explained that in these "executive" positions, the beneficiary developed and sold "computerized manufacturing systems" and supervised "the strategic business development, supply-chain and technology

planning of the multimedia communications product lines of [the foreign entity] for North American markets." The petitioner noted that the beneficiary also served on the board of directors of a subsidiary of the foreign entity. In his attached resume, the beneficiary's position of general manager within the digital and multimedia division was described as including the following responsibilities related to "business development" and "product engineering":

- Leading engineering teams to develop emerging wireless multi-media appliances including wireless Internet tablet, wireless personal digital assistant, mobile communicators using 2.5G wireless network, portable digital TV's and wireless home gateways.

- Developing strategic marketing/business relationship with world-wide leading companies and regional market leaders.

- Working with other [related] organizations to provide customers with complete service from product design, manufacturing, global logistics to after-sales services in North America, Europe, China and other parts of the Asia Pacific region.

In a January 4, 2005 request for evidence, the director noted that the petitioner had not submitted sufficient evidence establishing the beneficiary's responsibilities overseas in a primarily managerial or executive capacity. The director requested that the petitioner submit a "detailed, comprehensive description of the beneficiary's duties abroad within the three years prior to his entry into the United States." The director noted that the job description should include an outline of the beneficiary's specific job duties and the percentage of time the beneficiary would spend on each task. The director asked that the petitioner also include the foreign company's organizational chart, illustrating its structure, and include an explanation of the employees supervised by the beneficiary and their job duties.

Counsel responded in a letter dated March 26, 2005, and submitted a letter from the foreign company addressing the beneficiary's employment overseas as a general manager. In its March 16, 2005 letter, the foreign entity's corporate executive vice-president provided essentially the same job description for the beneficiary's employment in a "managerial/executive capacity" as that contained in the petitioner's December 10, 2003 letter.

In a decision dated April 19, 2005, 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 description of the beneficiary's overseas position "includes no detail regarding the beneficiary's duties abroad," and "no discussion of the beneficiary's specific duties, the time spent performing such duties, the structure of the foreign organization, the beneficiary's placement within such structure, or whether the beneficiary had any subordinate employees." The director concluded that the petitioner's "brief, general description" failed to establish the beneficiary's employment abroad as a manager or executive. Consequently, the director denied the petition.

In an appeal filed on May 17, 2005, counsel contends that the director erred in concluding that the beneficiary was not employed by the foreign entity in a primarily managerial or executive capacity. Counsel states that while the evidence submitted to establish the beneficiary's employment with the foreign organization in a qualifying capacity may not have been "the specific document requested," the record demonstrates the

beneficiary's "executive/managerial function." Consequently, counsel claims that the directors' denial "was based on an erroneous characterization of the facts and a failure to fully consider all of the evidence presented." Counsel restates the two "general manager" positions held by the beneficiary in the foreign entity, and adds, as "further clarification," a list of specific job duties performed by the beneficiary in these positions. As the list of job duties is part of the record, it will not be repeated herein. Counsel outlines the statutory criteria for "managerial capacity" and "executive capacity" and claims that the beneficiary satisfied each employment capacity while employed by the foreign company. Counsel addresses the number of workers employed by the foreign entity in Taiwan, which counsel estimates to be 20,000, and contends that the beneficiary, as an employee "at the top of a responsibility pyramid that contained hundreds of workers," could not be considered a first-line supervisor. Counsel further notes that in the position of general manager of the research and development team, the beneficiary "[was] charged with running the entire division and ensuring that [the foreign entity] continues to develop products in this fast paced and competitive market." Counsel also submits an affidavit on appeal from the foreign entity's executive vice-president, in which he outlines the same foreign job duties as those provided by counsel in his appellate brief.

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

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner submits on appeal an outline of the specific job duties performed by the beneficiary while employed overseas, as well as a discussion of why the beneficiary's former position should be considered managerial and executive in nature. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Rather, the petitioner failed to submit anything more than the evidence already provided at the time the immigrant petition was filed. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the AAO will consider this issue according to the record before the director at the time of his review.

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). As addressed by the director, the record contains two statements from the petitioner describing the beneficiary's prior employment overseas as the general manager of the automated manufacturing plant division and general manager of the business development and product research and development division. Even after a request from the director for a "detailed" and "comprehensive" job description, the petitioner submitted essentially the same description as already provided in its December 10, 2003 letter. The petitioner's limited claim that the beneficiary supervised the foreign entity's strategic business development, supply-chain and technology planning for the multimedia communications product lines fails to establish the beneficiary's previous employment in a primarily managerial or executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act. Case law dictates that a

petitioner's blanket claim of employing the beneficiary as a manager or executive without a description of how, when, where and with whom the beneficiary's job duties occurred is insufficient for establishing employment in a primarily managerial or executive capacity. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108. The petitioner's 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).

Additionally, the limited evidence provided for the record suggests that the beneficiary performed non-qualifying functions of the foreign entity's business. The beneficiary identifies on his resume that one of the three responsibilities associated with his position as general manager of the digital video and multimedia division included "developing strategic marketing/business relationship[s]." Additionally, the beneficiary was responsible for providing customers with design, manufacturing, global logistics and after-sales services. As previously stated, the petitioner did not address the specific job duties related to these responsibilities, however, it appears that the beneficiary was personally providing services related to the foreign entity's products and performing the foreign company's marketing functions. 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).

The AAO notes that, despite the director's specific request, the petitioner did not identify the lower-level employees supervised by the beneficiary while employed abroad. The petitioner also failed to submit the requested organizational chart reflecting the foreign entity's structure and the beneficiary's former position within the company. This information is essential to establishing the beneficiary's position in a primarily managerial or executive capacity, particularly in light of the above-discussed non-qualifying job duties, which appear to be performed by the beneficiary. Without evidence regarding the foreign entity's organizational structure or the employees supervised by the beneficiary, the AAO cannot determine whether the beneficiary was relieved from performing the non-managerial and non-executive job duties related to the foreign company's marketing and product support services. Additionally, the record does not support the petitioner's claim that the beneficiary "*supervise[d]* the strategic business development, supply-chain and technology planning," as the petitioner has not identified any subordinate employees who were responsible for personally performing the tasks associated with the product development and planning. (Emphasis added). 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)).

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.

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

On Form I-140, the petitioner noted that the beneficiary would be employed as its president at an annual salary of $120,000. The petitioner indicated that it employed five workers at the time of filing the petition.

In an attached letter, dated December 10, 2003, the petitioner stated that as the president, the beneficiary "is entrusted with all of [the petitioner's] business operations," which encompasses the following job responsibilities:

- Leading the business development team to broaden the scope of both [the foreign entity's and its Mexican subsidiary's] manufacturing and logistics service in such product areas as Web Tablets, Smart Displays, and other digital consumer appliances.

- Outsourcing technologies and design [intellectual properties] from high-technology companies in the U.S. to enhance [the foreign entity's] product design capabilities.

- Working as a liaison to [the foreign entity's] design teams based in Taiwan.

- Over the next several years, building technology development teams for the emerging technology [research and development] and extending the Company's capabilities to assist in [the foreign entity's] migration into a global high-tech company.

[The beneficiary] directs and will continue to direct the management of the entire organization including establishing the goals and policies of the organization. He exercises wide discretion in decision making, and he reports only to the Board of Directors.

The petitioner explained that during his two years of employment with the petitioning entity, the beneficiary has been responsible for increasing profits and successfully launching the foreign entity's products with such companies as Microsoft and Intel. The petitioner submitted documentation confirming the beneficiary's completion of Bachelor and Master degrees in engineering and a Doctor of philosophy.

The director issued a request for evidence dated January 4, 2005, noting that the limited job description provided by the petitioner, which included "broad, undefined terminology," did not demonstrate the beneficiary's employment in a primarily qualifying capacity. The director asked that the petitioner submit the following documentary evidence of the beneficiary's proposed managerial or executive position: (1) a detailed description of the beneficiary's specific job duties, outlining the amount of time the beneficiary would devote to each task; (2) the petitioner's organizational chart identifying the beneficiary's position within the company; (3) a list of the beneficiary's subordinate employees, as well as the positions held and job duties performed by each; (4) the petitioner's most recently filed Internal Revenue Service (IRS) Form 941, Employer's Federal Quarterly Tax Return, and state quarterly tax return for the period ending December 2003; (5) IRS Form W-2, Wage and Tax Statement, for all workers employed in 2003; and (6) the petitioner's 2003 federal income tax return.

Counsel responded in a letter dated March 26, 2005. As evidence of the beneficiary's proposed employment as an executive, counsel submitted a letter from the foreign company, in which the company's corporate executive vice-president outlined the beneficiary's above-listed job duties. In an appended "summary," dated March 16, 2005, the petitioner explained that the beneficiary's job duties in the United States entity were split between two "main" responsibilities: "Business practices," which would encompass 75 percent of the beneficiary's time, and "Company Management," to which the beneficiary would devote the remaining 25

percent of his time.[1] The petitioner further explained that within the responsibility of "business practices," the beneficiary would allocate his time among the follow specific functions: wireless tablet sales – planning, execution, and sales review, 25 percent; business development of original design manufacturing (ODM) products – business planning, customer engagement, and execution supervision, 30 percent; and strategic business development for digital media applications – strategic direction, partnership, and planning for the foreign corporation, 10 percent. The petitioner stated that within his responsibility of "company management," the beneficiary would devote his time to the following tasks: (1) employee supervision, 15 percent; (2) expenses and income control, 12 percent; (3) key administrative work, 4 percent; (4) employees' pay, incentives, and benefits, 3 percent; and (5) board meetings and company reports, 1 percent. The petitioner provided a detailed description of the specific job duties associated with each of the above-outlined functions, however, as the summary is part of the record, it will not be repeated herein.

The petitioner also submitted the requested state quarterly tax report. The petitioner's tax report for the period ending December 2003, the relevant time period herein, indicates that the petitioner employed four workers, including the beneficiary, at the time of filing the petition. The petitioner did not submit the requested organizational chart or additional evidence requested by the director explaining the positions and job duties of the petitioner's employees, and particularly those subordinate to the beneficiary.

In his April 19, 2005 decision, the director concluded that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director addressed the beneficiary's job description, but noted that the petitioner, who referenced a "five-person management team" of the petitioning entity, did not submit any evidence pertaining to the job positions held by the managers. The director noted doubt that the five individuals of the management team were in fact employed as managers, stating that "[it is] highly unlikely that the company could function with only managerial employees, as there would be no one to provide the functional duties of the entity." The director concluded that the beneficiary would not be overseeing professional, managerial or supervisory employees. The director also concluded that while the beneficiary would perform "some managerial level duties, it appears that the majority of his time will be spent performing the functional duties of the entity rather than acting as a manager or executive." As evidence of the beneficiary's performance of non-qualifying business tasks, the director referenced the beneficiary's assistance in marketing the company's products to its customers, and his participation in the negotiation of sales agreements. Consequently, the director denied the petition.

In the petitioner's May 17, 2005 appeal, counsel contends that the director's denial of the petition "was . . . based on an erroneous characterization of the facts and a failure to fully consider all of the evidence presented." Counsel clarifies that when filing Form I-140, the petitioner requested employment of the beneficiary in a primarily executive capacity, but notes that he would also qualify under the statutory definition of manager. Counsel outlines each of the statutory criteria for "managerial capacity" and "executive capacity," and addresses how the beneficiary meets the qualifications under each capacity. Counsel also provided a "job duties description" outlining responsibilities of the beneficiary as president, and a May 12, 2005 affidavit from the chairman of its board of directors, in which the chairman confirmed the

[1] The AAO notes that in this same letter, the petitioner stated that the beneficiary would spend 65 percent of his time on the company's "business practices," while 35 percent of his time would be devoted to managing the company.

employment of the beneficiary in an executive capacity and outlined related job duties. As counsel's brief and the appended documents are part of the record, they will not be entirely repeated herein.

Counsel references the beneficiary's four subordinate managers who hold the positions of "senior manager of marketing and logistics," "vice-president of strategic business development," "strategic marketing manager," and "strategic product planning and business development." The AAO notes that in addition to the four managers named in counsel's May 17, 2005 letter, the petitioner's organizational chart submitted on appeal also identifies a "relationship and sales manager" and a "vice-president of finance and service contracts" as subordinate employees of the beneficiary.

Counsel also addresses on appeal the director's reference to the petitioner's small number of employees, and states that, as a result of the foreign company's subsidiaries in the United States and abroad, the reasonable needs of the petitioning organization are met and the company is operating at a profit. Counsel also attempts to clarify a "mistranslation" in the petitioner's March 16, 2005 summary of the beneficiary's job duties. Counsel states that the petitioner's reference to "business practices" as a responsibility of the beneficiary's actually means that he "is directing the management of the company and establishing its goals and policies."

Upon review, the petitioner has not established the proposed employment of the beneficiary 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). It is important to note that on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. *Id.*

In the instant matter, a critical review of the record supports a finding that at the time of filing the petition, the beneficiary's non-managerial and non-executive job duties would have exceeded those that were managerial or executive in nature. Consequently, the beneficiary would not be employed in the United States in a primarily qualifying capacity. Based on the petitioner's response to the director's request for evidence, the beneficiary would spend 65 percent of his time on "business practices." In its March 16, 2005 summary, the petitioner defined "business practices" as including such day-to-day functions as developing sales, devising annual sales plans, "defining product features," "determining customers' credit limits," providing assistance in marketing and promotions, developing product plans, visiting customers, and "conduct[ing] frequent customer dialogs." In addition, the beneficiary would be responsible for administrative tasks, including negotiating employee benefits and contracting for "network/communications," legal and outside services, and property insurance. According to the petitioner's representations, the beneficiary would devote approximately 69 percent of his time to the non-qualifying daily tasks associated with the research, development, and sales

services offered by the petitioner.[2] The petitioner also recognized this finding in its March 16, 2005 summary, in which it stated that a majority of the beneficiary's time "is spent conducting various business activities." 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).

The AAO recognizes the petitioner's attempt on appeal to clarify a "misinterpretation" of the beneficiary's role in a primarily managerial or executive capacity. However, the petitioner has not provided sufficient clarification or evidence that the beneficiary is not personally responsible for the above-named tasks. Counsel's blanket statement that the "business practices" performed by the beneficiary involves "directing the management of the company and establishing its goals and policies" is not sufficient to overcome the petitioner's initial representations of the beneficiary's job duties. Counsel has not addressed why the AAO should not consider the above-outlined non-qualifying tasks to be responsibilities of the beneficiary. Specifically, counsel has not explained why in its March 16, 2005 letter the petitioner designated the non-qualifying tasks associated with the company's "business practices" as the beneficiary's responsibilities, yet subsequently described the term "business practices" as executive in nature. Additionally, the beneficiary's resume confirms that the beneficiary's "specialization" in "business development" includes the "strategic planning of digital consumer products" and developing the market for such products. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and 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).

Moreover, it appears that counsel is using the appeal as an opportunity to revise the beneficiary's position. The petitioner's May 12, 2005 affidavit reflects a list of job responsibilities for the beneficiary that the petitioner originally represented in its March 16, 2005 summary would consume 35 percent of the beneficiary's time. On appeal, it appears that these are the beneficiary's primary responsibilities. More importantly, the petitioner's affidavit on appeal fails to mention the functions related to the petitioner's "business practices," which it initially represented would consume 65 percent of the beneficiary's time. The petitioner may not alter on appeal the beneficiary's job responsibilities in an attempt to correct deficiencies addressed by the director in his decision. Without additional evidence, it appears that counsel is attempting to resolve the issue raised by the director: that the beneficiary is "performing the functional duties of the entity." Evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence.

The record does not support a finding that the beneficiary would be relieved from performing these non-qualifying job duties by a subordinate staff. The AAO again notes that where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Here, the petitioner submits evidence on appeal of the petitioner's staffing levels and the employees to be supervised by the beneficiary. As the director previously requested this evidence in his January 4, 2005 notice, the appeal will be adjudicated based on the record of proceeding before the director.

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[2] The AAO notes that due to the petitioner's inconsistent statements in its March 16, 2005 summary, the beneficiary would spend either 69 or 79 percent of his time performing the above-named job duties.

Although the petitioner referenced in its March 16, 2005 summary three managers and a vice president who report directly to the beneficiary, there is no specific evidence of the job duties performed by each. As referenced by the director, other than "working consistently to contribute to the company's growth," it is unclear what the petitioner's "five-person management team" is doing, particularly with regard to supporting the beneficiary in a primarily managerial or executive capacity. The AAO notes that this information was specifically requested by the director. Again, the 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). While the petitioner noted in its March 16, 2005 letter that the vice-president of finance would ensure financial management of the company, including preparing monthly financial and analysis reports, it did not submitted essential evidence confirming the employment of the vice-president of finance. The petitioner's state quarterly tax return for the period ending December 31, 2003 does not identify the vice-president as an employee. Nor does the petitioner's 2003 income tax return reflect that the vice-president was compensated as an officer of the organization or as contracted labor. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The AAO addresses counsel's blanket claim on appeal that the reasonable needs of the organization have been met by the petitioner's five-person management team. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, counsel has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Counsel further contends on appeal that in its denial of the instant petition, CIS erroneously re-adjudicated the petitioner's previous two L-1A nonimmigrant visa petitions. Counsel cites an April 23, 2004 CIS memorandum, in which the Associate Director of Operations provides instruction for adjudicating matters related to the extension of a nonimmigrant petition involving the same parties and the same underlying facts.

The AAO notes that the referenced memorandum pertains to the review of the extension of nonimmigrant petitions whereas the instant petition is an initial request for an immigrant multinational manager or executive

visa. It should also 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).

The appeal will be dismissed based on the petitioner's failure to demonstrate that the beneficiary was employed abroad or would be employed in the United States in a primarily managerial or executive capacity.

The AAO notes that the petitioner is not barred from filing a new immigrant petition for the beneficiary, with the required supporting documentation, based on his revised job responsibilities.

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.