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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: NOV 23 2005
SRC 04 123 52653

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

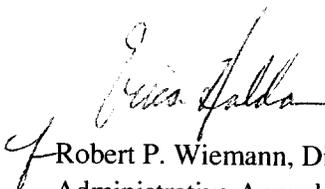
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Delaware that is licensed to do business in the State of Florida as a wholesaler of men's clothing. The petitioner seeks to employ the beneficiary as its vice-president of marketing and merchandising.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) a qualifying relationship existed between the foreign and United States entities; (2) the beneficiary was employed abroad or would be employed in the United States in a primarily managerial or executive capacity; (3) the petitioning entity has doing business in the United States for at least one year prior to the filing of the instant petition; or (4) the foreign entity is doing business in Canada.

On appeal, the petitioner challenges the director's findings claiming that a qualifying relationship exists between the two companies as a result of the petitioner's ownership of 50 percent of the foreign entity's issued stock. The petitioner further claims that the beneficiary would be employed in an executive capacity, and that both the foreign and United States organizations have been doing business for more than one year prior to the filing of the petition. The petitioner submits a brief and additional documentary evidence in support of the 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 a qualifying relationship exists between the foreign and United States entities.

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;

* * *

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 filed the instant petition on March 26, 2004. In an attached affidavit, dated March 1, 2004, the petitioner noted an affiliate relationship between the United States and foreign entities. The petitioner did not submit documentary evidence of a qualifying relationship with the immigrant petition.

In her February 22, 2005 Notice of Intent to Deny, the director asked that the petitioner submit documentary evidence establishing ownership and control between the foreign and United States organizations. The director noted that such evidence may include stock certificates, corporate by-laws or constitutions referencing stock ownership, certified corporate affidavits describing ownership, or published annual reports. The director asked that the petitioner also submit its articles of incorporation and 2003 corporate tax return.

In response, the petitioner submitted a stock certificate identifying [REDACTED] as the owner of 1,500 shares of stock in the petitioning entity, and an additional stock certificate, numbered "four," also identifying [REDACTED] as the owner of 100 shares of stock issued by the foreign entity. The petitioner also submitted a copy of an application to amend its corporate name, a certificate of amendment of its certificate of incorporation, and certification from the State of Delaware confirming the petitioner's change of name. The petitioner further provided its 2003 Internal Revenue Service (IRS), Form 1120S, U.S. Income Tax Return for an S corporation. An attached IRS Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, identified [REDACTED] as a 50 percent shareholder in the foreign entity. An attached Schedule K-1, Shareholder's Share of Income, Credits, Deductions, etc., identified [REDACTED] as the owner of 100 percent of the petitioner's stock.

In a decision dated April 1, 2005, the director concluded that the petitioner had not demonstrated that the purported affiliate relationship existed between the foreign and United States entities. The director noted the petitioner's failure to present copies of stock certificates one, two, and three previously issued by the foreign entity. The director also stated that the petitioner had not offered the foreign entity's articles of incorporation, which the director noted may have identified how many stock certificates and shares of stock had been issued. The director stated that "[i]t cannot be assumed that the shares owned by [REDACTED] represent 100% of the shares of the foreign company." Consequently, the director denied the petition.

On appeal, the petitioner states on Form I-290B that a qualifying relationship exists as a result of the petitioner's ownership of 50 percent of the shares issued by the foreign entity. As evidence of a qualifying relationship, the petitioner submitted a December 28, 2001 shareholder agreement from the foreign entity and a [REDACTED] of the foreign entity, both of which named "[REDACTED] and [REDACTED] as the owners of 100 shares of stock each. The petitioner submitted copies of cancelled stock certificates, numbered one and two, previously issued by the foreign entity, and stock certificates three and four which reflected [REDACTED] and [REDACTED] cumulative ownership of 200 shares of stock. The petitioner submitted untranslated copies of the foreign entity's certificate of incorporation and articles of incorporation.

Upon review, the petitioner has not demonstrated the existence of the purported affiliate relationship between the foreign and United States companies. Because the petitioner failed to submit certified translations of a portion of the foreign entity's corporate documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The additional evidence offered on appeal in support of a qualifying relationship contradicts evidence previously submitted by the petitioner. Based on the foreign entity's stock certificates, 200 shares of stock have been issued since its incorporation. Although the stock ownership reflected on the foreign entity's issued stock certificates is confirmed in its shareholder agreement and "Resolution," the petitioner reported contradictory information on its IRS forms. On IRS Form 5471, which covered the period July 1, 2002 through June 30, 2003, the petitioner noted that the foreign entity had issued 100 shares of stock, and that [REDACTED] owned 50 shares of the issued stock. This is in contrast to the stock certificate, which identified [REDACTED] as the owner of 100 shares of stock. The petitioner has not acknowledged this discrepancy, nor offered an explanation of the stock ownership in the foreign entity. Clarification of the foreign entity's stock ownership is relevant to determining whether [REDACTED] possesses ownership and control of both organizations, and essential to establishing the purported affiliate relationship. The AAO emphasizes that IRS Form 5471 was filed more than two years after the purported stock issuances to [REDACTED] and [REDACTED]. Furthermore, even if the AAO were to consider ownership of the foreign entity by individuals, the petitioner has not clarified this with its claim on appeal that "the petitioner holds 50% of the shares of the foreign company [and therefore,] prove[s] the existence of a qualifying relationship between both the foreign and US companies." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the director requested specific documentary evidence which the petitioner did not submit until the appeal. Specifically, the director noted that the evidence submitted in response to her Notice of Intent to Deny should include stock certificates, corporate by-laws and constitutions. The petitioner submitted this documentation related to the foreign entity on appeal. Moreover, the petitioner failed to supply its articles of

incorporation as requested by counsel, submitting only a confirmation of its name change. 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).

As a result of the inconsistencies, the AAO cannot determine the ownership of the foreign entity, and likewise, whether an affiliate relationship exists between the foreign and United States companies. Accordingly, the appeal will be dismissed.

The AAO will next consider 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-

- (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.

In its March 1, 2004 affidavit submitted with the immigrant petition, the petitioner noted that the beneficiary had been employed by the foreign company in an "executive/managerial capacity." As the petitioner did not submit evidence related to the beneficiary's employment capacity, the director asked in her February 22, 2005 Notice of Intent to Deny that the petitioner submit the following: (1) a "definitive statement" identifying the beneficiary's position, job duties, the percentage of time spent on each task, and the number of subordinate managers, supervisors and employees who report directly to the beneficiary; and (2) the staffing level in the foreign company, including the job titles and duties performed by each employee and the level of education completed by the workers.

In response, the petitioner submitted a statement written by the president of the foreign company, in which he outlined the following job duties performed by the beneficiary as the company's "marketing manager":

- Intercompany [c]oordination: daily communications and follow up between our Canadian office and our US office for the shipping and receiving of samples, inventory, goods and products, marketing strategies, etc. . .
- Preparation of all required documentations for the customs release of shipments from the United States and form offshore factories
- Merchandising all samples receiving into several collections and dispatching them to our sales representatives.
- Devising and establishing clearly defined marketing strategies
- Creating press and advertising material for trade publications as well as for the retail industry and consumer publications.
- Setting up our participation and representation in trade shows.
- Overall management of the office and full charge of all personnel at all level[s]

The foreign entity's president stated that the beneficiary divided her time among the job duties according to "daily" priorities. He explained that the foreign entity's "open door policy" created an environment such that each employee, except for the company's president, reported to the beneficiary, who also acted as the "general office manager." The petitioner submitted a list naming the positions of the fifteen workers who are employed by the foreign entity and briefly stating their job duties.

In her April 1, 2005 decision, the director concluded that the petitioner had not established that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. Following a review of the beneficiary's job duties, the director found that the beneficiary's tasks of preparing import and export documents, "merchandising samples and creating marketing material" were not managerial in nature. The director stated that the beneficiary was performing the "day to day marketing duties of the company." The director also noted that other than two employees, none of the beneficiary's subordinates held

a professional degree. The director concluded that the beneficiary was not primarily supervising professionals. Consequently, the director denied the petition for the petitioner's failure to demonstrate that the beneficiary's employment abroad satisfied the regulatory criteria for "managerial capacity" or "executive capacity."

In its April 27, 2005 letter filed on appeal, the petitioner contends that the beneficiary "was employed in full and absolute managerial/executive capacity." In an appended letter from the foreign entity, dated April 22, 2005, the company's president explains that the beneficiary's former position as marketing manager included the following:

Directing the overall management of the company as well as focusing on developing and staffing a marketing department tailored to the needs of our company. She was consequently responsible for establishing goals and policies for the company such as what products from our US company were suitable for the Canadian Market, how to market them successfully and overseeing the realization of our long term and short term objectives. In doing so, she exercised substantial latitude in discretionary decision making in all aspects of our company's day to day activity. Our company being a small one, without any actually defined departments, and all employees engaging in various and different activities defined by priority, she supervised all employees and was free to employ any members of the staff for any particular task or job. She also had decision making authority on the salaries paid, except that of the President, as well as hiring or dismissing employees. Finally, she received actually no supervision or direction from any higher level, but chose at her own discretion to conference with the President on a regular basis.

In its April 27, 2005 letter, the petitioner clarifies information submitted in response to the director's notice of intent to deny, stating "the [beneficiary's] duties were listed and described as being her responsibility without mentioning that the functions are not directly performed by herself." The petitioner stated that "the majority of these duties are performed by lower level staff," while the beneficiary "directs the management of the company, establishes sales and marketing goals and policies, determines which employees will be responsible for the particular corporate goals, supervises work, and makes final decisions pertaining to the companies major departments."

Upon review, the petitioner has not established that the beneficiary was employed abroad 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 has not clarified whether the beneficiary's employment abroad encompassed primarily managerial job 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 a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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. Here, particularly in the petitioner's April 22, 2005 letter, the petitioner blends the statutory criteria for "managerial capacity" and "executive capacity," stating that the beneficiary directed the management of the organization, established goals and policies, exercised latitude in discretionary decision-making, supervised employees, and had the authority to hire and

fire employees. Despite the beneficiary's managerial title, the petitioner outlines executive job duties, which, as discussed further, are not supported by the record.

The petitioner's vague and limited statements fail to establish that the beneficiary was employed in a managerial or executive capacity. On appeal, in particular, the petitioner merely restates portions of the statutory definitions of "managerial capacity" and "executive capacity" without identifying specific daily managerial or executive job duties. *See* sections 101(a)(44)(A) and (B) of the Act. 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).

Additionally, as properly noted by the director, the beneficiary was performing many non-qualifying functions of the foreign business. Specifically, the beneficiary was responsible for devising the foreign company's marketing strategies, including creating advertisements and consumer publications, preparing customs documentation, representing the company at trade shows, "merchandising" and "dispatching" samples, and maintaining communications pertaining to shipments to the petitioning entity. While the petitioner maintains on appeal that the foreign entity's lower-level employees actually performed "the majority of these duties," the record does not substantiate the petitioner's claim. Of the fourteen lower-level employees listed as personnel of the foreign entity, none are described as performing the above-mentioned tasks. The AAO acknowledges that the petitioner accounted for the performance of such lower-level tasks as "picking and packing," "inventory control," and "order entry [and] invoicing." However, because the petitioner failed to provide a more detailed description of what these tasks entail, and particularly whether they included the performance of "merchandising" and "dispatching," which were identified as job responsibilities of the beneficiary, the AAO cannot conclude that the lower-level employees relieved the beneficiary from performing at least a portion of the above-named non-managerial and non-executive job duties. The AAO emphasizes that the petitioner did not identify any lower-level employees who were responsible for the foreign entity's marketing, advertisements, publications, or customs documents. 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)). Therefore, it is reasonable to conclude that the beneficiary was primarily performing non-managerial and non-executive functions of the foreign entity. 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).

Furthermore, the petitioner has not demonstrated that the beneficiary was supervising and controlling other supervisory, managerial or professional employees as required in the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. While the petitioner identified such lower-level employees as "sales manager," "operations manager," "warehouse manager," and "office manager," the record does not contain an organizational chart demonstrating that these workers were employed in a managerial role. Rather, it appears the beneficiary

occupied a position of first-line supervisor, as the record is also devoid of evidence that the employees supervised were professional. *See* 8 C.F.R. § 204.5(j)(4).

Based on the foregoing discussion, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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

The petitioner noted on the immigrant petition that in the position of vice-president of marketing and merchandising, the beneficiary would:

[D]etermine the demand for products; Devise [and] implement marketing strategies with the goal of maximizing [the] firm's profits [and] market share; [and] oversee product development[.]

In its attached March 1, 2004 affidavit, the petitioner stated that in addition to the above-mentioned job duties, the beneficiary would also be responsible for "merchandis[ing]" the company's four apparel collections, developing and introducing marketing strategies, coordinating attendance at trade shows, and creating advertisements for United States and Canadian markets.

In the February 22, 2005 Notice of Intent to Deny, the director asked that the petitioner submit the following documentation establishing the beneficiary's employment capacity in the United States: (1) a "definitive statement" identifying the beneficiary's position, job duties, subordinate managers, supervisors, and employees; (2) a statement noting the percentage of time the beneficiary would spend on each task; (3) a brief description of the lower-level employees' job titles, job duties and educational levels; (4) documentary evidence, such as IRS Form W-2, reflecting the petitioner's staffing level and all workers employed in 2003 and 2004; and (5) Form 941, quarterly tax report, for each quarter in 2004.

The petitioner responded in a letter dated March 4, 2005, stating that in the position of vice-president of marketing and merchandising, the beneficiary would perform the following job duties:

- Merchandising the company's yearly [four] collections of men's apparel.
- Devising [and] implementing innovative marketing strategies
- Scheduling [and] organizing the company's participation in major trade shows.
- Attending all trade shows as the company's public relations person and to assist sales representatives and customers.
- Preparing print advertising [and] marketing material for our sales associates and for the retail industry in English for the US market and in English/French for the Canadian market
- Creating seasonal catalogs and other sales promoting material for our US and Canadian representatives
- Preparing salesmen sample collections for the Canadian Market and conducting sales meetings with our Canadian representatives.
- Supervising all shipments of merchandise/stock to the Canadian Office and preparing all required documentation.

- Coordinating the making of samples from offshore factories and preparing the required documentation.
- Executive assistant to the CEO
- Overall management of the office and fill charge of all personnel at all level in the absence of the CEO.
- Full decision making authority in the absence of the CEO.

In response to the request to allocate the time spent on each job duty, the petitioner stated that because of the "seasonal" nature of the garment industry, "there are certain duties which are concentrated over a period of several months and where deadlines and pressure necessitate that the beneficiary work full time on these duties on a parallel level to her other general duties."

With regard to the beneficiary's subordinate employees, the petitioner explained that during the chief executive officer's absence, the beneficiary would supervise all division managers and supervisors, which, according to the employee list provided by the petitioner, includes twenty-nine employees.¹ The petitioner stated that, specifically, five employees, including two coordinators, a supervisor, and two assistants, would report to the beneficiary in connection with the "preparation of collections and selling material," while a manager, bookkeeper, shipper, and office assistant would report to the beneficiary for samples and merchandise shipments. The petitioner explained that the Canadian company's managing staff would also report to the beneficiary regarding issues concerning the transfer of goods, inventory, and samples from the petitioning entity to the Canadian company. The petitioner stated:

All other duties of the beneficiary such as marketing and developmental strategies, projects, proposals, and all written material for public relations purposes are the fruit of her own individual labor and represent an essential function within the organization; the end result of this work being the promotion of our products and goods, the increase of our business both in the USA, CANADA and eventual[ly] other markets, and the sustained growth of our company.

Finally, as the second in charge after the CEO, the beneficiary will fill an essential position within the company.

The petitioner submitted a list identifying thirty-five workers, and provided the requested IRS Form W-2 for all workers employed during 2004. The AAO notes that the petitioner did not provide a Form W-2 for four of the workers identified.

In her April 1, 2005 decision, 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 stated that the beneficiary's job description demonstrates "that she is performing the day to day marketing duties of the company," including preparing import and export documents, "merchandising samples, creating marketing strategies, creating catalogs, and creating marketing material." The director also stated that the beneficiary's position does not satisfy the four statutory criteria of "managerial capacity," as she would not be primarily supervising professional employees. The director explained, "that the petitioner has

¹ It is unclear from the petitioner's representations whether the beneficiary would also supervise the four vice-presidents of the operations, golf and resort, credit management, and consulting departments.

not demonstrated that the beneficiary's primary assignment . . . will be primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel, who relieve [her] from performing nonqualifying duties." Consequently, the director denied the petition.

On appeal, the petitioner contends that the beneficiary occupies an executive position within the United States organization. In support of the beneficiary's employment in a qualifying capacity, the petitioner submitted two letters, both dated April 15, 2005, noting that the beneficiary would direct the management of the marketing department, establish marketing goals and policies, "exercise wide latitude in discretionary decision making" in the company's day-to-day activities, supervise the daily activities of all departments, and execute the following specific tasks:

- A) Directing the general management of the company: . . . In her capacity as Vice President of Marketing and Merchandising, the beneficiary has direct management capacity over the [design, sales, invoicing and shipping] departments to ensure that [the petitioner's] product is designed, sold, invoiced and shipped according to the company's goals and policies.
- B) Establishing goals and policies of the company: The beneficiary in her capacity as Vice President of Marketing and Merchandising is entrusted with devising and implementing goals and strategies for the company to develop and market a successful product. Based on the continuous market research, the beneficiary will systematically and regularly evaluate the company's long term and short term goals and establish policies to be followed by every department of the company.
- C) Decision Making: the beneficiary is entrusted with wide latitude in discretionary decision making. This is a major component of her job description. The beneficiary establishes if a product is suitable to our customer base [and] how it is to be marketed and sold. Consequently, the beneficiary is also entrusted in hiring and firing and additional staffing needs are [sic] they arise on a part time and/or full time basis. In addition, in the absence of the CEO, who travels extensively to the Orient, Europe and frequently to New York, the beneficiary has full decision making authority over all and every aspects of the company.
- D) Reporting to the CEO of the company: The beneficiary is required to report only to the CEO of the company and only at the beneficiary's discretion.

The petitioner also explained in an April 27, 2005 brief that the job duties listed in its March 4, 2005 letter were "described as being [the beneficiary's] responsibility without mentioning that the functions are not directly performed by herself." The petitioner stated that "the majority of these duties are performed by lower level staff in various departments of the company depending on the nature of the task."

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

As noted previously, 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). On appeal, the petitioner

claimed to employ the beneficiary in an executive capacity yet identified "managerial" responsibilities. A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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.

It is unclear from the job description provided by the petitioner over which departments and employees the beneficiary has authority. The petitioner has presented inconsistent claims regarding the scope of the beneficiary's purported executive authority, stating in its April 15, 2005 letters that the beneficiary "direct[s] the management of the company's *marketing* department," and "[directs] the *general management* of the company." (Emphasis added). The petitioner's statement that "all division managers/supervisors will report directly to the beneficiary" also fails to clarify the specific employees supervised by the beneficiary, particularly whether the beneficiary has executive authority over the company's four vice-presidents. 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.

Despite the inconsistent representations of the beneficiary's subordinate staff, the record demonstrates that the beneficiary would primarily perform non-qualifying functions of the petitioning entity. Based on the petitioner's representations, the beneficiary would be personally responsible for the petitioner's marketing and promotions, including designing the petitioner's catalogs and advertisements, attending trade shows "as the company's public relations person," and "devising . . . innovative marketing strategies." While the marketing of the petitioner's products may be an essential function, as claimed by the petitioner on appeal, there is no evidence that the beneficiary is "managing" this function, as required in the statutory definition of "managerial capacity." See § 101(a)(44)(A) of the Act. The petitioner has not identified any employees who are performing the marketing functions of the company. Rather, it is clear from the evidence presented that the beneficiary is personally responsible for performing the above-named non-qualifying marketing tasks. 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.

Additionally, as noted by the director, it appears that the beneficiary is personally responsible for preparing customs documents and the documentation associated with the coordination of samples from offshore factories. Although the petitioner identified four employees subordinate to the beneficiary who would assist in the shipment of samples and merchandise, none was identified as being responsible for the actual preparation of the related documentation. Additionally, the petitioner has not identified any lower-level employees who would relieve the beneficiary from preparing the petitioner's customs documents. Again, 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. *Id.*

The AAO notes that the petitioner has the responsibility of establishing that the beneficiary would be *primarily* employed in the United States in a qualifying capacity. See §§ 101(a)(44)(A) and (B) of the Act. Consequently, an accurate allocation of the percentage of time the beneficiary would spend on each job duty is essential to determining the true employment capacity of the beneficiary. Here, the petitioner's vague statement that "100% of the beneficiary's time will be spent in the duty that requires the priority at the precise moment," in conjunction with the findings addressed above, fails to substantiate the claim that the beneficiary would be employed in a primarily executive capacity. 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. Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed for this additional reason.

The AAO will next consider the issue of whether the petitioning entity was doing business in the United States for at least one year prior to filing the instant immigrant petition.

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petitioner noted on the immigrant petition that it was established in 1996 as a wholesaler of men's clothing and has a gross annual income of approximately \$3,555,904. As the petitioner did not submit documentation related to its business activity from March 23, 2003 through the filing of Form I-140, the director subsequently requested that the petitioner provide invoices, bills of sale, product brochures, and its 2003 corporate tax return. In response, the petitioner submitted numerous invoices from the petitioning entity to the Canadian company dated April 24, 2003 through March 6, 2005. The petitioner also provided copies of its certification to amend its corporate name, a copy of its commercial lease for premises commencing on July 1, 2004 and company brochure, as well as its unaudited 2003 balance sheet and its 2003 corporate tax return reflecting a gross profit of approximately \$3,555,000.

The director concluded in her April 1, 2005 decision that the petitioner had not demonstrated that it had been doing business in the United States for at least one year prior to the filing of the instant petition. The director, noting that the petitioner has provided invoices from April 24, 2003 through March 8, 2005, stated that the petitioner had not "clearly established" that it had been doing business since March 26, 2003, one year prior to the date on which the petition was filed. Consequently, the director denied the petition.

On appeal, the petitioner states that it "has been doing business continuously and was doing business for more than [one] year at the time the petitioner was filed." In the attached brief, the petitioner notes the evidence provided in support of its business activity, including invoices to customers dated September 26, 2002 through April 23, 2005. The petitioner claims that the invoices "establish that the petitioner was doing business as of and prior to March 26, 2003."

Upon review, the petitioner has demonstrated that it has been doing business for at least one year prior to filing the petition. The record contains invoices from March 26, 2003 through March 26, 2004, the date of filing Form I-140, evidencing the sale of goods to the foreign company. Despite the fact that the transactions represented on the petitioner's invoices are solely between the petitioner and the foreign entity, the petitioner has demonstrated that it is doing business in the United States. Accordingly, the director's decision pertaining to this issue only will be withdrawn.

The remaining issue is whether the petitioner demonstrated that the foreign entity is doing business in Canada.

Classification as a "multinational executive or manager" implies that the organizations by which the beneficiary is employed are conducting business in two or more countries. *See* 8 C.F.R. § 204.5(j)(2) (defining "multinational" as "[a] qualifying entity, or its affiliate, or subsidiary, [which] conducts business in two or more countries, one of which is the United States).

As the petitioner did not submit evidence with the filing of Form I-140 demonstrating the foreign company's business activities in Canada, the director requested that the petitioner provide invoices, bills of sale and product brochures from the foreign entity. In response, the petitioner submitted the foreign entity's unaudited balance sheet as of June 30, 2004, reflecting gross profit for 2003 and 2004 as \$635,056 and \$719,736, respectively. The petitioner also provided the foreign entity's tax return for the tax year July 1, 2003 through June 30, 2004.

In her April 1, 2005 decision, the director determined that the petitioner had not established that the foreign entity was doing business in Canada. The director again noted that the invoices reflected items transferred between the petitioner and Canadian companies, and do not "clearly establish that the foreign company is engaged in the regular, systematic and continuous provision of goods and/or services." Consequently, the director denied the petition.

On appeal, the petitioner contends that the foreign company meets the regulatory criteria of doing business. As evidence of the foreign entity's operations, the petitioner submits invoices dated October 4, 2002 through March 25, 2005, sales journals for the dates September 2002, August 2003, March 2004, September 2004, and March 2005, bank statements for various dates in November 2002 through January 2005, and 2002 through 2005 invoices from suppliers to the foreign entity.

Upon review, the petitioner has not established that the foreign entity has been doing business. 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).

As noted previously, 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. at 766. The petitioner did not submit for review by the director the requested invoices issued by the foreign entity. The invoices offered by the petitioner in response to the director's request pertained only to those goods shipped by the petitioning entity to the Canadian company, and did not reflect business operations of the foreign entity. The petitioner submits on appeal invoices issued by the foreign entity and those received by the foreign entity from suppliers. 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.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The petitioner also provided sales journals and bank statements. This evidence, by itself, is not sufficient to demonstrate that the foreign entity was engaged in the "regular, systematic, and continuous provision of goods" at the time of filing the petition. 8 C.F.R. § 204.5(j)(2). The sales journals apply to September 2002, August 2003, March and September 2004, and March 2005. Additionally, the bank statements for the year 2004 pertain only to the months January, May, June, November, and December. The petitioner has not

provided consecutive sales journals or bank statements reflecting "continuous" business operations. As a result, the AAO cannot conclude that the foreign entity was doing business at the time of filing the immigrant petition. Consequently, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated that it has the ability to pay the beneficiary her proffered annual salary of approximately \$55,016. 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 the proposed annual 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 petitioner did not supply its 2004 corporate tax return, the AAO cannot ascertain whether the petitioner has sufficient net taxable income to pay the proffered wage of \$55,016. Accordingly, 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 AAO notes the prior approval of an L-1A nonimmigrant visa petition for 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.

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(I)(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 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.