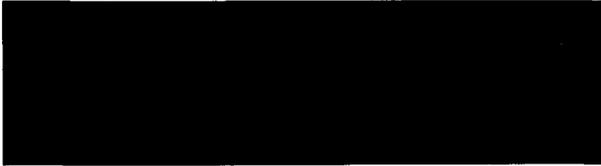




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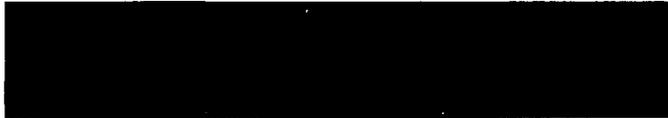
Office: CALIFORNIA SERVICE CENTER

Date: NOV 23 2005

IN RE:

Petitioner:

Beneficiary:



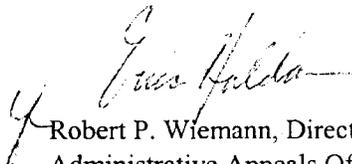
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Arizona in March 1998. It is engaged in the insurance business. It seeks to employ the beneficiary as its executive vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established: (1) that it had a qualifying relationship with the beneficiary's foreign employer; (2) that the beneficiary would be employed in a managerial or executive capacity with the petitioner; (3) that the beneficiary had been employed in a managerial or executive capacity for the foreign entity for one year prior to entering the United States as a nonimmigrant; (4) that it had the ability to pay the beneficiary the proffered annual wage of \$150,000; or, (5) that it had been doing business for one year prior to filing the petition on May 21, 2004.

On appeal, counsel for the petitioner asserts: (1) that the petitioner is a joint venture between an Australian corporation (John Benson & Associates Pty, Ltd.) and Infinity Capital Services and that each entity has equal control and veto power over the petitioner; (2) that the beneficiary has maintained full-time employment with the petitioner in a managerial capacity; (3) that the beneficiary was employed as an executive director and chief operation officer of John Benson & Associates Pty, Ltd., from January 1997 to January 1998; (4) that the petitioner's wholly-owned subsidiary received a total of \$446,000 in revenue in 2003, an amount sufficient to cover the beneficiary's base salary, bonuses, and profit sharing payments totaling \$164,000; and, (5) that the petitioner had been doing business in the United States since 1998, through its wholly-owned subsidiary.

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

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

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

The first issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

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

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner in this matter claims that John Benson & Associates Pty. Ltd., employed the beneficiary prior to his entry into the United States as a nonimmigrant. The petitioner initially did not submit documentary evidence to support its claim that the petitioner and the foreign entity enjoyed a qualifying relationship as defined by the pertinent parts of 8 C.F.R. § 204.5(j)(2).

On February 1, 2005, the director requested further evidence including: proof the foreign parent company had paid for its interest in the petitioner; copies of all the petitioner's stock certificates issued; the petitioner's stock

ledger; a copy of the foreign entity's articles of incorporation; copies of the foreign company's business bank statements and business licenses; and, copies of the foreign entity's payroll records pertaining to the beneficiary for the year preceding the filing of the petition.

In a March 25, 2005 letter in response, the petitioner's chairman stated that the "Australian operation is solely dependent upon revenues generated from our US operations," and that the chairman's personal counsel would be acting as the foreign entity's group general manager and would house the foreign entity's business offices within his legal offices. The petitioner also attached its 2003 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return showing on Schedule K, Line 5 and the accompanying statement, that "Specialty Admin Services Pty Ltd" owned 51 percent of the petitioner's voting stock.

The petitioner also provided a March 17, 2005 letter from the attorney and general manager of the foreign entity. The attorney indicated that a review of a financial journal forwarded by the beneficiary showed that a telegraphic wire transfer in the amount of \$8,000 was delivered to the beneficiary's Bank One personal account in March 1998 to reimburse the beneficiary for the cost of incorporation and to provide funding for sundry expenses incurred in the start up "of a [redacted] Pty Ltd sponsored and affiliated counterpart company in the United States of America." The petitioner also provided letters from the beneficiary and an accountant to confirm the transfer of monies to the beneficiary for the petitioner's start up.

The petitioner's chairman who is also identified as the sole shareholder of the foreign entity, [redacted] and Associates Pty Limited, indicates in a March 25, 2005 letter that he owns 50 percent of the petitioner's shares in trust for John Benson and Associates Pty Limited. In the same letter, the petitioner's chairman referenced an agreement with [redacted] wherein the petitioner agreed to transfer 50 percent of its shares to Infinity Capital Services Inc, a wholly-owned subsidiary of [redacted]. The petitioner also included its stock ledger showing that it had issued share certificate number 100 to [redacted] for [redacted] Pty Limited in the amount of 500 shares in March 1998; share certificate number 101 to [redacted] in March 1998 in the amount of 100 shares; share certificate number 102 to the beneficiary in March 1998 in the amount of 400 shares; and share certificate number 103 to Infinity Capital Services Inc. in February 2004 in the amount of 500 shares.

On May 18, 2005, the director denied the petition observing the inconsistencies between the petitioner's 2003 IRS Form 1120 and the other information provided by the petitioner and concluding that Citizenship and Immigration Services (CIS) could not determine the claimed qualifying relationship between the petitioner and the beneficiary's foreign employer.

On appeal, counsel for the petitioner provides an updated stock ledger that shows that stock certificates 101 and 102 were cancelled and stock certificate 103 was issued to Infinity Capital Services Inc. in February 2004 in the amount of 500 shares. The revised stock ledger also shows that stock certificate number 100 in the amount of 500 shares was transferred to Specialty Admin Services Pty. Ltd., in January 2003 and was transferred again to [redacted] in February 2004 and on the same date was transferred to [redacted] for [redacted] Pty. Ltd. Counsel asserts that Infinity Capital Services Inc. and [redacted] for [redacted] Pty. Ltd. each own 50 percent of the petitioner.

Counsel's assertion is not persuasive. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. The record does not contain consistent evidence that would support counsel's assertion. 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).

Moreover, the petitioner's failure to include the "updated" stock ledger in support of the petition or in response to the director's request for evidence casts doubt on its legitimacy. 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). 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. 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). Further, 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).

Further, neither counsel nor the petitioner have reconciled or offered adequate explanations regarding the inconsistencies between the petitioner's 2003 IRS Form 1120 with the myriad number of transfers of the petitioner's stock between the foreign entity's claimed sole shareholder and other parties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Hö*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. In this matter the petitioner has not provided evidence of the purported joint venture agreement between the

beneficiary's claimed foreign employer and the unrelated third party. 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)). As the director correctly found, the record does not provide sufficient evidence to determine that a qualifying relationship exists between the petitioner and the beneficiary's claimed foreign employer. For this reason, the petition will not be approved.

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

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), 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 a May 19, 2004 letter appended to the petition, the petitioner stated that the beneficiary "holds the position of Executive Vice President in [REDACTED] Inc. ([REDACTED]) and President of [REDACTED] insurance division: [REDACTED] LLC and Pacific Marketing Investments, LLC (together [REDACTED])." The petitioner indicated that the beneficiary as executive vice president would be responsible for all administrative elements of the petitioner's operation and analysis of all new markets and investments for the company and the company's affiliates. The petitioner referenced the beneficiary's authority to make decisions on all daily operations and report only to the chairman and chief executive office of the petitioner. The petitioner also noted the beneficiary's duties for the [REDACTED] and his lead role in the development of the petitioner's alliance with [REDACTED] LLC.

On February 1, 2005, the director requested a more detailed description of the beneficiary's duties including what the beneficiary would do in the day-to-day execution of his position, the percentage of time the beneficiary would spend in each of the listed duties, and a list of the employees under the beneficiary's direction. The director also requested the petitioner's organizational chart including the names of all executives, managers, supervisors, and number of employees within each department or subdivision.

In a March 25, 2005 response, the petitioner listed the beneficiary's duties for the petitioner as:

- Oversees daily operations of the company
- Builds financial models
- Identifies new markets and assesses investment opportunities
- Designs new products and marketing strategies
- Implements new insurance products into market
- Manages relations with affiliates
- Prepares financial reports of the company
- Orders, reviews and approves all medical reports required for qualification of life insurance policy stock

The petitioner also listed the beneficiary's duties for the [REDACTED] and included new duties assumed by the beneficiary since the petition had been filed in May 2004. The petitioner indicated that the beneficiary currently split his time equally between two new product lines. The petitioner's updated organizational chart identified three individuals associated with the operations of the petitioner, the chairman, [REDACTED] the beneficiary as the president of USA operations, and an individual associated with a retail marketing partnership.

The petitioner provided its 2003 IRS Form 1120 showing that no income, salaries, or wages had been paid, and that it had a total of \$237 in assets. The petitioner also provided [REDACTED] LLC, 2003 IRS Form 1065, U.S. Return For Partnership Income, which showed that [REDACTED] held a 46.1971 percent partnership interest and [REDACTED] LLC owned a 53.8029 percent partnership interest in the company. The record shows that the beneficiary owns a 100 percent interest in Sativus Investments LLC and in [REDACTED] LLC. The record also includes a March 25, 2005 letter from the petitioner's chairman stating:

Although a direct charge of John Benson and Associates, [the beneficiary] is responsible for the operation of its affiliate businesses and is therefore appointed as a consulting contractor with his private company, Sativus Investments LLC, responsible for collecting payments to him.

The director denied the petition determining that the petitioner did not possess the organizational complexity to require an executive due to its low volume of sales and low levels of staffing. The director noted that the record did not contain evidence of subordinate employees who would perform the day-to-day tasks associated with performing the petitioner's operational functions and did not provide evidence that the beneficiary would manage managerial or professional employees.

On appeal, counsel for the petitioner re-stated the beneficiary's duties for the petitioner and again referenced the beneficiary's duties for the petitioner's purported insurance division.

Counsel does not provide new evidence and does not indicate how the director's decision is in error. However, for the record, the AAO observes that the petitioner states that it does not directly employ the beneficiary. The record suggests that the beneficiary is self-employed by his own separately owned and controlled organizations and that his consulting services are for hire to other companies. The beneficiary's services for his own companies, the companies included in the [REDACTED] cannot be considered duties for the petitioner. For this visa classification, the beneficiary "must seek to enter the United States in order to continue to render his services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive." See section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). As the petitioner does not employ the beneficiary, the petitioner has not established an essential element of this visa classification. The beneficiary is not seeking to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate.

Even if the petitioner employed the beneficiary, the record does not contain sufficient evidence to establish that the beneficiary's duties for the petitioner would be primarily managerial or executive. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner initially provided a broad description of the beneficiary's duties that suggested that the beneficiary would provide market analysis services for the petitioner. The petitioner's elaboration of the beneficiary's duties on appeal, indicated that in addition to market analysis, the beneficiary

would build financial models, identify new markets and opportunities, implement new products into the market, and order, review, and approve all medical reports required for qualification of life insurance policy stock. These are the duties of an individual actually performing entrepreneurial and marketing functions. The petitioner has not explained how these duties comprise primarily managerial or executive functions rather than the performance of the necessary operational functions of the petitioner. 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).

Moreover, the beneficiary's oversight of daily operations does not convey an understanding of the beneficiary's daily duties. 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). The petitioner's reference to the beneficiary's new responsibilities after the petition was filed is not probative. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has not provided evidence that the beneficiary will perform primarily managerial or executive duties for the petitioner. For this additional reason, the petition will not be approved.

The next issue in this matter is whether the petitioner has established that the beneficiary had been employed for the claimed foreign entity for one year prior to entering the United States as a nonimmigrant. In its May 19, 2004 letter appended to the petition, the petitioner stated that the beneficiary had joined the foreign entity in 1994 and in January 1997 became the foreign entity's executive director and chief operating officer. The petitioner stated that:

[The beneficiary] was responsible for the daily management of the company's operation as well as staff. In addition, [the beneficiary] established pre-marketing administrative processes as well as joint venture arrangements [with] U.S. business associates. [The beneficiary] also administered operations of all property activities of [the foreign entity]. Prior to leaving for the U.S., [the beneficiary] also coordinated and implemented our corporate downsizing processes in preparation of establishing our subsidiary, [the petitioner], in the U.S.

On February 1, 2005, the director requested a more detailed description of the beneficiary's duties including what the beneficiary would do in the day-to-day execution of his position, the percentage of time the beneficiary would spend in each of the listed duties, and a list of the employees under the beneficiary's direction. The director also requested the foreign entity's organizational chart including the names of all executives, managers, supervisors, and number of employees within each department or subdivision. The director further requested the foreign entity's payroll records pertaining to the beneficiary.

The petitioner did not provide a response to the director's request for evidence. The petitioner supplied current organizational charts and did not include information pertinent to the beneficiary's position with the foreign entity prior to the beneficiary's entry into the United States as a nonimmigrant.

The director denied the petition, observing that the beneficiary had failed to respond to his request for further detail regarding the beneficiary's duties for the foreign entity and had failed to provide the requested payroll records. The director determined that the petitioner had not submitted sufficient evidence to establish this element of the visa classification.

On appeal, counsel for the petitioner re-stated the petitioner's initial job description for the beneficiary's position with the foreign entity. Counsel also explained that the foreign entity had not kept payroll records as far back as 1997 but that the foreign entity's chairman and chief executive officer had confirmed the beneficiary's foreign employment.

Counsel again failed to identify any erroneous conclusion of law or statement of fact as a basis for the appeal on this issue. Counsel's explanation that the foreign entity had not kept payroll records from 1997 is acknowledged; however, the record still does not provide sufficient information regarding the beneficiary's actual daily duties for the foreign entity and does not establish that the foreign entity actually employed the beneficiary for one year prior to entering the United States as a nonimmigrant. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503.

The record is insufficient to establish that the beneficiary was employed in a primarily managerial or executive capacity for the foreign entity for one year prior to his entry into the United States as a nonimmigrant. For this additional reason, the petition will not be approved.

The next issue in these proceedings is to determine whether the petitioner has established its ability to pay the beneficiary the proffered wage.

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

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

In analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

In this matter, and as observed above, the record shows that the petitioner does not employ the beneficiary; but rather that two companies owned and controlled by the beneficiary employ him. The record further shows that the beneficiary has received no payment from the petitioner and that the petitioner is not generating income. Counsel's assertion on appeal that [REDACTED] Investments, LLC pays the beneficiary and is the petitioner's wholly-owned subsidiary is not substantiated by the record. The record shows that the beneficiary's wholly-owned company owns the majority percentage interest in [REDACTED] Investments, LLC. The record does not provide evidence showing that the petitioner owns and controls or is sufficiently affiliated with the beneficiary's company, for immigration purposes, to direct the payment of the beneficiary's salary. The record does not provide evidence that the petitioner has paid the beneficiary in the past, has generated sufficient net income, or has sufficient net assets to pay the beneficiary the proffered annual wage of \$150,000. For this additional reason, the petition will not be approved.

The last issue in this proceeding is whether the petitioner has established that it had been doing business for one year prior to filing the petition. Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

\* \* \*

- (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the 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."

In this matter, the petition was filed in May 2004 and the petitioner's 2003 IRS Form 1120, shows that the petitioner did not generate income, did not pay salaries or wages, and did not hold significant assets in the 2003 year. Based on this information, the petitioner has not established that the petitioner had been conducting business in 2003, the year prior to the petitioner filing the petition. Further, the record does not contain sufficient evidence that the petitioner conducted business after the petition was filed. The AAO acknowledges that the beneficiary's companies were attempting to enter into agreements and initiate new product lines but the petitioner has not shown how it would benefit from or be sufficiently involved in such business. The record is not sufficient to establish that the petitioner is doing business as defined in the regulations. For this additional reason, the petition will not be approved.

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.

The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, 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 general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 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).

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 approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same unsupported 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).

Further, 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 petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(1)(9)(iii).

ORDER: The appeal is dismissed.