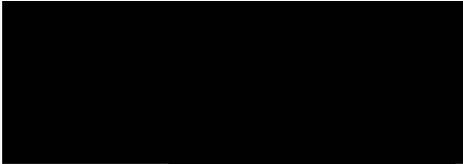




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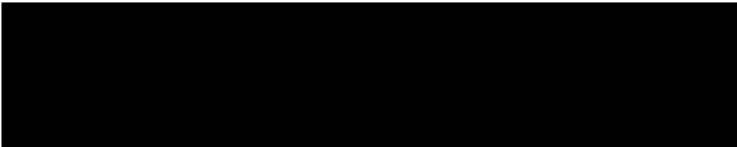
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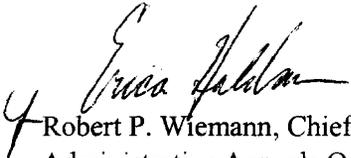
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based petition. The petitioner filed a timely appeal of the director's denial, which the Administrative Appeals Office (AAO) remanded to the director for further action and consideration. The director again denied the immigrant visa petition. Once more, the matter is before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner filed the immigrant visa 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 New York that is engaged in repairing, remodeling, mending, and cleaning carpets. It seeks to employ the beneficiary as its general manager.

In a January 7, 2005 decision, the director denied the petition concluding that the petitioner had not established that the beneficiary had been or would be employed by the foreign or United States entities in a primarily managerial or executive capacity. Upon review of the petitioner's appeal, the AAO remanded the matter to the director, noting that the director had not issued a request for evidence, thereby providing the petitioner an opportunity within which to address the deficiencies in the record.

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

In this timely appeal, counsel for the petitioner claims that the beneficiary would be employed by the United States organization in both a managerial and executive capacity. Counsel submits an appellate brief and documentary evidence challenging the director's findings.

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 issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the immigrant visa petition on September 25, 2004, claiming on the Form I-140 that the beneficiary would be employed as the general manager of the eight-person United States organization. In an

appended letter, dated August 27, 2004, the petitioner provided the following description for the beneficiary's proposed position:

His duties include planning, formulating, directing, managing, and coordinating activities of professional workers engaged in *expert* repair, remodeling, and mending rugs and carpets, as well as overseeing supervisory personnel and other workers engaged in cleaning rugs and carpets, and warehouse management; planning, developing, formulating and managing advertising, marketing, and promotion of our services to develop new markets, increase share of market, and obtain competitive position in industry; allocate operating budget and approve supplies and equipment requisition; outline work plan and assign tasks, duties, responsibilities, and scope of authority; review quality of work for conformity to overall company's standards; adjust customers' complaints; screen and hire job applicants, and recommend promotions, transfers or dismissals.

(Emphasis in original).

Following the director's January 7, 2005 denial and the AAO's remand of the instant matter to the director, the director issued a request for additional evidence. In the November 12, 2005 letter to the petitioner, the director noted that the record lacked sufficient evidence to determine the beneficiary's proposed employment capacity in the United States entity. The director asked that the petitioner submit a statement addressing the following: (1) the petitioner's staffing levels, including the names and job titles of all employees, their related job duties, educational backgrounds, and the manner in which each person is paid; (2) an outline of the beneficiary's job duties and the amount of time the beneficiary would spend on each task in a regular workweek; (3) the petitioner's 2004 federal income tax return and quarterly tax returns submitted by the petitioner since the filing in September 2004; and (4) Internal Revenue Service (IRS) Forms W-2, W-3 and 1099 issued by the petitioner in 2003 and 2004.

The petitioner responded in a letter dated December 19, 2005, claiming that the beneficiary would occupy an "executive/managerial" position in the United States company. The petitioner outlined the statutory requirements for "managerial capacity" and "executive capacity," and contended that the beneficiary would qualify for the requested immigrant visa under either classification. The petitioner submits the following description of the position of general manager:

[P]lanning, formulating, directing, managing, and coordinating, the overall activities of operations of our company, through subordinate *supervisory, professional, or managerial* employees, directly reporting to him, ensuring optimum efficiency and economy of operations and maximum profits [11 hrs/wk]; developing advertising, marketing and promotion of our services, to develop new markets, increase share of market, and obtain competitive position in the industry [6 hrs/wk]; determining funding limitations and allocate operating budgets to our various departments, identifying areas in which reductions can be made [5 hrs/wk]; overseeing the organization, scheduling, and implementation of projects, ensuring operational efficiency and economy [2 hrs/wk]; outline work plan, assign tasks, duties, establishing responsibilities and scope of authority [4 hrs/wk]; supervise and control the hiring and dismissal of employees [1 hr/wk]; review quality of work for conformity to overall company standards [2 hrs/wk]; evaluate performance of subordinate *supervisory,*

*professional, or managerial* employees and their respective contribution towards meeting goals and objectives [3 hrs/wk]; adjust customers' complaints [1hr/wk].

(Emphasis in original).

The petitioner stated that with respect to "executive capacity," the beneficiary satisfies the statutory criteria as he would "[be] in charge of planning, organizing, budgeting, directing, controlling, and coordinating the *overall activities of operations* of our organization, overseeing the business and financial decisions of our entity, and *formulating business management policies*," as well as evaluating the "performance of subordinate *supervisory, managerial and professional* employees under his control for compliance with established policies and objectives and their respective contribution in attaining objectives," and developing budgets and cost controls. (Emphasis in original). The petitioner further stated that the beneficiary would direct the organization's management, oversee activities, operations, and major functions, and exercise full decision-making authority with respect to the business, staffing, resources, and operations. The petitioner claimed that the above-named responsibilities held by the beneficiary demonstrate his proposed employment in a primarily executive capacity.

The petitioner also addressed the beneficiary's purported employment in a primarily managerial capacity, stating:

By managing the *function* of our organization (*expert* repairs, remodeling, mending, and cleaning of carpets and rugs, including high-end, expansive [sic] rugs, such as Persian, Chinese, and Bukhara rugs), developing and implementing a management plan, directing and overseeing effective and efficient implementation thereof on an economical basis and within time constraints, overseeing its organization, scheduling, and implementation; planning, organizing, directing, controlling, and coordinating the *overall activities of operations* of our entity and/or its functions, he also meets the "[m]anagerial capacity" criterion set forth at 8 C.F.R. [§] 204.5(j)(2)(A).

(Emphasis in original)

The petitioner stated in that in addition to managing six lower-level employees working in the positions of expert rug cleaner and rug-carpet cleaner, the beneficiary would supervise a color expert, warehouse manager, and rug cleaning supervisor, who the petitioner claimed occupied professional, managerial, and supervisory positions. The petitioner claimed that besides managing subordinate professional, managerial and supervisory employees, the beneficiary would function at a senior level within the organization and would manage the company's "essential" marketing functions. The petitioner contended that the above-named job duties demonstrate that the beneficiary would occupy a "senior/key position" in the organization, rather than being employed as a first-line supervisor.

As authority for the beneficiary's employment in a primarily managerial and executive capacity, the petitioner references the Standard Occupational Classification (SOC) User Guide and the Occupational Outlook Handbook (OOH), both of which are published by the U.S. Department of Labor and address occupational categories and related job information. The petitioner claimed that the SOC acknowledges that, in general, the position of general manager requires planning, directing and coordinating a company's operations and formulating policies.

The petitioner also stressed that Citizenship and Immigration Services (CIS) had previously approved two L-1A nonimmigrant visa petitions filed by the petitioner on behalf of the beneficiary.

In a decision dated February 7, 2006, 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 stated that the "vague and general" job description offered by the petitioner does not sufficiently address his specific job duties or explain "what the beneficiary will be doing on a day-to-day basis for forty hours a week." The director also stated that the record was devoid of evidence "establishing that the beneficiary has or will have managerial control and authority over a functioning department, subdivision or component of the United States entity, or that the beneficiary will operate at a [s]enior level within the entity's hierarchy or with respect to a function." The director noted that the cumulative amount in salaries paid by the petitioner in 2004 did not appear to include compensation paid to the beneficiary, and did not support the petitioner's claim of employing subordinate managerial employees. The director concluded that the petitioner had not established that "the beneficiary will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve him from performing the services of the corporation." Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal. In an attached appellate brief, dated February 27, 2006, counsel contends that CIS erred in concluding that the beneficiary would not be employed as a manager and executive of the United States organization. Counsel challenges the director's finding with respect to the "vague and general" job description, stating that the petitioner submitted a "crystal clear, plain and simple, detailed, and lucidly characterized" description of the beneficiary's job duties as the general manager of the United States company. Counsel references the job description provided in the OOH for "general manager," noting that the description offered by the petitioner is analogous to the job duties named in the OOH, and therefore, is sufficient to establish the beneficiary's purported employment in a qualifying capacity.

Counsel contends that CIS failed to explain its finding that the petitioning entity would not support the beneficiary in a primarily managerial or executive position. Counsel states that CIS did not take into account the reasonable needs of the organization in light of its overall purpose and stage of development, as required under section 101(a)(44)(C) of the Act, and incorrectly focused on the size of the petitioner's staffing levels as a "determinative factor" in the beneficiary's employment as a manager or executive. Counsel references the OOH, which counsel notes as an "authoritative source" of the AAO, stating that it recognizes the reasonable need of both large and small organizations to employ a general manager, who would be "responsible for the operational success of a company." Counsel also states that the SOC acknowledges the beneficiary's position of general manager as a top executive position.

Counsel further contends that CIS incorrectly concluded that the beneficiary would be performing non-managerial and non-executive tasks of the organization. Counsel states:

A simple review of the description of [the] beneficiary's job duties reveals the beneficiary, in fact, is not engaged in any of the [company's] non-managerial day-to-day operations, but rather plans, directs, oversees, and coordinates the overall activities of operations to ensure that goals or objectives are accomplished within [the] prescribed time frame and budget; determining time frame, funding limitations, procedures for accomplishing projects, staffing requirements, allotment of available resources, outline work plan and assign duties,

responsibilities, and scope of authority; supervise and control the hiring and dismissal of employees; review status reports and modify schedules or plans as required; planning, developing, formulating and managing advertising, marketing, and promotion of the company's services to develop new markets, increase share of market, and obtain competitive position in [the] industry; allocate operating budget and approve supplies and equipment requisition; review quality of work for conformity to overall company's standards; adjust customers' complaints, as opposed to *first-line* supervisors, managers, and professional employees under the beneficiary's control, such as, [w]arehouse [m]anager [recognized as "Manager" – D.O.T. Code 184.167-114 O\*NET Code 11-3071.02], [c]olor [e]xpert [recognized as "Professional" – D.O.T. Code 141.051-010, O\*NET Code 27-1025.00], and [r]ug/[c]arpet [c]leaning [s]upervisor [recognized as "Supervisor" – D.O.T. Code 369.137-014, O\*NET Code 51-1011.00], who supervise other subordinate *non-managerial* workers engaged in the actual performance of *expert* rug repairs or carpet and rug cleaning. Clearly then, the beneficiary does *not* perform any of the 'non-managerial, day-to-day operations involved in producing a product or providing a service.'

(Emphasis in original). Counsel restates the job descriptions offered by the petitioner in its December 19, 2005 letter, and further claims that the "extensive, complete and comprehensive" job description establishes that the beneficiary would manage supervisory, professional, and managerial employees, as well as an essential function of the organization, and demonstrates that the beneficiary would function at a senior level of the company as he would manage and direct the organization's operational activities. Counsel notes that the "actual cleaning of rugs and carpets is performed by [the] petitioner's [m]achine/[h]and rug cleaners," while the rug repairers reweave or tack any damaged areas. Counsel notes that the organizational hierarchy of the petitioning entity is further supported by the varying amounts in salary paid to each employee.

Counsel emphasizes the prior two L-1A nonimmigrant visa petitions approved by CIS for the benefit of the beneficiary's employment as general manager in the petitioning entity. Counsel contends that the petitioner has demonstrated by a preponderance of the evidence that the beneficiary would be employed by the United States entity in a primarily managerial and executive capacity.

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.

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).

While the petitioner and counsel submitted lengthy job descriptions, neither addresses the specific managerial or executive job duties to be performed by the beneficiary in the position of general manager. For instance, in its December 19, 2005 letter, the petitioner allocates the beneficiary's time among such vague job responsibilities as "planning, formulating, directing, managing and coordinating, the overall activities of operations" through subordinate managerial, supervisory and professional employees, promoting the company, developing new markets, determining operating budgets, "planning, developing, and establishing policies, objectives and goals," "overseeing the organization, scheduling and implementation of projects," assigning tasks, establishing responsibilities, reviewing the work of subordinates, and handling customer complaints. Additionally, significant portions of both job descriptions submitted in response to the director's request for evidence and on appeal are mere restatements of the statutory definitions of "managerial capacity"

and "executive capacity." See §§101(a)(44)(A) and (B) of the Act. For example, the petitioner specifically relies on the definition of "executive capacity" in its claim that "[b]y virtue of [the beneficiary's] planning, developing, formulating and establishing our company policies, developing long range goals and objectives, and establishing responsibilities, scope of authority, and procedures for attaining said objectives [the beneficiary] also meets the second criteria of [e]xecutive capacity] set forth at 8 C.F.R. [§] 204.5(h)(2)(B)." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The regulation at 8 C.F.R. § 204.5(j)(5) requires a detailed description of the beneficiary's daily managerial or executive 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. at 1108.

The petitioner's failure to address the specific managerial and executive tasks involved in such responsibilities as promoting the company, developing new markets, determining operating budgets, or handling customer complaints is particularly relevant as these more closely resemble non-qualifying, operational tasks related to the organization's marketing, sales, and advertising functions. Based on the petitioner's claims, the beneficiary would *manage* the previously noted tasks; yet, the petitioner has not identified a subordinate staff that would develop and implement the company's marketing, advertising, and promotional programs. It is reasonable therefore, to conclude that rather than managing these functions, the beneficiary would personally perform the related non-managerial and non-executive tasks.

According to the job descriptions, the beneficiary would also determine the company's budget and spending limitations, schedule cleaning or repair projects, and handle customer complaints, responsibilities that are not typically deemed to be managerial or executive in nature. See §§ 101(a)(44)(A) and (B) of the Act. Based on the petitioner's descriptions, these non-managerial and non-executive responsibilities, as well as the marketing and advertising responsibilities, would consume approximately 35 percent of the beneficiary's time. The AAO notes, however, that the petitioner has not accounted for the performance of such additional day-to-day administrative tasks related to its personnel, banking, bookkeeping, and accounting functions. Despite counsel's claim that the petitioner's non-managerial and non-executive tasks are performed solely by its support staff, the petitioner's non-qualifying day-to-day tasks include not only those related to rug and carpet cleaning and repair, but also the administrative and operational tasks noted above. As the petitioner has not identified an administrative support staff, it is questionable who, other than the beneficiary, would be responsible for assuming the performance of these non-qualifying tasks. The AAO notes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The finding that the beneficiary would not be employed in a primarily managerial or executive capacity is further supported by an analysis of the petitioner's reasonable needs. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

In accordance with the above discussion, while the petitioner demonstrated the employment of a staff sufficient to execute its offered services, the petitioner's business is comprised of significantly more routine business functions, the performance of which the petitioner did not account. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary and the support staff.

The AAO notes that although counsel identifies on appeal CIS' obligation to consider the petitioner's reasonable needs in conjunction with the size of its staff, counsel does not specifically demonstrate that the nine-person staff employed on the filing date would meet the petitioner's reasonable needs. Rather, counsel references the OOH as authority for the suggestion that, in general, all corporations have a "reasonable need" to employ a general manager, regardless of its size and staffing levels. The AAO does not question or dispute a small company's need for a general manager. However, as suggested in the statute, the "reasonable needs" analysis is specific to the petitioning corporation, and requires a review of the petitioner's staffing levels, overall purpose and stage of development. Paraphrasing job descriptions found in the OOH is not sufficient to establish a beneficiary's eligibility as a manager or executive. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. 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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

As additional evidence of the beneficiary's purported employment as a manager or executive, counsel notes the beneficiary's managerial authority over professional, managerial and supervisory employees. The AAO questions the petitioner's references to its color expert as a "professional" and to its warehouse manager as a managerial employee. The AAO notes that the warehouse manager is not managing or supervising any subordinate employees, but appears to be performing all warehouse functions himself. Also, despite counsel's claim that the color expert is a professional, counsel has not established that the position of color expert requires a baccalaureate degree as a minimum for entry into the field. *See Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966) (finding that the term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 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).

The record also fails to corroborate counsel's additional claim that the beneficiary would be employed as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii).

The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

In support of the beneficiary's purported employment as a function manager, counsel states on appeal:

Since our organization is engaged in *expert* repairs, remodeling, mending and cleaning of carpets and rugs, including expansive Persian, Oriental, and Bukhara rugs, then managing the overall activities of operations relating to said function, ensuring optimum efficiency and economy of operations and maximizing profits, is an 'essential function' within the meaning set forth at 8 C.F.R. [§] 204.5(j)(2)(B); planning, developing, and establishing advertising, marketing and promotion of our services, to develop new markets, increase share of market, and obtain competitive position in the industry is also an *essential function* – the OOH acknowledges marketing as an *essential function*, stating that '[t]he fundamental objective of any firm is to market its services profitably' (copy attached) – running our business successfully and maximizing profits, while ensuring our customers are satisfied, is not only essential for our company (or any company, for that matter), but rather crucial; that is indeed the essence of our existence). Top managers/executives are essential to the success of any organization.

(Emphasis in original).

Counsel's blanket claims are not persuasive. Counsel's essentially presents a circular argument that the beneficiary should be considered a function manager because he would manage the company's "overall" operations and plan its marketing, which are essential functions. The AAO acknowledges that the maximization of profits is essential to any operation; yet, this nonspecific claim by counsel is not sufficient to meet the requisite specificity to demonstrate the beneficiary as a function manager. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel makes the additional argument that the petitioner established by a preponderance of the evidence that the beneficiary would be employed in a primarily managerial or executive capacity. The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the

applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence is not relevant, probative, and credible. As discussed above, the vague and nonspecific job descriptions do not present sufficient detail of the managerial or executive job duties to be performed by the beneficiary, and thus cannot be deemed probative of the capacity in which the beneficiary would be employed. Additionally, the petitioner's assertions as to the beneficiary's management are not credible, as the petitioner did not identify a subordinate staff of employees who would actually perform the non-qualifying tasks purportedly managed by the beneficiary. Rather, the record demonstrates that many of the non-managerial and non-executive tasks related to the petitioner's marketing and advertising functions, as well as such administrative tasks as banking, bookkeeping, and accounting would be performed by the beneficiary. As a result, counsel's argument is without merit. The petitioner has not demonstrated by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *See Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

The AAO recognizes that CIS previously approved two L-1A nonimmigrant visa petitions filed by the petitioner on behalf of the beneficiary for employment as its general manager. In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. As stressed by counsel, 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 25 (D.D.C. 2003).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. 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 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 approvals 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).

Notwithstanding the petitioner's failure to demonstrate the beneficiary's eligibility for the requested classification, the AAO notes error on the part of the director in her review of the instant matter. Specifically, in her February 7, 2006, the director analyzed the petitioner's 2004 federal income tax return and the salaries paid by the petitioner in 2004. The director noted that the beneficiary was not compensated by the petitioner as an officer of corporation, and further concluded that the separate salary amounts did not establish that any of the beneficiary's subordinate employees were employed in a managerial position. The director partially based her decision on an improper analysis of the salaries paid by the petitioner. While helpful in determining the full-time or part-time status of an employee, and, in turn, whether the beneficiary is sufficiently supported in a primarily managerial or executive capacity, an employee's salary is not indicative of an organization's managerial hierarchy or staffing levels. Moreover, whether a beneficiary is compensated as an "officer" or an "employee" of the petitioning corporation is not material to his employment in a primarily managerial or executive capacity. Despite the director's partial reliance on an improper standard, the record as presently constituted fails to establish that the beneficiary would be employed as a manager or executive.

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.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.