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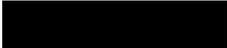
U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: FEB 01 2006

WAC 04 144 54292

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 visa 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 authorized to do business in the State of California as an outsourcer of hotel mini-bars. The petitioner seeks to employ the beneficiary as its chief operations officer.

The director 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.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services' (CIS) denial of the immigrant petition was arbitrary and capricious as it "did not provide a rational connection between the facts found and the decision made." Counsel claims that CIS failed to comply with the statutory criteria defining "managerial capacity" and "executive capacity," particularly with respect to the petitioner's staffing levels and its reasonable needs. Counsel further claims that pursuant to an April 23, 2004 CIS memorandum, the director is bound by the three prior L-1A approvals of the beneficiary's classification as a nonimmigrant intracompany transferee, which counsel notes incorporates the same definitions of "managerial capacity" and "executive capacity." Counsel submits a brief and additional documentary evidence in support of the appeal.

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

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

* * *

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

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

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

The 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 instant immigrant petition on April 22, 2004, noting its employment of two workers, including the beneficiary, who would be employed in the proposed position of chief operations officer. The petitioner submitted with the petition a letter, dated February 25, 2004, in which it provided the following description of the beneficiary's proposed position:

In this capacity, [the beneficiary] has been primarily responsible for ensuring the successful start-up of operations and business development efforts on behalf of [the petitioning entity]. He has directed the operating activities of [the petitioner]. The Chief Operations Officer exercises discretionary authority over day-to-day operations and has the decision making authority over overall business strategies. Specifically, he has been responsible for planning, establishing and developing the variety of business and operational policies and objectives of [the petitioner] in the United States. He has been responsible to [sic] develop and implement a business strategy to position the company successfully in the U.S. market. He plans the strategic direction of the company to penetrate successfully the mini[-]bars market; develops the short-term and long-term business goals and growth objectives of the company in respect to market orientation; develops and implements the company's Business Plan; develops and implements appropriate plans to achieve the projected goals and objectives; manages and evaluates the business planning and budgeting to ensure that the company's services and business competitiveness are enhanced, and revises the plans accordingly.

[The beneficiary] has been responsible for the management, control and coordination of operations including advertising and sales, marketing, customer service, finance, and human resources. He supervises the attendants and contractors, establishes policies and procedures for business development and client relations. The Chief Operations Officer has the authority to hire, fire and train personnel; sign contracts on behalf of the company; prepare and file all operating reports for taxation, and regulatory purposes; direct work; appraise performance; address complaints and resolve problems. He has been responsible for overseeing the negotiations with vendors and suppliers as well as supervising the company's relationships with those vendors and suppliers. [The beneficiary] provides discretionary decision-making and has final authority with respect to policy formulation for the business.

The petitioner submitted documentation of the service agreements between the petitioning entity and hotels. Of particular importance is the language contained in the "Installation and Outsourcing Operation Agreement" describing the use of "operators," or hotel employees, "who will be responsible for refilling the [mini-bars], cleaning the [mini-bars] and performing Product consumption checks of the [mini-bars], all strictly in accordance with direction which they receive from the Supervisor, who in turn will receive directions and assistance from the [petitioner]." The agreement included the additional terms that the operators will report to the hotel manager, who acts a liaison between the hotel and the petitioning entity, and that the petitioner will reimburse the hotel for wages paid to the operators. The petitioner also provided a statement describing the tasks to be performed by the operators, or "mini-bar attendants."

The director issued a notice of intent to deny dated March 9, 2005, addressing the petitioner's two-person staff. The director stated that "[w]ith one employee other than himself, the performance of some of the mundane tasks like clerical, secretarial and other similar functions must therefore be performed by the beneficiary." The director also stated that the petitioner had not demonstrated a reasonable need for the beneficiary's employment as an executive. The director further noted that the beneficiary's job description "is vague and general in nature," and does not precisely explain what the beneficiary would do on a day-to-day basis. The director provided the petitioner with thirty days within which to submit evidence of the beneficiary's employment in a primarily managerial or executive capacity.

Counsel responded in a letter dated April 7, 2005, stressing that the beneficiary's employment capacity is not dependent on the number of workers employed by the petitioning entity. Counsel submitted a letter from the petitioner, dated April 4, 2005 letter, in which the petitioner challenged the director's conclusion that the petitioner did not require a full-time executive. The petitioner explained its business of installing and operating hotel mini-bars, and stated:

[The beneficiary's] role as Chief Operations Officer is to supervise the mini-bar installations and handle the relationships with these hotels once the mini-bars are installed. While our company has only 4 employees, [the beneficiary] is also in charge of supervising and directing subcontractors who actually service the minibars and handle the day-to-day operation in each hotel. Due to union contract requirements, the individuals servicing the minibars are unionized employees of the hotel whom the hotel has subcontracted to our company, and who report directly to [the beneficiary]. Our nonunion hotels prefer similar arrangements. These hotel employees are directly supervised by [the beneficiary]. [The beneficiary] is responsible for creating the employee schedule. He trains and supervises the employees. Moreover, all the employees report directly to [the beneficiary] and if any questions arise, [the beneficiary] is the manager they contact. He currently supervises the following: two full time employees under union contract at the Hyatt San Francisco; one full time and one part time direct employees at the Hyatt Seattle; one hotel employee under union contract at the Hilton Seattle; one full time, three part time employees under union contract at the Mayflower in Washington DC; and one full time employee at the Hyatt regency in Boston. In addition, [the beneficiary] directly supervises one supervisor in New York that assists him with the operations. This employee reports directly to [the beneficiary] and is a[n] [employee of the petitioning entity]. Thus in total, [the beneficiary] is responsible for supervising a staff of ten employees.

* * *

On a regular daily basis, [the beneficiary] oversee the hotels who already have mini-bars in operation. He is the main liaison with the hotel management, from the mini-bar employee to the Food and Beverage director, from the accounting department for consolidation to the General Manager of the hotel. He has hiring authority in selecting the staff and supervises the staff selected. In addition, he inspects the operation sites to ensure quality and maintenance of standards. He is responsible for choosing the suppliers for the mini-bars, pricing the new products, reviewing the condition and terms, and negotiating the national agreement with suppliers. [The beneficiary] also oversees the ordering of products. In addition, [the beneficiary] tests new products and is responsible for developing new menus (concept and design) and products for testing. He is also responsible for technical problems and call service if needed, and invoicing and reporting to the hotels.

In addition to overseeing the mini-bars already in place, [the beneficiary] is also in charge of enlarging the business by marketing and sales. He initiates the demand for our services and closes the negotiation deals with hotel owners, hotel management, and [the] legal department. He prepares plans and offers for interested hotels and prepares revenue projections. [The beneficiary] is also responsible for optimizing the investment, managing the investment of the shareholders and financial partners (approximately \$3 million over the last two years). In

addition, he supervises and manages the pre-installation of the mini-bars to make sure the requirements on site are met and to ensure the preparation is complete prior to our arrival. To facilitate this process, he communicates with all the other contractual staff involved in the installation.

As evidence of the salary reimbursement by the petitioner to the hotels, counsel submitted invoices and time sheets dated from January through March 2005 cataloging wages due to the operators. Counsel also provided Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for four workers employed during 2004, and the petitioner's 2004 IRS Form 1120, U.S. Corporation Income Tax Return.

The director issued a decision dated June 20, 2005, concluding that the petitioner had not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity. The director noted the petitioner's employment of three employees, two full-time and one part-time, during 2004, but also stated that as subcontractors, the employees are not deemed to be professionals. The director stated that the beneficiary would not be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from the non-qualifying duties of the petitioner's business. The director further stated that because the beneficiary would not be supervising professional employees, he would be employed as a first-line supervisor. The director also concluded that the petitioner "does not possess the organizational complexity to warrant having such an employee." Consequently, the director denied the petition.

Counsel filed an appeal on July 19, 2005. In an appended appellate brief, counsel contends that the director did not make a "rational connection" between his denial of the petition and the facts presented. Counsel provides a comprehensive discussion of the procedural history involved in the development of the present statutory definitions of "managerial capacity" and "executive capacity," and stresses that the current definitions "clearly indicate that a certain staffing level is not required for the [beneficiary's] job to meet the definition of managerial/executive capacity." Counsel also states that the statute requires CIS to "take into account the nature and operation of the petitioner's business" if considering its staffing levels, which counsel claims the director failed to do in his denial of the immigrant petition.

Counsel challenges the director's finding that the beneficiary would perform the "mundane" tasks associated with servicing the mini-bars. Counsel states:

The day to day operations associated with the company's services involve installation, repair, maintenance and stocking of the mini[-]bars. As evidenced by the documents on the record, the beneficiary does not perform any of these mundane duties, nor does he have direct contact with the actual mini[-]bars. Rather, the beneficiary determines and implements the overall policy of the company's mini[-]bar installation and maintenance function. The Chief Operating Officer must survey the existing and prospective mini[-]bar accounts to determine the proper allocation of company funding. He has total discretion in the direction of the budget based on his evaluation of the existing accounts and current market conditions. He must also evaluate the servicing of the mini[-]bars to determine whether the outsourcing agreements are being met, and he must meet with hotel management to coordinate existing servicing or to arrange for new servicing of mini[-]bars.

The beneficiary sets the particular policy objectives of the company and achieves the objectives by coordinating the activities of the hotel staff, pursuant to the relevant

outsourcing agreement, to ensure that they are installing and maintaining mini[-]bars in accordance with the contractual agreements between the petitioner and the various client hotels, and in accordance with the automated design specifications of the mini[-]bars. The beneficiary's job description evinces duties that require the orchestration of the company's institutional practices in the aggregate, not the performance of minute tasks involving the manipulation of tools, machines, or other accoutrements of clerical labor. The mundane service tasks of the business are conducted by hotel staff and subcontractor labor.

Counsel further notes that qualification as a manager or executive does not require the supervision of professional employees, but rather a petitioner may demonstrate a beneficiary's employment in a senior level position in the organization. Counsel states that although the beneficiary "does not have an extensive full-time subordinate staff," the beneficiary's management of the installation and maintenance of the mini-bars is essential to the petitioner's "direction, life and overall fate in the marketplace."

In addition, counsel claims that the director failed to consider the reasonable needs of the petitioning organization, including its overall purpose, and focused solely on the petitioner's limited staffing levels. Counsel again notes the petitioner's use of subcontractors for the installation and service of the mini-bars, and notes that the beneficiary directs the "outside labor sources." Counsel states that the beneficiary's role within the company "is consistent with . . . directing a high level function of the company without engaging in the mundane tasks of the daily routine activities associated with the mini[-]bars in the actual hotel rooms." Counsel cites two unpublished AAO decisions to support the claim that "the size of the petitioning employer is not a determinative factor in deciding whether a beneficiary meet the managerial/executive capacity definition."

Counsel also contends that the director's denial of the I-140 petition violates the instructions outlined in an April 23, 2004 CIS memorandum. Counsel states that "prior legal determinations of an agency adjudicator 'should be given deference,' where no material error or substantial change in circumstances have taken place." Counsel claims that CIS' prior approval of three L-1A nonimmigrant petitions on behalf of the beneficiary, which involved the same job duties as those performed by the beneficiary herein, should influence the director's finding in the instant matter.

Counsel again submits the petitioner's 2004 income tax return and invoices reflecting compensation due to the hotels' operators. Counsel also provides a letter from the petitioner's accountant, in which the accountant explains that the compensation paid to outsourced staff, as well as the expenses incurred by the petitioner for the maintenance and servicing of the mini-bars, is reflected on the petitioner's tax return as "cost of goods sold."

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). 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).

Based on the current record, the AAO is unable to determine whether the beneficiary's claimed managerial duties constitute the majority of his duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Counsel claims on appeal that the beneficiary manages the essential function of mini-bar installation and maintenance, and exercises discretion over the petitioner's daily operations. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. The AAO recognizes that the beneficiary holds managerial and executive responsibilities in his position as chief operations officer. However, the petitioner's description of the beneficiary's job duties includes such non-qualifying tasks as testing new products, developing new menus, pricing and invoicing merchandise, responding to technical problems or providing "call service," supervising installations, training mini-bar operators, ensuring adequate supplies, and filing tax reports. These administrative and operational tasks, which are directly related to the maintenance of the mini-bars, are not typically deemed to be managerial or executive in nature. See §§ 101(a)(44)(A) and (B) of the Act. Additionally, despite the petitioner's claim of utilizing contractors to perform the daily maintenance associated with the mini-bars, there are many other non-managerial and non-executive tasks that must be performed in order for the petitioner to sustain operations. Specifically, the petitioner has not accounted for the employment of workers who would perform the business' sales, marketing, purchasing, finances and general administration tasks. The record is devoid of evidence demonstrating that someone other than the beneficiary would be responsible for these non-qualifying job duties. The petitioner has not established that he would manage or supervise the performance of these routine duties by subordinate workers. Without additional information documenting the amount of time the beneficiary would spend on each of the above-named tasks, the AAO cannot conclude that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function. The AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* As discussed previously, the record does not contain sufficient evidence describing the petitioner's staff and subcontractors at the time of filing the petition, and particularly, the positions held and job duties performed by each. Absent this relevant evidence, the AAO cannot conclude that the petitioner's reasonable needs are met. In other words, there is no way to determine what functions of the petitioner's business are being performed without a description of the company's staffing levels and contractors, and their related job duties. The AAO notes that 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO stresses that an essential element of determining the beneficiary's proposed employment capacity, is whether *at the time of filing the petition* the beneficiary would be primarily performing job duties managerial or executive in nature. 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 is likewise obligated to establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Here, the petitioner has failed to satisfy the crucial requirement that the petitioner employed a staff sufficient to support the beneficiary in a primarily managerial or executive capacity at the time of filing. The record contains limited evidence of the workers employed or the contractors utilized by the petitioner in April 2004, the period during which the petition was filed. While the petitioner submitted copies of its IRS Forms W-2 identifying four workers, including the beneficiary, employed during 2004, the petitioner did not reconcile this claim with the information contained on Form I-140, which indicated a staff of two employees. The AAO notes that the Forms W-2, while providing names of workers employed by the petitioner at some time during the year 2004, do not provide guidance on the specific staff employed at the time of filing. In addition, its April 4, 2005 letter, the petitioner referenced four employees, yet identified only one, a supervisor in New York, who assists the beneficiary with operations. The lack of documentation in the record, such as quarterly wage reports or monthly pay slips, prevents the AAO from determining which employee, other than the beneficiary, would be employed at the time the petition was filed. The AAO also notes that, in addition to omitting the employees' dates of employment, the petitioner did not address the positions in which the workers would be employed or the job duties to be performed by each. This information is essential to determining whether the petitioner in fact employed workers and utilized subcontractors to perform the day-to-day non-qualifying tasks of the organization. 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)).

Specifically, the record fails to identify the "operators," or hotel staff, utilized by the petitioner at the time of filing. In his July 13, 2005 letter submitted on appeal, the petitioner's accountant maintains that the petitioner's use of contract workers is demonstrated through the payment of compensation reflected as "cost of goods sold" on the petitioner's 2003 and 2004 income tax returns. However, in 2004, the relevant time period herein, the petitioner paid approximately \$23,000 in "cost of labor." Despite the accountant's reference to costs incurred by the petitioner in the amount of approximately \$207,000, it appears that only a small portion was in fact compensation for labor performed by the "operators." The petitioner's year 2005 invoices submitted from the "Mayflower Renaissance Hotel" and the "Hyatt Regency" provide insight into the average amount of wages paid by the petitioner to the operators. A critical review of the invoices supports the conclusion that the \$23,000 paid in "cost of labor" by the petitioner in 2004 did not account for services throughout the entire year. In other words, the low amount of compensation paid by the petitioner for labor in 2004 raises the question as to how many operators were performing the operational functions related to the maintenance of the mini-bars at the time of filing. Likewise, the record does not demonstrate whether, at the time of filing, the petitioner utilized an adequate amount of subcontractors to relieve the beneficiary from assuming the non-qualifying day-to-day tasks of the organization. The record does not specifically identify

who, other than the beneficiary, would be responsible for servicing and maintaining the company's mini-bars. Absent this relevant evidence, the AAO cannot conclude that the operational functions described in the previously-referenced "Installation and Outsourcing Operation Agreement" would be performed and satisfied by hotel "operators." Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The AAO notes that the petitioner did not submit invoices cataloging the compensation paid to the purported operators throughout 2004. The invoices submitted on appeal, which catalog wages earned in January through March 2005, will not be considered herein. Again, 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).

Additionally, a significant unexplained inconsistency exists in the amount of compensation paid for salaries in 2004 and the wages identified on the IRS Forms W-2. While the petitioner reported on its 2004 tax return a cumulative amount of \$102,480 in salaries, it is unclear who received this compensation, what positions they occupied, or what tasks each employee performed, particularly at the time of filing. Although the wages paid to the three employees identified on the 2004 IRS Forms W-2 account for \$62,760 of this reported amount¹, the petitioner has not identified who received the remaining \$39,720 paid in salaries and wages. Again, the petitioner did not specifically identify the workers employed at the time of filing. Nor did it explain what appears to be a superfluous payment of wages in 2004. The contradiction between the petitioner's claim of two employees and its payment of approximately \$102,000 in salaries during 2004, as well as the limited evidence describing the workers employed directly by the petitioner, creates confusion as to the petitioner's true staffing levels at the time of filing, and most notably the beneficiary's subordinate staff. While these figures appear to represent compensation sufficient for a subordinate staff of more than one employee, the AAO cannot assume that the workers employed at the time of filing performed the functions of the business in order to support the beneficiary in a primarily managerial or executive position. 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.

Counsel references on appeal a 2004 CIS memorandum as authority for the proposition that the director must defer to the three prior petitions approved by the CIS for the beneficiary's employment as an L-1A nonimmigrant intracompany transferee. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004). The AAO notes that the instructions provided in the memorandum are not applicable to the instant matter. The 2004 CIS memorandum referenced by counsel provides guidance in adjudicating a nonimmigrant petition to extend the validity of a petition previously approved by CIS under the same classification. The requested classification in the instant matter is neither nonimmigrant, nor does it involve the extension of a previously approved petition. The petitioner herein requested that the beneficiary be granted immigrant status as a multinational manager or executive. Accordingly, the 2004 CIS memorandum is not relevant to the adjudication of the instant matter.

¹ The beneficiary's salary of \$161,250 is not included in this amount as it was reported as "compensation of officers."

It should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. See 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. See e.g. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 petitions after approving prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity. Particularly relevant to this finding is the failure

on the part of the petitioner to document the workers employed by the petitioner at the time of filing. The lack of documentation prevents a finding that someone other than the beneficiary is performing the operational and administrative tasks of the petitioner's business. The petitioner's additional claim of utilizing contractors as "operators" in the hotels is not supported by sufficient documentary evidence such that the AAO could confirm that at the time of filing the beneficiary was relieved from the responsibility installing and maintaining the mini-bars. The AAO notes that substantial evidence submitted both in response to the director's notice of intent to deny and on appeal pertained to the staff and subcontractors hired and used by the petitioner after the filing of the petition. Again, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The AAO further notes that the petitioner is not barred from filing a new I-140 petition based on the beneficiary's present position.

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.