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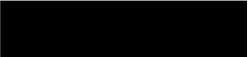
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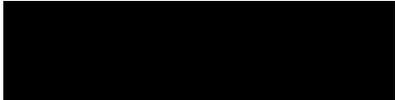
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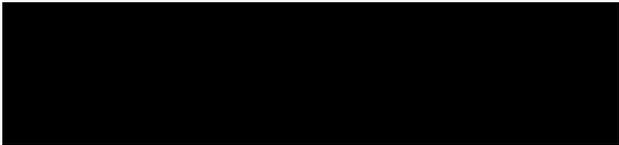
Petitioner:



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 Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is doing business as a wholesaler of garments and is also operating a travel agency. The petitioner seeks to employ the beneficiary as its president.

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

On appeal, counsel for the petitioner claims that the director's denial is based on an erroneous interpretation of the statutory definitions of "managerial capacity" and "executive capacity," as well as an incorrect reliance on *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Counsel contends that the beneficiary's proposed employment satisfies the criteria outlined under both employment capacities. Counsel submits a brief in support of his claims on appeal.

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

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

\* \* \*

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

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

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

The 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 petition on November 5, 2004, noting its employment of the beneficiary as president, as well as a staff of seven workers. In an appended letter, dated November 4, 2004, counsel provided the following outline of proposed job duties to be performed by the beneficiary:

- Plans, develops, and establishes the policies and objectives of the company in accordance with board directives
- Controls and directs the activities of the other employees of the company, with the ability to hire and fire and take other personnel actions as required

- Reviews activity reports and financial statements to determine company progress and the status of attaining objectives
- Makes revisions in corporate plans in accordance with conditions
- Directs and coordinates formulation of financial programs to provide funding
- Plans and develops marketing and public relations policies designed to improve the company's image and market share
- Has the ultimate responsibility for all day to day operations of the company.
- Administers the office. This includes: 1) overseeing personnel activities, including maintaining personnel records, hiring and firing, promotion decisions, wage and overtime rates; 2) directing bookkeeping and accounting, including preparing the budget, collecting payments, billing, etc.; 3) directing maintenance of company facilities and equipment.

Counsel stated that the beneficiary's subordinate staff of seven workers included two managers. Additionally, counsel outlined the statutory definitions of "managerial capacity" and "executive capacity," contending that the beneficiary satisfied criteria of both employment capacities.

Counsel also addressed Citizenship and Immigration Services' (CIS) reference to *Matter of Church Scientology*, 19 I&N Dec. 593, 604 (Comm. 1988) in the prior adjudication of the petitioner's visa petition. Counsel challenges CIS' reliance on this matter as a basis for the proposition that a beneficiary who primarily performs the tasks necessary to produce a product or to provide a service is not considered to be a manager or an executive. Counsel claimed that the 1990 regulations, which defined the terms "managerial capacity" and "executive capacity," established a new precedent which no longer addressed a beneficiary's role in "produc[ing] a product" or "provid[ing] a service," thereby eliminating the need to rely on *Matter of Church Scientology International*. Counsel contended that *Matter of Church Scientology International* "represents the application of a regulatory provision that no longer exists." Counsel referenced "current law," mainly unpublished decisions by the AAO, to substantiate the claim that a beneficiary's employment in a managerial or executive capacity is not dependent on the size of the organization or the number of workers employed, and claimed:

[I]f applicants who were the petitioners' sole employees were employed in a 'primarily' managerial capacity, despite their performance of most, if not all, of the 'substantive' tasks of the business, it is obvious that [CIS] has recognized, in numerous cases since 1991, that the performance of substantive tasks of the business, or the function managed, is not a proper basis for denial of a multinational manager petition – under the current law.

Counsel submitted the petitioner's organizational chart on which it identified the following nine positions occupied within the company: president, vice-president of operations and administration, manager of travel related services, accountant, fashion designer, sales supervisor, and three travel agents.

On January 13, 2005, the director issued a request for evidence asking the petitioner to submit the following documentation pertaining to the beneficiary's proposed employment in a primarily managerial or executive capacity: (1) an organizational chart reflecting the petitioner's managerial hierarchy and staffing levels at the date of filing the petition and clearly identifying all employees subordinate to the beneficiary; (2) a brief job description of the tasks performed by the company's lower-level employees, as well as their educational levels, wages and dates of employment; (3) a more detailed description of the job duties to be performed by

the beneficiary, including the day-to-day job duties performed by the beneficiary over the past six months and the education and employment qualifications for the beneficiary's position; (4) an account of the goals, policies, and discretionary decisions established and made by the beneficiary during the previous six months; (5) copies of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Report, filed for the last four quarters; and (6) the petitioner's payroll summary and Internal Revenue Service Forms W-2, W-3 and 1099-MISC evidencing compensation paid by the petitioner in 2004. The director also noted that, if relevant, the petitioner should provide probative evidence that establishes the beneficiary's role as a functional manager.

Counsel responded in a letter dated April 1, 2005 and submitted documentation that was previously provided with the filing of the immigrant petition, including counsel's enumeration of the beneficiary's proposed job duties. Counsel again defined the terms "managerial capacity" and "executive capacity" and contended that the beneficiary would be employed in both capacities. Counsel further alleged CIS' erroneous use of *Matter of Church Scientology International*, claiming it "is not a valid precedent." Counsel also noted the three previous L-1A nonimmigrant visa approved by CIS on behalf of the beneficiary's employment in the same position, noting that the sole difference in the facts of this petition was the petitioner's income. With regard to the director's January 13, 2005 request for evidence, counsel claimed that the director made "numerous demands" that were "non-responsive to the voluminous evidence submitted with the petition." While counsel appended additional documentation to his response, the majority had been submitted with the original filing.

In his June 6, 2005 decision, the director concluded that the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted that the petitioner had failed to substantiate its claim of eight employees with ancillary evidence in the form of payroll records, quarterly wage reports or federal wage and tax statements. The director also noted that despite the petitioner's undocumented staffing levels, the petitioner claimed on its 2004 corporate tax return to pay wages in the amount of approximately \$68,000. The director stated "[i]f the wages paid are accurate it is not clear if the beneficiary or the business is operating in a full-time capacity." The director further stated that the "general and vague" job description provided by the petitioner "[failed] to convey any understanding of exactly what the beneficiary will be doing on a daily basis," or the percentage of time to be spent on each task. The director concluded that the beneficiary would not be managing the organization, or a department, subdivision, function or component, nor would he be functioning at a senior level with the organization. Consequently, the director denied the petition.

The petitioner filed an appeal on June 30, 2005. In an appended letter, dated June 28, 2005, counsel contends that the record demonstrates that the beneficiary, as the corporation's president and chief executive officer, would be employed in both a managerial and executive capacity. Counsel restates the beneficiary's proposed job duties, and outlines the evidence previously submitted by the petitioner in support of the purported employment capacities. Counsel focuses on the issue of whether the beneficiary would be "primarily" employed in a qualifying capacity, and, following a lengthy discussion about the definition of the term "managerial," asserts that "[a] person who conducts the business activities of a company is still a 'manager' of that business." Counsel contends that CIS erroneously maintains that "conducting and carrying on the business" is not a managerial task. Counsel states:

[The beneficiary] is a man engaged in the business of importing textile goods from India for sale in the United States. He does not make the goods, he does not physically carry them to the United States, but he does direct the activities of the business, being particularly

concerned with the marketing and sales of the product. He 'conducts' its business, and in doing so is inevitably involved in its day-to-day operations or, as [CIS] prefers to call it, the 'substantive' function of the business. However, doing so is not just 'primarily' managerial in nature, it is *entirely* managerial, if one is following the standard definition of the term. Saying that conducting business is equivalent to producing the product which is the subject of the business is simply mistaken.

(Emphasis in original).

Counsel again challenges CIS' reliance on *Matter of Church Scientology International* to support the proposition that an employee primarily engaged in the production or sale of a product cannot be considered a manager or executive, and provides essentially the same discussion as that in his November 4, 2004 and April 1, 2005 letters. Counsel cites other cases in support of the claim that the performance of the "substantive operation of the business" should be deemed to be a managerial task, and further contends that "there is no longer even any legal basis for contending that those who spend the majority of their time producing the company product are not employed in a 'managerial capacity' if they otherwise, in fact, 'manage' the business as that term is defined in the dictionary, since the regulatory provision which was the basis for that position no longer exists." Counsel states:

The evidence shows, beyond any doubt, that [the beneficiary] is operating a business importing clothing manufactured in India to be sold in the United States and occupies a position as the President of the company. He employs six or seven people in this business and pays them, and himself, poorly. The preponderance of this evidence indicates that [the beneficiary] is most certainly involved in the day to day operation of the business, i.e. he performs some of its 'substantive' tasks. The evidence does not indicate whether a 'majority' of his time is spent in performing these tasks and it is the petitioner's position that the law does not require it to prove or disprove any such thing, that 100% of his time could be spent on such tasks without affecting the fact that he still 'manages' the business and is thus a 'managerial capacity' employee, and that [CIS] does not have a proper legal basis for claiming this must be established. Thus its concern over this point is mistaken and irrelevant and the lack of evidence directly applicable to it factually and legally meaningless to a proper adjudication of the merits of the petition.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the petitioning 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 limited job description offered by the petitioner fails to identify the specific daily managerial or executive job duties to be performed by the beneficiary. Although the director requested a detailed job description of the beneficiary's proposed role in the petitioning entity, counsel provided an outline of job duties identical to that in his November 4, 2004 letter. Additionally, counsel did not submit an allocation of the amount of time the beneficiary would devote to each task, as also requested by the director. On appeal, counsel submits the same brief outline, and again, dismisses the opportunity to submit additional documentary evidence that would assist the AAO in its review. The AAO will not attempt to surmise the managerial and executive job duties associated with "establish[ing] the policies and objectives of the company," "control[ling] and direct[ing] the activities of the other

employees of the company," "mak[ing] revisions to corporate plans," and "direct[ing] and coordinat[ing] formulation of financial programs." The petitioner has failed to satisfy the regulatory requirement at 8 C.F.R. § 204.5(j)(5), which requires that the petitioner "clearly describe the duties to be performed by the [beneficiary]." Case law dictates that a petitioner's blanket claim of employing the beneficiary as a manager or executive without a description of how, when, where and with whom the beneficiary's job duties occurred is insufficient for establishing employment in a primarily managerial or executive capacity. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves will reveal the true nature of the employment. *Id.* at 1108.

The AAO notes that the petitioner failed to supply extensive amounts of evidence specifically requested by the director that would have been relevant to establishing the beneficiary's employment capacity. Counsel notes that CIS has been advised against sending a request for a voluminous amount of evidence when only a small amount is required. Despite the director's comprehensive request for evidence, it is clear that counsel chose to ignore the requests for specific documentation that is pertinent to the present issue. A review of the record negates counsel's claim that "much, if not all, of the items demanded in the [request for evidence] were included in [the initial] evidence [submitted]." Specifically, besides disregarding the director's request for a detailed description of the beneficiary's proposed position, counsel neglected to submit the petitioner's payroll summary, IRS Forms W-2 and W-3, quarterly wage reports, and a description of the tasks performed by the lower-level employees. This information is essential to determining whether the petitioner employs a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. In other words, absent a support staff to perform the non-qualifying functions of the business, it is reasonable to conclude that the beneficiary would assume the responsibility of personally performing the petitioner's day-to-day functions. As it is presently constituted, the record does not identify the tasks to be performed by the beneficiary's lower-level employees. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

The AAO acknowledges the petitioner's organizational chart, which reflects the employment of nine workers, yet notes an inconsistency in the information contained on the chart and on Form I-140. The petitioner represented on the visa petition that it employed a staff of seven workers. 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 Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

A review of the beneficiary's job description further suggests that the beneficiary would be performing non-managerial and non-executive functions of the petitioner's business. In particular, the beneficiary would be personally responsible for planning the company's marketing and public relations policies, as well as "administer[ing] the office," which counsel stated included such day-to-day functions as maintaining personnel records and billing accounts, preparing the company's budget, collecting payments, and directing the maintenance of the company's facilities and equipment. As the petitioner failed to provide an allocation of the amount of time the beneficiary would devote to these tasks, the AAO cannot conclude that the beneficiary *primarily* performs high-level managerial or executive responsibilities and does not spend a majority of his time on day-to-day functions. 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)).

Contrary to counsel's numerous objections, the foremost requirement for classification as a manager or executive is demonstrating that the beneficiary would be *primarily* performing managerial or executive job duties. Counsel incorrectly claims that CIS may no longer rely on *Matter of Church Scientology International* for the proposition that an employee who primarily performs the tasks necessary to produce a product or to provide services may not be considered to be employed in a managerial or executive capacity. Sections 101(a)(44)(A) and (B) of the Act, in which the terms "managerial capacity" and "executive capacity" are defined, specifically dictate that a beneficiary must "primarily" perform each of the four named criteria as part of his or her assignment in order to be considered a manager or executive of the petitioning entity. The court in *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991), stating that the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature and what proportion is actually non-managerial, affirmed the AAO's finding that the petitioner "failed to establish that [the beneficiary's] duties . . . would be *primarily* executive or managerial". (Emphasis in original). Additionally, in *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999), the Court held that regardless of whether a beneficiary is managing what would be construed as an "essential" function, the modification of the definition of "managerial capacity" by the word "primarily" requires a petitioner to document and quantify the amount of time the beneficiary would dedicate to his purported managerial tasks. Whether a beneficiary is an "activity" or "function" manager "turns on whether [the petitioner] has sustained [its] burden of proving that his duties are 'primarily' managerial." *Id.* at 24. Furthermore, although unpublished, the Court in *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995), citing *Matter of Church Scientology International*, affirms the proposition 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. An employee's "impressive title" without additional specific evidence of the beneficiary's compliance with the statutory criteria for "managerial capacity" and "executive capacity" is not sufficient for classification as a multinational manager or executive. *See Boyang, Ltd. v. I.N.S.*, 67 F.3d 305. As a result, CIS' requirement that the petitioner demonstrate the beneficiary's employment in a *primarily* qualifying capacity is consistent with prior case law.

Counsel fails to substantiate his additional claim that the beneficiary would be employed as a functional manager of the petitioning entity. 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. Here, counsel makes a cyclical claim that "[a] person who manages the organization is unquestionably managing an 'essential function' of that organization since the operation of the business is certainly 'essential' to its existence." Counsel's blanket assertion does not satisfy the specific requirements outlined in the regulation at 8 C.F.R. § 205.4(j)(5). Under counsel's theory, demonstrating employment as a functional manager would require nothing more than a claim of managing or operating the petitioner's business. 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). As noted above, the claim of employment as a functional manager requires, at a minimum, a clear breakdown of the amount of time the beneficiary would dedicate to his purported managerial tasks. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

Counsel cites several decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel also addresses CIS' prior approvals of an L-1A visa for the employment of the beneficiary in a position equivalent to the position proposed herein. 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. at 597. 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 by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated its ability to pay the beneficiary's proffered annual salary of \$48,000. Following the director's request for evidence of the petitioner's ability to pay, counsel noted a change in the beneficiary's salary from the proposed amount of \$48,000 to \$20,072, the beneficiary's salary the previous year, and one which counsel stated the petitioner "can, beyond a doubt, pay." The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a 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 petitioner's decision to decrease the beneficiary's salary by approximately \$28,000 after the issue was raised by the director casts doubt on the petitioner's ability to pay the proffered salary, as well as the authenticity of the facts alleged in the original petition. 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). 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).

This conclusion is reinforced by the information contained on the petitioner's 2004 corporate tax return, which identifies the beneficiary's salary of \$20,072 and taxable income in the amount of \$9,543. In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary at the proposed salary of \$48,000.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D.

Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on November 5, 2004, the AAO must examine the petitioner's tax return for 2004. The petitioner's IRS Form 1120 for calendar year 2004 presents a net taxable income of \$9,543. The petitioner could not pay the additional \$28,000 of the beneficiary's salary out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. The petitioner's liabilities, which include accounts payable in the amount of approximately \$182,000, far exceed the petitioner's assets of \$70,000. Accordingly, the petitioner has not demonstrated its ability to pay the beneficiary's initial proffered salary of \$48,000.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.