



U.S. Citizenship
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FILE:

WAC 04 211 53803

Office: CALIFORNIA SERVICE CENTER

Date: JUN 02 2006

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, Chief
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 California that is engaged in the export of agricultural products to Korea. The petitioner seeks to employ the beneficiary as its chief executive officer.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; or (2) a qualifying relationship existed between the foreign and United States entities at the time of filing. The director also noted that the record contained insufficient evidence to determine whether the petitioner had the ability to pay the beneficiary's proffered salary at the time of establishing the priority date.

On appeal, counsel for the petitioner contends that, as the company's chief executive officer, the beneficiary satisfies the criteria outlined in the statutory definition of "executive capacity." Counsel further contends that a parent-subsidiary relationship exists between the foreign and United States entities as a result of the foreign entity's ownership of the entire amount of stock issued by the petitioner. Counsel submits a brief 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 AAO will first consider the issue of 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 July 27, 2004 noting the beneficiary's employment as the chief executive officer of the five-person company. In an appended letter, dated July 22, 2004, the petitioner noted the beneficiary's position as "president and CEO," and outlined the beneficiary's responsibility of making decisions related to the petitioner's business, finances, and long-term goals, as well as scientific issues. The petitioner provided the following job description for the beneficiary:

He is responsible for making decisions on acquiring crops compatible with the Korean market and demands giving [sic] Korea's dependence on import materials. He is responsible for reviewing videos, U.S. reports, track commodity markets and set prices based upon market conditions in Korea and to track commodity trends and demands. He interprets sales data and forecasts and adjusts according to the U.S. supply. Because [of] Korea's dependence on import materials, this position plays an important part in maintaining Korea's food supply by ensuring agricultural productivity and safety of food supply.

a. Scientific Decisions

The President and CEO uses the principles of biology, chemistry, physics, mathematics and other sciences to solve problems in agriculture. He reviews work of biological scientists on basic biological research and appl[ies] the advances in knowledge brought about by biotechnology. In the past two decades, there has been a rapid advance in basic biological knowledge relating to genetics spurred [by] growth in the field of biotechnology. This technology manipulates the genetic material attempting to make organisms and livestock more productive or resistant to disease.

As the President and CEO, [the beneficiary] is responsible for analyzing data to identify genetic traits in swine and cattle and choose between strains of cattle and swine depending on its breeding history. He reviews data in the U.S. with the changing needs of the Korean market and makes decisions as to the modifications required in the import of product and livestock to Korea and directs and oversees management for the successful execution and implementation of these decisions.

* * *

b. Business Decisions

The CEO is required to make decisions on determining the types of hay required for import in the Korean market, selecting the items for export from Washington, Oregon and California, and directing the General Manager to select farmers, balers and pressing facilities and receive quotations for contracts for purchase, and form contracts with the ocean freight forwarders for import overseas. Upon reviewing estimates, the CEO makes the decision.

c. Financial Decisions/Setting Long Term Goals

The CEO is also responsible for making decisions of export CNF prices as the prices vary according to quality grade, region, harvest time, etc. He is responsible for setting long term goals and policies for the U.S. Company. At the current time, he has established three goals:

- a) The Construction of a Hay Pressing Facility – decision to construct in El Centro, California based upon cost-benefit analysis of land and labor.
- b) The Expansion of American Breeding Company to Korea – the CEO is responsible for establishing compatibility between Korean and American Genetic History; and,

- c) The Development of New Export Items – identify and source appropriate products compatible with Korean market based upon conditions and needs.

[The beneficiary] is responsible for directing management in the day-to-day operations and to successfully execute the new goals of the U.S. Company. As the CEO of the U.S. Company, he exercises a wide latitude in discretionary decision-making and only reports his decisions and policy making to the Parent Company. When the occasion warrants, [the beneficiary] may seek direction or input from Parent Company.

The petitioner identified and explained the following positions subordinate to the beneficiary: general manager, agricultural division manager, operations division employee, and hay specialist.

In a decision dated August 24, 2005, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director referenced the job description offered by the petitioner, and stated that the job duties are "more indicative of an employee who is performing the necessary tasks to provide a service or to produce a product," which the director noted is not considered to be executive in nature. The director concluded that the petitioner's organizational structure did not preclude the beneficiary from "assisting with the day[-]to[-]day non-supervisory duties." The director further concluded that the beneficiary would not be employed as a function manager, as he was performing "routine operational activities of the entity." The director noted an inconsistency in the quarterly wage reports submitted by the petitioner and the petitioner's claimed staffing levels, in that the report filed for the quarter ending December 31, 2003 reflected three employees as opposed to five.¹ Consequently, the director denied the petition.

On appeal, counsel for the petitioner outlines the statutory definition of "executive capacity" and contends that the beneficiary's employment in the United States entity satisfies the statutory requirements. Counsel restates the job description provided for the beneficiary's role as president and chief executive officer, and supplements the record with another description of the beneficiary's job duties. As counsel's brief is part of the record, it will not be entirely repeated herein. Counsel explains that the beneficiary would make financial decisions related to the variety and quantity of hay to be exported, as well as scientific and business decisions regarding the quality of the hay purchased by the petitioner. Counsel states that the beneficiary would also be responsible for the management of the company's finances, which includes reviewing reports and determining prices. Counsel addresses the beneficiary's additional responsibility of choosing items available for export, in particular the breed of swine and dairy cattle. Counsel stresses the knowledge needed in selecting the specific breed to be exported and in interpreting the data resulting from various tests performed on the livestock. Counsel contends that these daily tasks are executive in nature and do not qualify as "menial" tasks of the organization. Counsel explains that the beneficiary's relocation to the United States "does not diminish or minimize his responsibilities and/or authority required to fulfill the parent company's clients needs," particularly in light of the foreign entity's dependence on the petitioner for its agricultural products. Counsel emphasizes the "steady growth" in the petitioner's sales volume, particularly during the year 2003, as evidence of the beneficiary's employment as an executive.

¹ As noted by the director, the petitioner did not provide its quarterly wage report for the quarter ending September 30, 2004, the period during which the immigrant petition was filed.

Counsel restates the petitioner's staffing levels and the job duties performed by each worker, and submits an organizational chart of the petitioning entity. Counsel also provides certifications of each worker's graduation from a university in support of his assertion that the beneficiary is managing professionals.

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.

Although counsel addresses on appeal the beneficiary's employment in an "executive" capacity, both the petitioner and counsel reference throughout the record the beneficiary's *managerial* authority over professional employees. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner has not clarified the capacity in which it is claiming to employ the beneficiary. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. In the alternative, if the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. As discussed below, the petitioner has not demonstrated that the beneficiary is primarily employed as a manager or an executive.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial and executive job duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-qualifying operational duties of the organization. The petitioner fails to quantify the time the beneficiary would spend on the named managerial or executive job duties, as opposed to the operational tasks assigned to the beneficiary. This failure of documentation is important because several of the beneficiary's daily tasks, particularly in relation to the scientific decisions made by the beneficiary, are non-managerial or non-executive in nature. For example, the beneficiary's analysis of biological research and data includes performing an "exterior investigation" to identify genetic traits and the breeding history of swine and cattle. The petitioner went so far as to mention that this investigation included an examination of the test performance data issued by the National Swine Registry of America and The National Association of Animal Breeders. In addition, the beneficiary would review soil and climate conditions in order to select the quality of hay to be exported, as well as other crops that would be compatible with the Korean market. The beneficiary's analysis included "reviewing videos, U.S. reports, track[ing] the commodity markets and [setting] prices based upon market conditions in Korea." Based on the petitioner's representations, the beneficiary is personally responsible for selecting the petitioner's product line, which encompasses performing in-depth analyses of studies and test data, rather than *managing* or *directing* others who would perform this function. The beneficiary is not merely applying his professional expertise to the development and modification of the petitioner's product line, but is solely responsible for performing the function. *See* 9 FAM 41.54 N8.2-1 (stating that a manager or executive may apply his "professional expertise to a particular problem"). The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion is actually non-managerial

or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 job descriptions provided by counsel on appeal do not clarify the beneficiary's purported role in the United States as a manager or executive. Besides being particularly vague, the petitioner outlines similar responsibilities for both the general manager and the beneficiary on its organizational chart. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). For example, the petitioner represents that the general manager would select the goods to be sold by the petitioner, set price terms, review sales reports and financial data to determine "cost reduction and program improvement," coordinate "financial and budget activities in order to fund operations, maximize investments, and increase efficiency," and establish the responsibilities of each department. These same tasks were identified as responsibilities of the beneficiary in the petitioner's June 14, 2003 letter and in counsel's appellate brief. Additionally, the petitioner represents that the hay specialist would be "[r]esponsible for all hay market research," yet explained in its July 22, 2004 letter and appellate brief that the beneficiary's knowledge of the Korean market is essential to the decisions related to buying and exporting hay. 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).

Moreover, the petitioner has not established that its staffing levels are sufficient to support the beneficiary in a primarily managerial or executive position. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a four-year-old export company that employed the beneficiary as chief executive officer, as well as two managers, an "operations" employee and a hay division specialist. The AAO notes that although assigned a managerial title, the agricultural division "manager" is not supervising lower-level workers and is responsible for performing the tasks of the department. Likewise, as discussed above, the petitioner has offered the beneficiary the "executive" title of "chief executive officer," yet the beneficiary is performing non-qualifying operational tasks relevant to the petitioner's sales. 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 four employees. 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.

Based on the foregoing discussion, the petitioner has not established the beneficiary's employment in the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing.

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

Affiliate means:

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

* * *

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

In its July 22, 2004 letter submitted with the immigrant petition, the petitioner noted the existence of a parent-subsubsidiary relationship between the foreign and United States entities. As evidence of this relationship, the petitioner submitted the following documents: (1) its articles of incorporation authorizing the issuance of 1,000,000 shares of stock; (2) a May 22, 2000 stock certificate naming the foreign entity as the owner of 1,000,000 shares of stock; (3) the petitioner's stock transfer ledger confirming the transfer of stock to the foreign entity; (4) transaction receipts for wire transfers to the petitioning entity occurring during the months of February through May 2000; and (5) the petitioner's years 2001, 2002 and 2003 income tax returns.

In his August 24, 2005 decision, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities. Specifically, the director stated that the petitioner had not "shown that the foreign entity owns the U.S. entity," as a result of furnishing consideration in exchange for its purported stock ownership. The director stated that it was not clear which of the wire transfer receipts offered by the petitioner evidenced funds transferred for the purpose of purchasing the petitioner's stock. The director also noted that Schedule L of the petitioner's 2001 income tax return reflected a zero balance in common stock at the beginning of the year and a balance of \$3,000 at the end of the year. The director stated that the information contained on the tax return did not reflect the petitioner's issuance of stock in May 2000, and noted that it was unclear whether the \$3,000 balance in capital stock "corresponds accurately to the 1,000,000 shares sold." Consequently, the director denied the petition.

On appeal, counsel for the petitioner contends that the foreign entity is the parent company of the United States corporation, and submits the following additional evidence: (1) the minutes from the foreign company's board of directors meetings in August 1999, April 2001, and June and October 2003, each discussing the United States entity; (2) the previously provided stock certificate and stock transfer ledger; (3) the foreign entity's December 31, 2000 balance sheet reflecting its ownership interest in the petitioning entity as a "marketable security"; and (4) two wire transfer receipts, dated May 22, 2000, confirming a cumulative

transfer of funds in the amount of approximately \$68,000 from the foreign entity to the petitioner. Counsel addresses the director's reference to the petitioner's tax returns, and explains that the director failed to consider that the petitioner's 2001 tax return reflects corporate earnings for the year 2000. Counsel states:

The U.S. Corporation was formed in May 2000, and as of January 1, 2000, the corporation did not exist; therefore, the value of common stock at the beginning of the year was \$0.00, as reflected in Schedule L of the U.S. Corporate Tax Returns. [The foreign entity] purchased the stock for a total of \$50,000 in May 2000. By end of year 2000, the value of common stock, held in its entirety by [the foreign entity] was determined to be \$3,000.00 according to the calculations of [the petitioner's certified public accountant].

Upon review, the petitioner has demonstrated the existence of a qualifying relationship between the foreign and United States entities. The petitioner provided documentary evidence of the foreign entity's ownership in the form of a stock certificate, stock transfer ledger, and wire transfer receipts, as well as sufficient documentation confirming the parent-subsidiary relationship, including the minutes from the foreign company's board of director's meetings and its December 2000 balance sheet reflecting its stock interest in the United States entity. The AAO acknowledges counsel's explanation on appeal verifying the value of the petitioner's common stock on its 2001 income tax return. Accordingly, the director's decision with regard to this issue will be withdrawn.

The director noted in his August 24, 2005 decision the issue of whether the petitioner demonstrated its ability to pay the beneficiary's proffered annual salary at the time the priority date was established. The record does not demonstrate the petitioner's ability to pay.

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

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

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 paid the beneficiary at the proposed salary. Rather, the petitioner stated in its July 22, 2004 letter that the beneficiary is on the payroll of both the foreign and United States entities, and receives a salary from each totaling \$100,000. Payroll records from the foreign entity reflect that in 2003, the foreign company paid \$77,800 of the beneficiary's salary. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner show that "the *prospective United States employer* has the ability to pay the proffered wage." (Emphasis added). The regulations do not allow for the consideration of the foreign entity's financial status in the ability to pay analysis.

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 July 27, 2004, the AAO must examine the petitioner's tax return for 2004. The petitioner, however, has not provided its 2004 tax return for review. The AAO notes that while it is reasonable that the tax return had not yet been prepared at the time of filing, it was likely available for the AAO's review at the time of the appeal in September 2005. 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)).

Although the petitioner submitted bank statements of its account balances for the months of January through June 2004, this is not sufficient evidence to demonstrate its ability to pay. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence of a petitioner's ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements"). The petitioner has not presented evidence that at the time the priority date was established it had the ability to pay the beneficiary his proffered annual salary. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. For this additional reason, the petition will be denied.

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

The AAO acknowledges that CIS previously approved four L-1 nonimmigrant petitions for the benefit of the beneficiary, including two L-1A visa petitions and two L-1B visa petitions. 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). Based on 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).

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.