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FILE:

SRC 05 014 51210

Office: TEXAS SERVICE CENTER

Date: OCT 12 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, Texas 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.<sup>1</sup>

The petitioner filed the instant immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C) of the Act. The petitioner is a corporation organized under the laws of the State of Texas that is engaged in the business of retail trade and investments. The petitioner seeks to employ the beneficiary as its director.

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 the director erred in his "assessment of executive capacity," and his finding that the beneficiary would not be employed in a primarily qualifying capacity. Counsel claims that the director incorrectly relied on the amount of wages paid by the petitioner, and did not consider its reasonable needs or whether the beneficiary would be employed as a "function manager." Counsel submits a brief and 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.

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<sup>1</sup> The director initially concluded that the instant appeal was untimely filed and treated it as a motion pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2). In a February 1, 2006 decision, the director dismissed the motion concluding that the petitioner had not submitted evidence to overcome the previous finding of ineligibility. The petitioner's counsel subsequently filed a motion to reopen and reconsider, which the director granted, and ultimately reopened and forwarded the original appeal to the AAO for review, resulting in the instant decision.

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 submitted the instant immigrant visa petition on October 20, 2004, noting the beneficiary's proposed employment as the director of its six-employee company<sup>2</sup>. In an attached letter, dated October 15, 2004, the petitioner outlined the job responsibilities held by the beneficiary in the position of director. As the petitioner repeated these responsibilities in its response to the director's request for evidence and provided the amount of time devoted by the beneficiary to each, they will be outlined below. The petitioner submitted an organizational chart identifying the beneficiary as supervising two retail clothing kiosks, which were run by a manager and two salespersons, as well as managing a subsidiary of the petitioner that was doing business as a gasoline station and convenience store. While the petitioner submitted with its initial filing copies of its state quarterly reports, none apply to the period during which the instant petition was filed.

The director issued a request for evidence on April 27, 2005, asking that the petitioner submit a statement addressing the following: (1) the beneficiary's position title; (2) a list of the job duties performed by the beneficiary; (3) the percentage of time the beneficiary would spend performing each job duty; (4) the qualifications required to perform in the beneficiary's position; (5) the level of authority held by the beneficiary; and (6) the job titles, job duties, and educational levels of the beneficiary's subordinate managers, supervisors, and employees. The director asked that the petitioner also submit an organizational chart depicting the beneficiary's position in the corporation, and explain whether he functions at a senior level.

Counsel for the petitioner responded in a letter dated July 12, 2005, stating that the beneficiary's employment in an executive capacity "is corroborated not only by the staffing that allows him to focus on executive directing but more importantly by the nature of the duties he has performed." Counsel explained that in the position of director, the beneficiary has focused on "executive networking," determining "marketing climates, and developing high level goals and guidelines for the U.S and foreign organizations." Counsel provided instances in which, he claimed, the beneficiary exerted his executive authority, such as purchasing a gasoline and convenience store and developing a cell phone store as an additional business in the gasoline and convenience market. Counsel explained that the lower-level personnel, which counsel stated was comprised of eight workers, including the beneficiary, would "execute the ministerial tasks of the business operation," while the beneficiary would direct the day-to-day activity of the subordinate staff. To corroborate the claim that the beneficiary would be employed in a primarily executive capacity, counsel referenced the following statement outlining the beneficiary's job duties:

- In consultation with the management and the Indian company develops long-range goals and objectives of the company, and *with particular emphasis on the import/export function* potential opened up by [General Agreement on Tariff and Trade (GATT)]; (25%)
- Directs and coordinates activities of the organization and formulates and administers subsidiary's investment policies (20%)
- Directs and coordinates activities relating to corporate planning, general administration, marketing-sales, and purchasing, activities for the subsidiary; (20%)
- Directs and coordinates activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives; (15%)

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<sup>2</sup> The record demonstrates that the petitioner in fact employed four workers at the time of filing; the remaining two workers were employed by a subsidiary of the petitioner.

- Reviews and analyzes activities, costs, operations, and forecast[s] data to determine progress toward stated goals and objectives (10%);
- Reviews with management and employees company's achievements and discusses required changes in goals or objectives of the company (10%);

(Emphasis in original)

An attached organizational chart identified the beneficiary's position as director-chief executive officer and the following subordinate positions: manager of exports and imports, two store managers (one who would manage the petitioner's two clothing kiosks and one who would manage the gasoline and convenience store owned by the petitioner's subsidiary), two salespersons working in retail clothing kiosks, and a salesperson working in the gasoline and convenience store. The AAO notes that the petitioner's state quarterly report for the period ending September 2004, one month prior to this filing, identifies four workers, the beneficiary, the clothing manager and two salespersons. Based on the amount of quarterly and annual wages paid to the manager and salespersons, none were employed by the petitioner on a full-time basis. Similarly, the accompanying quarterly report for the petitioner's corporate subsidiary demonstrates that neither the store manager nor salesperson was employed as a full-time worker. The petitioner submitted a statement of the job duties performed by each worker.

In an August 1, 2005 decision, 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 outlined the statutory criteria for "managerial capacity" and "executive capacity," and stated that while the beneficiary is "exercis[ing] discretion over the day-to-day operations of the activity, [ ] it must be noted that he is also performing some of the day-to-day duties of the business." The director reviewed the wages paid to the petitioner's employees, noting that, other than the beneficiary, none are full-time employees. The director concluded that the petitioner "does not need a full[-]time executive to manage part[-]time employees and to make decisions regarding the company." The director further stated that the petitioner had not established "that the beneficiary's primary assignment has been or will be directing the management of the organization nor that the beneficiary has been or will be primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel, who relieve him from performing non-qualifying duties." Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on September 6, 2005. In an appended appellate brief, counsel contends that as the director-chief executive officer of the petitioning organization, the beneficiary would be employed in a primarily executive capacity. Counsel challenges the director's findings, stating that her denial was based solely on an analysis of the wages paid by the petitioner to its employees and "a low employee count." Counsel stresses the statutory requirement imposed on Citizenship and Immigration Services (CIS) to consider the reasonable needs of the petitioning entity in conjunction with its review of the petitioner's staffing levels. Counsel states: "It is clear that at the time of the filing of the petition, the [p]etitioner was in early stages of operations (less than five years) and required few employees." Counsel contends that the petitioner's overall stage of development was either ignored by CIS or viewed negatively. Counsel further claims that the petitioner's limited staffing levels "should not be negatively dispositive," and notes that "the nature of [the] retail business in major malls has shifted the labor responsibilities from the individual retailers to the mall lessor . . . thereby reducing the payroll costs of the individual [retailers] like the [p]etitioner." Counsel cites an unpublished AAO decision as evidence that the size of the petitioner's staffing levels is not determinative of the beneficiary's employment capacity.

Counsel further states "it is possible that an entire absence of subordinate employees would still not automatically mean that [the] beneficiary is not acting in a executive and managerial capacity." Counsel contends that the beneficiary would be employed as a function manager as he "functions at a senior level of the organization," "manages the essential function of finance," and "exercises discretion over the day-to-day operations of the financial activities." Counsel claims that CIS ignored the petitioner's "shifting operational focus" from retail convenience store to importing and exporting apparel, stating that "this new shift in operational focus was corroborated by the trade shows, which the [b]eneficiary has attended and is scheduled to attend."

As additional evidence of the beneficiary's purported employment in a primarily qualifying capacity, counsel submits on appeal: (1) a statement from the beneficiary documenting his "activities" since his arrival as the director of the United States company; (2) a statement detailing the relevance of market awareness and positioning in the petitioner's business of selling garments; (3) photographs of the petitioner's booth at trade shows attended by the beneficiary; (4) "details regarding two major litigation issues negotiated and ultimately successfully resolved by the [b]eneficiary on behalf of the [p]etitioner"; and (5) evidence of the petitioner's sales in its retail kiosks.

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 limited statements offered by the petitioner as evidence of the beneficiary's qualifying employment are not sufficient to demonstrate that he would be employed in a primarily managerial or executive capacity<sup>3</sup>. The petitioner asserts such blanket claims as: directing "activities" related to planning, administration, marketing, sales, purchasing, production, and operations, coordinating "activities" and "investment policies" related to the company's subsidiary, reviewing and analyzing "activities, costs, [and] operations," forecasting data, and reviewing "company achievements," goals, and objectives. The petitioner represents that the beneficiary also "develops long-range goals and objectives," but states only that they are related to the company's import and export functions. The petitioner did not offer an additional explanation of the referenced "activities," "policies," "operations," "goals" or "objectives." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Moreover, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* at 1108.

The AAO notes that the job description offered by the petitioner in its response to the director's request for evidence identifies essentially the same broad job responsibilities as those outlined in the petitioner's initial filing. Despite the director's request for a "definitive statement describing the [beneficiary's] proposed job

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<sup>3</sup> While both the petitioner and counsel address the beneficiary's employment in a primarily *executive* capacity, the AAO will consider both statutory definitions of "managerial capacity" and "executive capacity."

duties," the petitioner submitted a similarly vague outline of proposed job responsibilities. 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). The 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).

Additionally, the record does not corroborate the petitioner's claims that the beneficiary would *direct* its marketing, production, operations, and purchasing functions. Based on the record, the petitioner does not employ any workers who would be responsible for the actual performance of the above-named functions, thereby allowing the beneficiary the opportunity to *direct* the functions rather than *perform* them himself. Of the petitioner's store manager and salespersons, none were described as performing the operational tasks related to its marketing or purchasing. In fact, in its October 15, 2004 letter, the petitioner initially identified the beneficiary as being responsible for the administration, marketing, sales and purchasing activities of its subsidiary, thus suggesting that the beneficiary would personally perform the non-qualifying tasks related to each of the functions. Moreover, while the petitioner claims that the beneficiary would supervise an import and export manager who would perform the related non-qualifying tasks of the petitioning entity, the record demonstrates that the import and export manager is actually an employee of the foreign entity. Other than the petitioner's claims, there is no specific evidence of the beneficiary's authority to direct the foreign company's import and export manager, or that the import and export manager is in fact responsible for performing the petitioner's non-qualifying import and export 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)). As the record does not corroborate the purported job responsibilities of the beneficiary, the AAO is left to question the validity of the petitioner's claims and the remainder of the beneficiary's claimed duties. 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 petitioner's unsubstantiated claims further undermine its representations as to the amount of time the beneficiary would spend purportedly *directing* the non-qualifying functions of the business. Based on the above discussion, the beneficiary would be primarily performing non-managerial and non-executive tasks, particularly those related to the petitioner's marketing. For example, the beneficiary is responsible for representing the petitioner at trade shows. The record does not demonstrate that the beneficiary maintains merely a public relations role at the trade conventions. *See* 9 FAM 41.54 N8.2-1 (recognizing that a manager or executive may participate in such activities as customer and public relations, lobbying and contracting). Rather, it appears that the beneficiary is selling the petitioner's products and marketing its services. The supplemental statement on appeal, in which the petitioner notes that the beneficiary attended a trade show in Las Vegas "to study the market and analyze it," supports the finding that the beneficiary would personally devise the petitioner's marketing strategies. The petitioner further explains that the beneficiary's additional responsibilities include meeting with buyers, presenting product samples, taking orders, and determining and offering lines of credit, tasks that are not typically deemed to be managerial or executive in nature. *See* §§ 101(a)(44)(A) and (B). Moreover, the beneficiary is identified as a "contact" on several sales invoices and

correspondence<sup>4</sup>, thereby reinforcing the finding of non-managerial and non-executive employment. The beneficiary's role in the petitioning entity appears to fall short of a mere public relations or "executive networking" position, as claimed by the petitioner, and cannot be considered to be primarily executive. 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).

An analysis of the petitioner's reasonable needs with respect to its purpose and overall stage of development also demonstrates that the beneficiary would not be employed in a primarily managerial or executive capacity. 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 noted by the director, the record demonstrates that the beneficiary is the only full-time worker employed by the petitioner. While not determinative of a beneficiary's employment capacity, the part-time employment of the petitioner's store manager and salespersons raises the question of how the petitioner's reasonable needs with respect to its two retail kiosks would be met. Based on the lease agreements, the petitioner is required to operate the kiosks during the shopping mall hours, which may presumably be up to eleven hours a day. The petitioner has not explained how it would maintain these two operations with three part-time employees, if not for the beneficiary's assistance. The AAO notes insufficiency in counsel's unsubstantiated claim on appeal that, as a five-year old company, the petitioner "was in [its] early stages of operations . . . and required few employees." Counsel has failed to document how the reasonable needs of the petitioning entity would be met through the employment of "few employees." 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).

Furthermore, the petitioner has not explained the beneficiary's purported continued supervision over the foreign entity's staff. Counsel emphasizes in his July 12, 2005 response to the director's request for evidence that the beneficiary "continues to oversee a large staff of over one hundred foreign sourced personnel." The AAO notes that without additional evidence of the beneficiary's purported supervision over the foreign workers or evidence of the responsibilities held by the overseas employees, counsel's claim will not be considered in the instant analysis. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534.

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<sup>4</sup> A July 25, 2003 and September 15, 2004 invoice for a clothing purchase, a May 14, 2004 letter for paid invoices, and various 2003 and 2004 invoices for the gasoline and convenience store identify the beneficiary as the contact person for the petitioner's businesses.

The AAO notes a deficiency in the record with respect to the operations of the gasoline and convenience store, which was maintained by the petitioner's subsidiary. From the information contained on the subsidiary's quarterly reports, it appears that its store manager and salesperson were also employed on a part-time basis. The limited discussion of the gasoline and convenience store, which incidentally appears to have been sold by the petitioner less than one month after this filing, limits the AAO's analysis of whether the reasonable needs of the store might plausibly be met through the employment of the beneficiary, a store manager, and a salesperson. 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.

The record does not support counsel's additional claim on appeal that the beneficiary would be employed as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

Here, counsel's argument does not sufficiently detail how the beneficiary would be employed as a function manager. Counsel states only that the beneficiary would function at a senior level of the organization, manage "the essential function of finance," and exercise "discretion over the day-to-day operations of the financial activities." Counsel does not define the finance function or identify the related activities. In fact, other than the petitioner's vague statement in its October 15, 2004 letter that the beneficiary would analyze its costs and forecast data, the beneficiary's purported role with respect to the petitioner's finances is not addressed in the record. Counsel's limited claim is not sufficient to establish that the beneficiary would be employed as the petitioner's function manager. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Despite the petitioner's failure to satisfy the eligibility requirements for the requested visa classification, the AAO notes that the director partially based her decision on an incorrect standard. The salaries received by the petitioner's lower-level employees, while representative of part-time or full-time employment status, are not, by themselves, determinative of whether the beneficiary would be employed in a primarily managerial or executive capacity. As noted by counsel and discussed above, section 101(a)(44)(C) of the Act requires CIS to take into account the petitioner's reasonable needs in light of its purpose and stage of development if considering the petitioner's staffing levels as a factor of the beneficiary's employment capacity. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. See 8 C.F.R. § 103.3(a)(1)(i). Notwithstanding the director's error, the record does not establish the beneficiary's eligibility for the requested classification.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In its October 15, 2004 letter, the foreign entity noted the beneficiary's role as "one of the main partners" of the foreign organization. The foreign entity's director stated that the beneficiary "[was] responsible for actively marketing [the foreign entity's] garments and products in trade shows and to customers all over the world," and further noted that the beneficiary was "solely responsible for improving [the foreign entity's] sales and [ ] brand image." In a subsequent job description, the organization's director identified the beneficiary as directing activities and coordinating policies, developing long range goals and objectives, supervising the organization's planning, administration, and marketing, sales, purchasing, and operational activities, analyzing costs, forecasting data, and reviewing goals. The AAO notes that the foreign entity's initial claims as to the beneficiary's exclusive role in its marketing and sales do not comport with the job description subsequently offered by the foreign entity. 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. at 591-92. Additionally, the latter description of the beneficiary's position as managing partner of the foreign entity addresses essentially the same job duties as those offered for the beneficiary's employment as director of the United States company. As already discussed above, the petitioner's statements are overly broad and do not identify the specific managerial or executive tasks performed by the beneficiary. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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 recognizes that CIS previously approved a nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary. 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.

Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

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

Furthermore, if the previous nonimmigrant petition was 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).

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.