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U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 01 2007  
WAC 05 248 52136

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

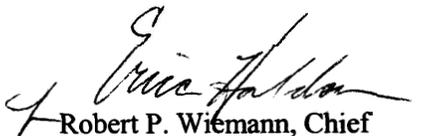
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Nevada that claims to be operating as an import, export, and investment company. The record, however, demonstrates that the petitioner is operating under the assumed name of [REDACTED] and is offering automobile repair and maintenance services. The petitioner seeks to employ the beneficiary as its president and chief executive officer.<sup>1</sup>

The director denied the petition concluding that the petitioner had not established: (1) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity; or (2) that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner challenges the director's findings, claiming that the beneficiary would be employed by the United States entity in a primarily managerial capacity, and that the beneficiary's employment in the foreign entity satisfies the statutory definitions of "managerial capacity" and "executive capacity." 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.

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<sup>1</sup> The record of proceeding demonstrates that on December 7, 1998, Citizenship and Immigration Services (CIS) approved a previously filed I-140 visa petition seeking employment of the beneficiary as its general manager. CIS subsequently revoked approval of the petition following an investigation performed in connection with the beneficiary's filing of Form I-485, Application to Register Permanent Residence or Adjust Status. Following the petitioner's appeal, the AAO, in a thorough decision, affirmed the director's findings and dismissed the appeal.

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 first 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 Form I-140 on September 14, 2005, noting the proposed employment of the beneficiary as its president/chief executive officer. With its initial filing, the petitioner submitted an organizational chart of its company, which was represented as providing auto services, and in which the beneficiary's job responsibilities were identified as follows:

Responsible for overall management of business, plans, develops and establishes business policies and objectives; oversees all financial functions and decision making; expansion of business markets. Full authority to hire and fire employees.

The beneficiary was identified as directly supervising a general manager, who managed subordinate employees in the following positions: certified public accountant; warehouse manager; operations manager; cashier; transmission technician; shop foreman; general mechanic and specialist; general mechanic; customer service specialist; and mechanic.

The AAO notes that the most recent employee records offered by the petitioner relate to wages paid to the company's employees on June 5, 2005, three months prior to this filing. At this time, the petitioner employed seven of the twelve employees identified on its organizational chart. The record does not contain documentary evidence confirming the petitioner's purported staffing levels at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971)(requiring that a petitioner establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts). 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)).

The petitioner noted the existence of a second United States company, [REDACTED], which was doing business as [REDACTED]. In an attached organizational chart, the beneficiary was identified as exercising managerial authority over [REDACTED] operations and financial functions. The beneficiary's noted job duties with respect to this business were identical to those outlined above. On the organizational chart, the beneficiary was represented as overseeing an operation manager, an assistant operation manager, three supervisors, a "fishman," two stockers, two cashiers, and an eleventh employee whose position was not identified.

The director issued a request for evidence on February 27, 2006, outlining the statutory definitions of "managerial capacity" and "executive capacity," and directing the petitioner to submit the following evidence that the beneficiary would be employed as a manager or executive of the United States entity: (1) a detailed description of the beneficiary's specific job duties and the amount of time the beneficiary would devote to performing each; (2) a description of the requirements necessary to perform in the beneficiary's proposed position, and evidence that the beneficiary meets the conditions; and (3) an organizational chart reflecting the employees to be supervised by the beneficiary, and a brief description of each employee's job duties, educational levels, dates of employment and annual salaries. The director noted that if applicable, the petitioner should submit evidence that the beneficiary qualifies as a function manager.

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<sup>2</sup> The record indicates that [REDACTED] was established in the State of Nevada on January 15, 2004, and that on August 15, 2005, 100 shares of stock were issued to the petitioner as the company's sole shareholder. Additional corporate documentation in the record establishes [REDACTED] as a subsidiary of the petitioning entity.

Counsel for the petitioner responded in a letter dated April 28, 2006, claiming that the petitioner had already submitted the requested evidence at the time of filing. Counsel restated the previously outlined job duties, stating that they satisfy both statutory definitions of "managerial capacity" and "executive capacity." Counsel again submitted copies of the previously offered organizational charts, which counsel contended demonstrated the beneficiary's role as a function manager in each organization. The AAO notes that counsel did not submit additional evidence in support of the beneficiary's employment as a manager or executive.

In a decision dated September 1, 2006, the director concluded that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. The director noted the beneficiary's job duties and the organization's purported staffing levels, but stated that the quarterly tax return indicated that the petitioner employed only five of the twelve workers identified on the company's organizational chart. The AAO notes that it is not clear what documentation the director is referencing in this particular finding, as the record does not contain employee records, such as quarterly wage reports or check registers, identifying the company's staffing levels in September 2005.

The director further noted uncertainty as to the type of business operated by the petitioner and ambiguity in the beneficiary's corresponding role. The director concluded that the petitioning entity, as represented in the record, "does not have a reasonable need for an executive because the type of business – import/export auto mechanic business [does] not require or have a reasonable need for an executive." The director also concluded that with five subordinate employees, the beneficiary would participate in the performance of non-managerial and non-executive tasks associated with the company's import, export, and automobile functions. The director stated that the beneficiary would not qualify as a manager or executive because he would not be supervising managerial, supervisory, or professional employees. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on October 3, 2006. In an appellate brief, dated October 30, 2006, counsel contends that in denying the immigrant visa petition, CIS failed to take into account the job duties performed by the beneficiary in relation to [REDACTED] which counsel contends employed eighteen workers as of July 2006. Counsel states that the organizational chart of [REDACTED] reflects the managerial position held by the beneficiary, as well as his associated job duties, and further contends that it undermines the director's finding that the beneficiary supervises only five workers. Counsel stresses that in his role as president/chief executive officer of [REDACTED] the beneficiary directly supervises an operation manager and assistant operation manager and indirectly supervises three departments. Counsel outlines the statutory definition of "managerial capacity," claiming that when the beneficiary's job duties in the petitioning entity and in [REDACTED] are considered together, "it becomes clear that [the beneficiary] exercises the requisite managerial duties [to qualify for the requested immigrant visa classification]." In support of the appeal, counsel submits copies of [REDACTED] 2006 quarterly wage reports and a copy of the company's organizational chart.

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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).

Notwithstanding counsel's emphasis on appeal to consider the beneficiary's position as president of ██████████ ██████████ in the instant analysis, the record falls significantly short of establishing that the beneficiary performed the high-level managerial or executive responsibilities provided for in the statutory definitions of "managerial capacity" and "executive capacity." *See* §§ 101(a)(44)(A) and (B) of the Act. The vague job description offered by the petitioner, which the AAO notes is the same for the beneficiary's role in both the petitioning entity and in ██████████ does not document the specific managerial or executive job duties to be performed by the beneficiary. Specifically, the petitioner stated that the beneficiary "[would be] responsible for overall management of [the] business," "plans, develops, and establishes business policies and objectives," "oversees all financial functions and decision making," "[expands] business markets," and possesses "[f]ull authority to hire and fire employees." The petitioner's statements do not define the beneficiary's purported high-level responsibilities, such as the specific policies or objectives planned by the beneficiary with respect to his "overall management" of each business. Nor did the petitioner provide examples of the beneficiary's managerial authority in decision-making, or explain what specific managerial or executive tasks are included in the expansion of each company's business market. 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).

Similarly, considering the regulation at 8 C.F.R. § 204.5(j)(5), which requires the petitioner to clearly describe the managerial or executive job duties to be performed by the beneficiary in the United States, it is unreasonable for the petitioner to expect that the identical descriptions for the beneficiary's role as president of an auto services business and as president of a food market would be sufficient to establish his eligibility for the requested visa petition. The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

Also, the petitioner's claim that the beneficiary would possess the authority to hire and fire each company's employees does not rise to the level of specificity necessary to establish the beneficiary as a manager or executive. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

Moreover, despite the director's request for a more specific and detailed description of the beneficiary's job duties and the amount of time devoted to each, counsel submitted the same limited list of job duties as that originally provided with the Form I-140. Counsel's failure to submit a more thorough outline of the beneficiary's managerial or executive tasks restricts the instant analysis, as the offered job descriptions are simply insufficient in explaining the specific role of the beneficiary as president in either company. 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).

Furthermore, while not conclusive of the capacity in which the beneficiary would be employed, the absence of employee records relevant to the filing date calls into question the staffing levels maintained by the

petitioner at the time of filing. While the director did not request evidence of wages paid to the petitioner's employees, such as quarterly wage reports or employee records, the AAO notes, in particular, the most recent check register, dated June 5, 2005, which identifies seven of the twelve employees on the organizational chart. The AAO again notes the director's finding that the petitioner employed only five of its purported twelve employees on the filing date. Regardless, counsel did not submit documentary evidence on appeal addressing or resolving the discrepancy raised by the director. Without additional evidence, the AAO cannot determine whether the petitioner employed the claimed twelve-person staff on the date of filing and whether the subordinate staff was sufficient to support the beneficiary in a primarily managerial or executive capacity.

Counsel emphasizes on appeal the beneficiary's concurrent employment as president of [REDACTED] claiming that when considered in conjunction with his role in the petitioning entity, the beneficiary qualifies as a manager under section 101(a)(44)(A) of the Act.

The job duties of the beneficiary for the petitioner and those on behalf of the petitioner's subsidiary may be considered together if the petitioner demonstrates that the companies are significantly interrelated. The statutory definitions of executive and managerial capacity refer to an assignment with an organization in which the employee either manages the organization or directs the management of the organization. Section 101(a)(28) of the Act defines "organization" as follows: "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanent or temporarily associated together with joint action on any subject or subjects." The AAO stresses however that the relevant regulations require that *the United States employer* seeking classification of the beneficiary as a multinational manager or executive employ the beneficiary in a primarily managerial or executive capacity.

Here, as discussed above, the job descriptions offered for the beneficiary's employment by the petitioning entity are not sufficient to establish his proposed employment in a primarily managerial or executive capacity. In accordance with the regulations, the analysis of the beneficiary's employment capacity can not be dependent on the tasks performed by the beneficiary in a separate, but related, organization. *See* 8 C.F.R. § 204.5(j)(5) (requiring that the prospective employer in the United States 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). As conceded by counsel, the beneficiary's employment in the United States would not rise to the level of managerial or executive unless CIS were to consider his concurrent role as president of Manila Market. Moreover, even if the AAO were to consider the beneficiary's employment by Manila Market, the essentially identical outline of vague job duties is not sufficiently descriptive to corroborate the petitioner's claims of employing the beneficiary in a primarily managerial or executive capacity. 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.

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

The second issue in this proceeding is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

With its initial filing, the petitioner provided an organizational chart of the foreign entity, on which the beneficiary's role as owner/general manager was identified as follows:

Responsible for overall management of business, plans, develops and establishes business policies and objectives; oversees all financial functions and decision making; expansion of business markets. Full authority to hire and fire employees.

The AAO notes that the beneficiary's job responsibilities are identical to those identified for his employment in the United States entities.

On the organizational chart, the beneficiary was identified as having directly supervised a general operation manager, as well as lower-level workers employed as sales representatives, stock persons, a driver, and a cashier.

In his February 27, 2006 request for evidence, the director asked that the petitioner submit a "more detailed description of the beneficiary's duties abroad," including the amount of time the beneficiary devoted to the performance of each task. The director also requested that the petitioner identify the employees supervised by the beneficiary while employed in the foreign entity.

In his April 28, 2006 response, counsel for the petitioner referenced the organizational chart submitted with the petitioner's initial filing, claiming that it included a detailed description of the beneficiary's job duties, and demonstrated that the beneficiary supervised the company's general operation manager. Counsel stated that the beneficiary satisfied the regulatory requirement that the beneficiary had been employed as a manager or executive for at least one year during the three years prior to his entrance into the United States as a nonimmigrant. Counsel again submitted a copy of the foreign entity's organizational chart.

In his September 1, 2006 decision, the director concluded that the beneficiary had not been employed by the foreign entity in a primarily managerial or executive capacity. The director noted the foreign entity's claimed staffing levels, but stated that the employee "reports" do not reflect the employees' dates of employment or that the beneficiary had been employed by the foreign organization. The director stated: "[I]t is unlikely with the business function and structure of the foreign entity that the beneficiary was attending to managerial or executive duties." Consequently, the director denied the petition.

On appeal, counsel for the petitioner emphasizes CIS' previous approval of an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary, which, counsel claims, comprised "the same operative set of facts relating to the foreign entity." Counsel contends that the prior approval should create a presumption of the beneficiary's eligibility for the requested immigrant visa classification. Counsel also references the previously submitted organizational chart documenting the beneficiary's job duties as evidence that the beneficiary possessed supervisory authority over the foreign entity's general manager. Counsel further contends that CIS applied a higher standard of proof to the instant issue, rather than the adopted "preponderance of the evidence" standard.

Upon review, the petitioner has not established that the beneficiary had been employed by the foreign 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).

As discussed above in the analysis of the beneficiary's employment in the United States, the identical description offered for the beneficiary's position as general manager of the foreign entity is not sufficient to establish his former employment in a primarily managerial or executive capacity. The petitioner offered only vague statements that the beneficiary "[was] responsible for overall management of [the] business," "plans, develops, and established business policies and objectives," "[oversaw] all financial functions and decision making," "[expanded] business markets," and possessed "[f]ull authority to hire and fire employees." Again, the petitioner's statements do not define the specific policies or objectives with respect to the management of the foreign entity, document examples of the beneficiary's managerial authority in decision-making, or explain what managerial or executive tasks were included in the expansion of the company's business market. 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 did 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).

Similarly, the petitioner's claim that the beneficiary possessed the authority to hire and fire each company's employee does not rise to the level of specificity necessary to establish the beneficiary as a manager or executive. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.* at 1108.

Also, although the director requested a description of the specific job duties performed by the beneficiary while employed by the foreign entity, counsel again submitted the same job description as already provided on the organizational chart. 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). The additional information requested by the director was relevant to the analysis of the instant issue as the original record was simply too limited to determine the beneficiary's employment capacity. 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).

Counsel suggests on appeal that the beneficiary's prior approval as a L-1A nonimmigrant intracompany transferee creates a presumption of his eligibility for classification as a manager or executive under section 203(b)(1)(C) of the Act. Counsel's claim is not persuasive.

The record demonstrates that CIS previously approved two L-1A nonimmigrant petitions filed on behalf of the beneficiary. 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.

Additionally, 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. *See* 8 C.F.R. § 103.8(d). 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.

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

Furthermore, 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).

Counsel further challenges the standard of proof applied by CIS to the instant matter. As correctly noted by counsel, the petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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

or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence is not probative and credible. The petitioner submitted identical descriptions for the beneficiary's employment as general manager of the foreign entity and as president/chief executive officer of the United States entity, neither of which specifically describes the managerial or executive tasks purportedly performed by the beneficiary. The petitioner's vague statements, which paraphrase portions of the statutory definitions of "managerial capacity" and "executive capacity," fall significantly short of establishing the beneficiary as a manager or executive.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, 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 wages at the time of filing the immigrant visa petition.

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.

The petitioner represented on the Form I-140 that the beneficiary would receive an annual salary of \$62,400. Upon further review of the record, it appears that of the proposed \$62,400 salary, the petitioner would pay \$38,400, while Manila Market would compensate the beneficiary the remaining \$24,000.

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 annual salary. Based on the beneficiary's 2004 Internal Revenue Service (IRS) Form W-2, the beneficiary received \$27,250, or \$11,150 less than the proffered salary.

As an alternate means of determining the petitioner's ability to pay, the AAO may examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. The AAO notes, however, that the record does not contain copies of the petitioner's 2005 federal income tax return.

Based on the record as presently constituted, it does not appear that the petitioner has the ability to pay the beneficiary his proposed annual salary of \$38,400. The submitted check registers, which document weekly wages paid in January 2005 and April through June 2005, indicate that the beneficiary has been receiving

approximately \$357 per week, or an annual salary of \$18,564. The record is devoid of evidence demonstrating the petitioner's ability to compensate the beneficiary the additional \$19,836. As a result, the AAO cannot determine whether the petitioner had the ability to pay the beneficiary is proffered wages at the time of filing. 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 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.