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FILE: [REDACTED]
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Office: TEXAS SERVICE CENTER Date: AUG 28 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

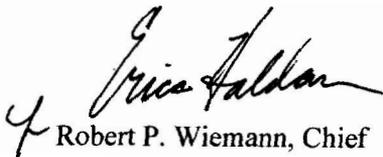
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 visa petition. The petitioner filed an untimely appeal, which the director treated as a motion to reopen and affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the 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 Florida that is engaged in the research and development of industrial software. The petitioner seeks to employ the beneficiary as its chief operating officer (COO).

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, the petitioner¹ contends that the beneficiary satisfied the eligibility requirements of a multinational manager or executive. The petitioner further challenges the director's failure to review its earlier claim of ineffective assistance of counsel, and contends that its right to due process was violated. The petitioner 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.

¹ While the petitioner is self-represented in the present appeal, two separate counsels represented the corporation during earlier proceedings. The petitioner's first counsel withdrew on August 3, 2005, and was replaced by a second attorney who represented the petitioner during the request for evidence stage of this matter.

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

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-140 on April 2, 2004, noting that the beneficiary would occupy the position of chief operating officer, which the petitioner described as: managing and directing the company's marketing campaign, including "designing, implementing, and [directing] [] the ongoing market research activities that have been initiated; directing "international exposition programs"; and, reporting to the company's president. In support of the beneficiary's proposed employment as a manager or executive, the petitioner submitted a copy of its March 25, 2004 letter, which it had submitted in connection with its L-1A nonimmigrant petition to temporarily employ the beneficiary in the same position. In its letter, the petitioner emphasized the beneficiary's responsibilities of ensuring both the foreign entity's successful expansion into the United States and the successful planning and execution of the petitioner's market and field testing campaigns. The petitioner provided the following outline of the beneficiary's "managerial" responsibilities:

Manage and Direct the Marketing Campaign – [The beneficiary] is be charged with designing, implementing, and directing the ongoing market research activities that have been initiated by himself with leading United States mixing and chemical processes equipment manufacturers. Further, [the beneficiary] leads [the petitioner's] research alliances with top engineering authorities, including [redacted] one of the country's most renowned mixing and chemical processes engineers. In his previous management capacity at [the petitioning entity], [the beneficiary] led the formation of a number of these key alliances. As COO, [the beneficiary] is, in effect, responsible for managing and directing the market and field testing that has been, and will continuously be, conducted at the academic and industry level by a number of prestigious United States firms, including Chem FlowTronics and Mix Tech. As a result of creating these valuable research alliances, [the beneficiary] has, and continues to, position [the petitioner's] software technology at a significant advantage over other foreign-owned information technology providers in this particular industry.

Manage and Direct the International Exposition Programs – [The beneficiary] is be [sic] charged with the coordination and negotiation function for placing and showcasing [the petitioner's] software technology at national and international industry and trade events. In his previous management capacity with [the petitioner], [the beneficiary] led a series of international trade exposition campaigns. In 2002 and 2003, [the beneficiary] organized and led [the petitioner's] delegation at AchemAmerica 2002, and 2003, the single largest trade event in all of the European Union to enter product service and sale negotiations. [The beneficiary] undertook the general direction of [the petitioner's] presentation at the event, and designed a successful targeted strategy to attract the most prominent mixing and chemical processes equipment manufacturers throughout Europe. The industry-wide exposition was held in Frankfurt, Germany. Additionally, [the beneficiary] has organized and led a series of other coordination projects at national events, including the 2002 American Institute of Chemical Engineers (AIChE). As COO, [the beneficiary] is responsible for successfully continuing and managing this essential international marketing function of [the petitioner].

Report to the President and Chief Executive Officer (CEO) of [the petitioning entity] – As the President and CEO is frequently out of United States conducting other business for [the petitioner], [the beneficiary] is charged with undertaking reporting functions concerning the ongoing marketing campaign involving market and field studies, and market

analysis conducted by a host of United States-based industry consultants, manufacturers, and installation service providers.

On March 14, 2006, the director issued a Notice of Request for Evidence.² In the notice, the director asked that the petitioner submit a "definitive statement" of the beneficiary's proposed employment in the United States entity, including: (1) his position title; (2) the associated daily job duties and the percentage of time the beneficiary would devote to performing each task; (3) the subordinate managers or employees who would report to the beneficiary, and a brief description of their positions, job duties, and educational levels; (4) the qualifications necessary to perform in the position of chief operating officer; and (5) the level of authority held by the beneficiary. The director requested specification of the beneficiary's position within the petitioner's organizational hierarchy, particularly whether the beneficiary would function at a senior level position. The director further asked that the petitioner explain who would perform the sales or services offered by the organization.

Counsel for the petitioner responded in a letter dated June 13, 2006, stating that the beneficiary's proposed position of chief operating officer would be comprised of primarily managerial and executive job duties. Counsel stated:

As Chief Operations Officer, [the beneficiary] will be acting in a senior level managerial and executive manner. His primary responsibility will be managing the marketing and dissemination of [the petitioner's] software products in the United States. In this capacity[,] he has the senior level responsibility of meeting with representatives of several Fortune 500 companies that have been testing and shaping the performance and quality of [the petitioner's] innovative software systems for mixing and processing operations in the U.S.

* * *

[The beneficiary] will manage and direct the overall operation of the marketing and software development functions of the organization. His primary managerial function will be the marketing of [the petitioner's] software throughout the United States and to manage the transformation of [the petitioner] into the international operations headquarters for distributing, marketing and developing [the petitioner's] pioneering software technologies throughout the world. He is the only executive responsible for overseeing the adaptability of [the petitioner's] software to the U.S. market. It is his sole responsibility to engage corporations to provide recommendations and industry analysis reports to help [the petitioner's] marketability in the U.S. Additionally, he will have the authority to hire and fire any support personnel as needed. Currently, however, the Petitioner has only two

² The record indicates that the director initially sent a request for evidence to the petitioner on March 23, 2005. It appears that, in response, the petitioner's first counsel submitted a July 18, 2005 letter requesting that the petition be withdrawn. Following the withdrawal of the petition, the petitioner submitted Form I-290B, dated September 7, 2005, on which it contended that its former counsel had erroneously filed a request to withdraw the petition. The director treated the appeal as a motion to reopen or reconsider, and granted the motion. The director ultimately denied the petition in a decision dated June 22, 2006.

employees, (1) the Chief Operations Officer, Beneficiary [] and (2) [the company's] President [].

In further support of the beneficiary's purported managerial or executive employment, counsel cited section 101(a)(44)(C) of the Act, noting that because the petitioner has not yet "developed into a large entity, and is anticipating or in the process of expanding, then [the beneficiary] . . . would not be expected to be supervising a large number of employees." Counsel also addressed the concept of function manager, stating that the beneficiary would "manage the marketing and software development of the company, including the delegation of non-managerial duties as well as managing the entire marketing and software development functions of the company." Counsel stressed the importance of this function to the business' growth and success.

Counsel further outlined the statutory definition of "managerial capacity," contending that the beneficiary would satisfy each of the criteria, as he would: manage the company's marketing and software development functions; function at a senior level of the company, report only to the president; possess the authority to hire and fire employees; and exercise discretion over the day-to-day operations of the marketing and software development function.

Counsel cited several unpublished AAO decisions in support of the beneficiary's proposed employment as a manager or executive. In her comparisons with the AAO decisions, counsel noted various responsibilities to be held by the beneficiary, such as: possessing managerial control and authority over the export functions of the company; establishing office procedures; assigning work; conferring with new employees; hiring additional employees; exhibiting "expertise" in the purchase and export of heavy equipment; binding the company in contracts; and determining pricing.

Also included with counsel's response was the following list of job duties associated with the beneficiary's proposed position:

- Manages all the marketing of [the petitioner's] software throughout the United States. (promotional material, website, market research analysis to determine beta testers)
- Manages the transformation of [the petitioning entity] into the international operations headquarters for distributing, marketing and developing [the petitioner's] pioneering software technologies.
- Directs and oversees the adaptability of [the petitioner's] software to the U.S. market.
- Targets and engages corporations to provide recommendations and industry analysis reports to help [the petitioner's] software product's marketability in the U.S.
- Directs field testing of [the petitioner's] software product line.
- Direct introduction of [the petitioner's] software product line throughout the U.S.
- Represents the company and meets with [the petitioner's] software testers, including corporate executives and university researchers[.]
- Exercises discretion over the day-to-day operations of the marketing and software development functions.
- Establishes the procedures and goals of the marketing and software development of the organization.
- Advises the president of special needs and the need for new positions in the company.
- Has the authority to hire and fire any support personnel as needed.

Counsel also submitted a list of companies that assisted the petitioning entity in the evaluation of its software products, and letters from two of the companies, which attested to their working relationship with the beneficiary. On a separate list of company employees, the petitioner noted the employment of the beneficiary as its president, as well as its use of an outside accounting firm for the preparation of its taxes.

In a June 22, 2006 decision, the director concluded that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director recognized the petitioner's staffing levels, and noted that the petitioner had not submitted documentary evidence of its claimed use of independent contractors. The director restated the job duties offered for the beneficiary's position as chief operating officer, and concluded that, despite the beneficiary's purported managerial authority, the beneficiary would be "fully involved in the marketing, sales and testing of the petitioner's product," as opposed to primarily managing those who would perform these functions. The director stated that the record failed to establish "that the beneficiary will supervise or manage the activities of others who will in turn market and sale [sic] the product." Consequently, the director denied the petition.

As noted previously, the petitioner subsequently filed an untimely appeal on December 14, 2006, which the director treated as a motion to reopen pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2). The record suggests that the director granted the motion, and, following a review of the record, again concluded that the beneficiary would not be employed in a primarily managerial or executive capacity. The director stated that the petitioner had not demonstrated that the beneficiary would be supervising lower-level employees or contractual workers who would relieve the beneficiary from performing the business' non-qualifying functions. The director also concluded that the reasonable needs of the organization would require the beneficiary to perform such non-managerial and non-executive functions as product development and marketing. Accordingly, the director affirmed the denial of the immigrant visa petition in a decision dated December 21, 2006.

In the instant appeal, filed on January 22, 2007, the petitioner contends that the beneficiary is eligible for the requested immigrant visa classification, stating that the beneficiary not only possessed the requisite managerial authority over the organization and its functions, "but the majority of his work relate[s] to the company's operational policy and management, carrying out its operations and policies (such as supervising lower level employees, performing sales work, operating machines and supervising who else does it)." The petitioner further notes the concept of function manager, stating that the beneficiary would manage both an essential function of the company and lower-level workers. The petitioner states:

This position requires [the beneficiary] to establish the operation of the company, organize and oversee all administrative matters[,] and exercise full responsibility for recruiting, hiring, training and dismissing employees. He ensures the coordination of the new departments and workers. He implement[s] policies and adopt[s] strategies to improve business[,] holding full authority over all executive decisions aiming to achieve the profitability goals set by the [foreign] company. He is administering the departments, as he considers necessary to carry out the business [of the foreign entity] cresting another business success such as the parent company in Brazil.

The petitioner references a previously submitted job description as evidence that the beneficiary's proposed position would be comprised of primarily managerial or executive job duties. The petitioner contends that the beneficiary would satisfy the reasonable needs of the organization according to its stage of development.

The petitioner further claims ineffective assistance of its two previous counsels, claiming that its first attorney failed to communicate to the petitioner the director's initial denial of the petition, while its most recent counsel did not submit an adequate response or the complete documentation requested by the director in her request for evidence. The petitioner claims that its first counsel led it to believe that the processing of the Form I-140 was pending, and as a result, was precluded from filing a timely appeal of the director's original denial. The petitioner seeks to toll the statute of limitation governing the filing of an ineffective assistance of counsel claim, stating that it was prejudiced by the actions taken by both attorneys, and that its due process rights were violated. The petitioner also contends that CIS' failure to recognize the concept of function manager in its review of the petition deprived the company of its right to due process. The petitioner requests that the AAO remand the matter to the director in order "to afford the petitioner a new opportunity to provide documentary evidence meriting approval of [the petitioner's] application on behalf of [the beneficiary]"

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

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The definitions of executive and managerial capacity have two separate requirements. 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).

While the petitioner submitted various descriptions for the beneficiary's position as chief operating officer, several contain only broadly-cast statements of the beneficiary's responsibilities that do not constitute an adequate account of the beneficiary's purported managerial or executive employment. Additionally, the job description provided by the petitioner with its initial filing does not appear to coincide with subsequent statements furnished by the petitioner and counsel in response to the director's request for evidence, on motion, and on appeal. Altogether, these inadequacies and inconsistencies raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine 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).

With respect to the list of job duties provided for the beneficiary's position, the petitioner noted such vague responsibilities as: manage the company's transformation into an international distribution, marketing, and development operation; oversee the adaptability of software to the United States market; appoint corporations to provide recommendations and industry analysis reports; direct the field testing and introduction of the petitioner's software product line; represent the company to software testers; exercise discretion over the day-to-day marketing and software development functions; establish the marketing and software development goals; advise the president; and make staffing decisions. The petitioner's limited representations of the beneficiary's responsibilities do not resolve the director's inquiry as to the specific managerial or executive tasks performed by the beneficiary on a daily basis. For example, the petitioner has not defined the qualifying tasks associated with transforming the petitioner into an "international operations headquarters," adapting and introducing software to the United States market, or selecting and regularly interacting with software testers. Nor did the petitioner explain why these tasks should be considered to be primarily managerial or executive in

nature. 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).

Additionally, the petitioner's references to the beneficiary's discretionary authority over day-to-day marketing and software development function and over the company's personnel decisions, as well as his authority to establish goals and policies are broad restatements of the statutory definitions of "managerial capacity" and "executive capacity" that do not rise to the level of specificity required by the regulations. See 8 C.F.R. § 204.5(j)(5) (requiring that at the time of filing the Form I-140, the petitioner clearly describe the managerial or executive job duties to be performed by the beneficiary). 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Nonetheless, the AAO acknowledges additional job descriptions offered by the petitioner. As noted above, however, the supplemental job descriptions do not appear to coincide with the petitioner's original claims, and, in effect, complicate the analysis of the true position to be held by the beneficiary. In its initial filing, as evidence of the beneficiary's proposed employment, the petitioner referenced the March 25, 2004 letter submitted with its L-1A nonimmigrant petition previously filed for the benefit of the beneficiary, which suggested that the beneficiary's role would be limited to three specific areas: managing the marketing campaign, managing the international exposition programs, and reporting to the president. Yet, in its June 13, 2006 response to the director's request for evidence, the petitioner's counsel noted such job responsibilities as establishing office procedures, assigning work, purchasing and exporting heavy equipment, and binding the company in financial contracts. Furthermore, in both its motion to reopen and appellate brief, which the AAO notes contain essentially the same discussion, the beneficiary is identified as supervising lower-level employees, performing sales work, operating machines, and overseeing departments. In addition to the inconsistencies in the submitted job descriptions, the veracity of these representations is questionable because: (1) the petitioner has not clarified the existence of "heavy equipment" or machines in its operations or the beneficiary's role with respect to its purchases or exports; (2) the petitioner conceded that it does not maintain a staff subordinate to the beneficiary, and likewise would not have "departments" that the beneficiary supervises; (3) there is no evidence corroborating the petitioner's claim of utilizing outside contractors; and (4) other than this brief claim, the petitioner did not address the "sales work" performed by the beneficiary.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence or filing an appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Due to the conflicting job descriptions offered by the petitioner, which address aspects of the petitioner's business that have not been adequately explained and contain substantial differences in the tasks and responsibilities of the beneficiary, the AAO cannot determine whether the original position offered to the beneficiary was primarily managerial or executive. 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.

The petitioner's additional claim that the beneficiary would be a function manager is not persuasive. The petitioner claimed that the beneficiary would manage the company's marketing and software development function and delegate non-managerial duties with respect to this function. 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.

The AAO recognizes the petitioner's relationship with various corporations that test and analyze the corporation's software. Yet, other than representing the beneficiary as being responsible for selecting testers and reviewing their analyses, the petitioner has not addressed how the beneficiary would manage the company's marketing and software development function. On the contrary, while the beneficiary may oversee the studies performed on the company's software, which, depending on the success of the study, would arguably indirectly relate to whether and how the product would be marketed to the public, there is no evidence that the actual marketing function would be primarily *managed* by the beneficiary. In fact, as conceded by the petitioner's counsel in his June 13, 2006 letter, the recommendation and industry analysis reports resulting from the field tests would merely "help in [the petitioner's] *marketability* in the U.S." (Emphasis added). However, excluding the use of an outside company for its website development, the petitioner has not identified the employment of any workers who would perform the marketing of the company's products following the completion of the tests. Considering the beneficiary's "primary managerial function will be the marketing of [the petitioner's] software throughout the United States," and in light of the fact that the petitioner has not identified anyone other than the beneficiary who would perform the company's marketing function, the record does not establish the beneficiary as being primarily employed as a function manager. 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).

Similarly, the record does not establish that the petitioning entity's reasonable needs would be met through the employment of the beneficiary in a primarily managerial or executive capacity. At the time of filing, the petitioner employed the company's president and the beneficiary. While it noted on the Form I-140 its use of contract workers, none have been specifically identified for the record. As already discussed above, absent the employment of additional employees or contracted workers, the record does not establish that the employment of the beneficiary would be sufficient to meet the company's marketing or distribution needs, two areas emphasized by the petitioner as being essential to its operations. The AAO notes that the petitioner has not accounted for the performance of any other functions, such as administration or sales. Additionally, the petitioner's blanket assertion on appeal that based on its stage of development the reasonable needs of the

corporation would be met through the employment of the beneficiary is not sufficient to establish the satisfaction of the petitioner's reasonable needs. 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)).

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 petitioner also claims on appeal ineffective assistance with respect to its two counsels throughout this proceeding. With respect to its first attorney, the petitioner claims that it was prejudiced by counsel's failure to inform the petitioner of the director's June 22, 2006 decision denying the immigrant visa petition, and mistakenly assumed that "this matter was being adequately handled." The petitioner further claims that its subsequent counsel failed to submit an adequate response to the director's request for evidence. The petitioner contends that this matter should be remanded to the director to afford the petitioner an opportunity to submit documentary evidence of the beneficiary's eligibility for classification as a multinational manager or executive.

The petitioner's claims are not persuasive. Despite the untimely filing of its first appeal, the petitioner's purported ignorance of the June 22, 2006 denial of the immigrant visa petition did not prejudice the petitioner. As the director treated the untimely appeal as a motion, and, in her review of the motion, considered the brief and evidence submitted in support of the appeal, the petitioner was, in effect, provided with a second opportunity during which to supplement the record in support of the beneficiary's eligibility. Moreover, in the instant appeal proceeding, the petitioner was afforded yet a third opportunity to submit documentary evidence of the beneficiary's employment as a manager or executive. The AAO again notes that the brief submitted on appeal is essentially the same as the brief previously considered by the director in the motion to reopen.

Also, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has not satisfied these requirements.

The petitioner also contends a violation of its due process rights because CIS did not consider that the concept of function manager. Although the petitioner argues that its right to procedural due process was violated, it has not shown that any violation of the regulations resulted in "substantial prejudice" to the company. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly considered the issue of function manager with respect to the beneficiary's employment. In her June 22, 2006 decision, the director stated: "Although the petitioner uses the word 'manage' in the job description, it is clear that the

beneficiary will actually perform the functions necessary for the marketing, sales, and testing of the product." The director further explained that the beneficiary's role in performing these functions is considered "in contrast to one who managers [sic] others involved in these duties." The petitioner's primary complaint appears to be that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated its ability to pay the beneficiary his proffered annual salary of \$35,000.

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 employed the beneficiary at salary equal to or greater than the beneficiary's proposed wage. Based on the petitioner's 2003 quarterly wage reports, the beneficiary received an annual salary of approximately \$24,000, or \$11,000 less than the beneficiary's proposed annual salary.

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 April 2, 2004, the AAO must examine the petitioner's tax return for 2004. The record, however, does not contain a copy of the petitioner's 2004 federal income tax return. A review of the petitioner's 2005 federal income tax return indicates that the petitioner would not be able to pay

the beneficiary's proposed annual salary of \$35,000. Based on the 2005 tax return, the petitioner did not realize any taxable income during 2005.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. As the company's net current assets for 2005 amount to \$223, the petitioner would not have sufficient income to pay the beneficiary's proposed salary.

In her June 13, 2006 response to the director's request for evidence of the petitioner's ability to pay the beneficiary's proffered wages, counsel for the petitioner referenced the 2005 federal income tax return of Campwood, Inc., a minority shareholder of the petitioning entity. The AAO notes that despite the purported relationship between Campwood and the petitioning entity, the financial status of a separate organization is not sufficient to establish the *petitioner's* ability to pay the beneficiary's proffered wages. The regulations specifically require that the petitioner possess the ability to pay the beneficiary's annual salary of \$35,000. *See* 8 C.F.R. § 204.5(g)(2)(requiring that *the prospective United States employer* have the ability to pay the proffered wage).

Based on the foregoing discussion, the petitioner has not demonstrated its ability to pay the beneficiary's proffered wage. For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner was doing business for the requisite one-year period prior to the filing of the instant petition as required in the regulation at § 204.5(j)(3)(i)(D).

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

As evidence of the company's operations, counsel referenced in her March 30, 2004 letter brochures of the petitioner's products, February through April 2003 invoices for accounting and website development services, receipts for rent payments made in March through May 2003, and two invoices for the purchase of advertisements and software services in February and April 2003. The AAO recognizes that the record also contains copies of two invoices, dated March 31, 2003 and June 4, 2003, for software sold, as well as copies of the beneficiary's travel itineraries for attending trade shows.

The limited amount of documentary evidence pertaining to the petitioner's sales during April 2003 and April 2004, the month during which the instant petition was filed, raises the question as to whether the petitioner was performing the "regular, systematic, and continuous provision of goods" during the requisite one-year period. The majority of the evidence in the present record of proceeding suggests that the petitioning entity is taking steps to begin selling its software development products in the United States, but has not yet commenced the regular sale of its products. This finding is underscored by counsel's statement in her June

13, 2006 letter, explaining that the beneficiary would hire employees "as [the petitioner's] products get closer to their marketable stage." Counsel's statement and the record as a whole suggest that the petitioner has been researching and performing tasks related to the marketing of its products, but has not reached the point where it has been continuously selling its software. Absent additional documentary evidence relevant to its sales, the AAO cannot determine whether the petitioner has been doing business in the United States for at least one year prior to the instant filing. The petition will be denied for this additional reason.

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 an L-1A nonimmigrant visa petition filed by the petitioner for the benefit 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.

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 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. *See* 8 C.F.R. § 103.8(d). The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See,*

e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

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

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.