U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship
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Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 11 2007

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IN RE: Petitioner:
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:

[redacted]

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, Nebraska Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded to the director for further consideration and entry of a new decision.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a limited liability company organized under the laws of the State of Alaska that is engaged in the development, marketing and management of real estate, as well as offering outdoor adventure tours in Alaska. The petitioner seeks to employ the beneficiary as its co-owner/manager.

The director denied the petition concluding that the beneficiary's assignments in the foreign and United States entities are not comprised of primarily managerial or executive job duties. The director focused on the evidence provided by the petitioner in its response to the director's request for evidence, noting that it was not sufficient to establish the beneficiary's former or current employment in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services' (CIS) denial of the petition was based on evidence not specifically requested by the director in his request for additional evidence. Counsel claims that in his request for evidence, the director failed to request specific evidence of the beneficiary's positions in the foreign or United States entities, or clarification of the staffing levels maintained by either organization, yet relied on these inadequacies in his decision. Counsel submits an appellate brief further detailing the job responsibilities held by the beneficiary in the foreign and United States entities and describing the positions held by the beneficiary's subordinate employees in each organization. Counsel also submits additional documentary evidence in the form of letters and organizational charts in support of the instant appeal.

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

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> > (C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

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

The 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-
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> (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 August 11, 2005, noting that the beneficiary would be the co-owner/manager of the eight-person United States organization. In an appended letter, dated July 14, 2005, the petitioner stated that as "the highest ranking on site executive management employee at [the petitioning entity]," the beneficiary would perform the following executive job duties:

- Direct management of a major component of [REINA Properties Corporation[1] (REINA Properties)] through [the petitioner]. As an investment management firm, REINA Properties directly and indirectly manages the real estate investment of foreign investors th[r]ough the United States. REINA Properties real estate investments in the Fairbanks, Alaska area are a major component of the company's portfolio and [the beneficiary's] management of these investments is a major function of the company.
- Devise long-term and short-term planning, strategies, goals and policies for [the petitioner] that aligns with the parent companies' objectives for the Fairbanks, Alaska investment component and functions that are subject to Board approval. This duty requires that [the beneficiary] identify the local investment opportunities and establish investment targets and policies with respect to the Fairbanks, Alaska operations for Board review.
- Assemble and oversee [the petitioner's] operations and management teams. [The beneficiary] exercises wide latitude in discretionary decision making and renders all decisions regarding hiring, firing and promoting of managers and non-managerial employees, selecting outside vendors such as real estate agents, financial institutions, and professionals, and engaging in property acquisition, development and sales.
- Conduct corporate tax planning with the assistance of financial planners and accountants.
- Report directly to the president of the parent companies and Board of Directors regarding the overall operations of [the petitioning entity]. As [c]o-owner of [the petitioning company] and [vice-president] of REINA Properties, [the beneficiary] is authorized to sign binding legal documents on behalf of the companies.
- Assemble [the petitioner's] legal team.

The petitioner also outlined the following managerial job duties:

- Managing real estate acquisitions, development and sales of REINA Properties and the companies' Alaska adventure travel business; both are essential functions and components of the U.S. business.
- Exercising day[-]to[-]day discretion over operation of the business including the hiring, firing and promoting of the construction team members, management employees and staff employees. And, function at a senior level within the organizational hierarchy and with respect to the functions he manages as [c]o-owner-[m]anager of [the petitioning entity], [vice-president] of REINA Properties and sole owner of [WildTrek International LLC (WildTrek)][2].

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[1] REINA Properties Corporation is represented as a Delaware Corporation that provides real estate investment opportunities in the United States to foreign investors.

[2] An "overview" of the foreign entity's history, as reflected in its 2001 business plan, indicates that the United States company, WildTrek International LLC, was formed as a division of the foreign entity to serve the United States market and to act as a member of a joint venture with REINA Properties Corporation. The

- Research, develop and cultivate new business opportunities.
- Negotiate property development contracts, subtrade contracts and tourist travel packages contracts.
- Oversee [the petitioner's] budgetary requirements in accordance with parent company's standards.
- Receive and review job cost reports for [the petitioner's] management teams.
- Manage the company's finance and operations functions.

The petitioner submitted an organizational chart of the United States entity depicting the beneficiary as a co-owner and co-manager of the organization and directly overseeing the company's office manager and project manager. Information contained on the organizational chart indicated that the office and project managers would manage employees from REINA Properties and WildTrek, which consisted of a property manager, a maintenance worker, a foreman, three carpenters, two "finish-carpenters," a lead-guide for its tour business, and two guides. The AAO notes that the positions of office manager and property manager, and foreman and lead-guide are identified as being held by the same two employees. Similarly, the job duties of the maintenance worker and finish-carpenter are performed by the same individual. Also, the employee identified as the company's foreman and lead-guide is represented as also occupying the positions of expedition journeys and courses manager and equipment dispatch manager in the foreign entity.

Additional evidence submitted by the petitioner's counsel includes a July 22, 2005 letter from the petitioner restating the above-outlined job duties, the beneficiary's resume, and descriptions of the real estate projects maintained by the petitioner.

The director issued a request for evidence, dated September 29, 2005, noting that the documentation submitted with the Form I-140 was not sufficient to establish the beneficiary's eligibility for classification as a multinational manager or executive. The director outlined the statutory definitions of "managerial capacity" and "executive capacity," and requested that the petitioner "submit evidence to establish that the beneficiary qualifies under all four criteria stated above for either a [m]anager or [e]xecutive." The director directed the petitioner to submit a statement from an authorized official of the petitioning entity describing the beneficiary's "intended employment," including "the dates of employment, specific job duties, types of employees supervised, if any, level of authority, and title and level of authority of the [beneficiary's] immediate supervisor." The director also requested a copy of the petitioner's organizational chart reflecting the beneficiary's position with respect to the company's other employees, and copies of the beneficiary's pay vouchers for August and September 2005.

Counsel responded in a letter dated November 30, 2005, stating that the beneficiary's position as co-owner and manager of the petitioning entity includes "extensive executive and managerial functions," such as supervising the petitioner's office and project managers and managing "the management employees" of REINA Properties and WildTrek. As evidence corroborating the beneficiary's employment as a manager and executive, counsel referenced a November 28, 2005 letter from the petitioner, which outlined the beneficiary's proposed job duties. As noted by the director in his decision, the job duties identified in the petitioner's November 28, 2005 letter are the same as those provided in the petitioner's July 14, 2005 letter, which was submitted at the time of filing.

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record reflects that the joint venture has since been dissolved, and that WildTrek and REINA Properties Corporation are equal members of the petitioning entity.

The petitioner submitted a second organizational chart reflecting the same positions as those previously identified on its initial organizational chart. The AAO notes, however, that the employee initially identified as the petitioner's foreman and lead-guide is now identified as holding the position of lead-guide only. In the organizational chart submitted on appeal, the same employee is again identified as the company's foreman-construction manager. The AAO points out that this employee is also noted as holding the position of equipment dispatch manager in the foreign entity.

In a decision dated March 9, 2006, the director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the job description initially provided by the petitioner at the time of filing "utilized undefined terminology . . . and paraphrased regulatory language with no elaboration." The director noted that the job description also identified non-qualifying job duties, and failed to indicate the amount of time the beneficiary spend performing "routine, functional duties of the [petitioning] entity." The director stated that the "word-for-word" job description submitted by the petitioner in response to the request for evidence failed to overcome the inadequacies in the initial filing. The director also determined that the record was insufficient to establish that the individuals managed by the beneficiary are professional, managerial, or supervisory employees. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on April 7, 2006. In an attached appellate brief, counsel claims that the director denied the petition without allowing the petitioner to supplement the record with evidence clarifying the documentation provided with its initial filing. Counsel outlines "critical information" not requested by the director, stressing that the director "merely cited the statutory criteria to satisfy the test for executive and [managerial] capacity and requested that the [p]etitioner 'submit evidence to establish that the beneficiary qualifies under all four criteria stated above for either a [m]anager or [e]xecutive." Counsel states that the director failed to request "a more specific description of the job duties identified in the initial filed Form I-140, . . . [or] a breakdown of the percentage of time spent on managerial/executive tasks versus non-managerial/non-executive tasks." Counsel states that the director also neglected to request a specific description of the positions held by the beneficiary's subordinate employees.

Counsel submits on appeal lengthy descriptions of the positions held by the beneficiary and his five subordinate managers. As the job descriptions are already part of the record, they will not be entirely repeated herein.

Upon review, the record does not establish that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity. While counsel provides on appeal lengthy and detailed descriptions of the positions held by the beneficiary and five subordinate workers, the job descriptions do not appear to represent a credible depiction of the beneficiary's role within the petitioner's organizational hierarchy.

Based on the record as presently constituted, the petitioner does not employ a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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.*

The AAO first notes inconsistencies in the staff employed by the petitioner. The petitioner represented an eight-person staff on the Form I-140, but noted in its July 14, 2005 letter its practice of hiring "about 30 workers from within the United States to work on its [residential development] projects," and subcontracting work to companies in the United States. On its organizational chart, the petitioner identified only two employees working directly subordinate to the beneficiary, and noted that the remaining ten lower-level positions in property management, construction and the tour business were occupied by employees from REINA Properties and WildTrek. Based on these conflicting representations, it is not clear who the petitioner employed at the time of filing the petition. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel's references on appeal to the petitioner's "management team," which counsel represents as being comprised of an office manager, project manager, foreman/construction manager, lead tour guide, and property manager, and as "effectuating the goals and policies of the company," fail to clarify the petitioner's true staffing levels on the filing date or the employees working subordinate to the beneficiary. 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 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).

With respect to the staffing levels represented by the petitioner, it is questionable whether the reasonable needs of the petitioning organization might plausibly be met through the employment of the beneficiary and ten lower-level employees. The AAO again notes that two of the petitioner's managerial positions – office manager and property manager – are held by the same individual. Additionally, according to the petitioner's initial organizational chart, the foreign entity's manager of expedition journeys and courses and equipment dispatch also holds the positions of foreman and lead guide in the petitioning entity. The petitioner did not address the multiple positions held by two of its employees or explain how the same two workers might plausibly perform the job duties related to four managerial positions in the United States company, particularly in the case of the foreman and lead guide, who also holds two managerial positions in the foreign entity. Furthermore, the two employees working as the petitioner's tour guides are also tour guides with the foreign entity. The petitioner has not addressed how the non-qualifying functions related to its office, project, property, construction, and tour departments would be met by the staffing levels maintained on the filing date. 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. at 591.

The petitioner also failed to document its purported use of contracted workers. The AAO notes that the petitioner's 2004 federal income tax return reflects a payment of $79,373 as cost of labor. The record, however, does not contain evidence that the petitioner utilized outside workers in the year 2005, the period during which the instant petition was filed. 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)).

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

The above-noted discrepancies also cast doubt on the credibility of the beneficiary's purported managerial or executive job duties. In addition to other responsibilities, the beneficiary is represented as overseeing the petitioner's operations and management teams, negotiating contracts related to property development and travel packages, reviewing reports prepared by the petitioner's management teams, and managing the company's finance and operations functions. These representations assume the existence of a subordinate managerial staff and lower-level personnel who would perform the non-qualifying functions of the petitioning entity. As already discussed, the petitioner has not established this essential element. Again, 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. at 591.

Also, it is unclear from the record whether the petitioner is claiming that the beneficiary would oversee managerial employees of REINA Properties or the foreign entity. The petitioner stated in its July 14, 2005 letter that the beneficiary "negotiates our contracts, markets the company, established the company in the U.S. and directs the companies abroad and in the United States." The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Id.* at 591-92.

The record as presently constituted does not establish the beneficiary's eligibility for the requested immigrant visa classification, and the petition will therefore be remanded to the director for further action and consideration. The director is instructed to consider the issue of whether the beneficiary would be employed in the United States in a primarily managerial or executive capacity, and request additional evidence related to the above-noted inadequacies, including personnel records documenting the petitioner's staffing levels on the date of filing, clarification of the positions held by the beneficiary's subordinate staff, and an explanation as to how the petitioner's reasonable needs would be met through the employment of the beneficiary in a primarily managerial or executive capacity and the staff maintained on the filing date. The director should also direct the petitioner to clarify whether while employed by the petitioning entity, the beneficiary holds concurrent responsibilities in REINA Properties or the foreign entity, and, if so, how the beneficiary would satisfy these responsibilities while primarily employed as a manager or executive of the petitioning entity. The AAO notes that remanding the instant matter is appropriate, as the director did not previously request the noted evidence. The director should enter a new decision based on his review of the record and any additional documentary evidence.

The AAO will next address whether the beneficiary's employment in the foreign entity was in a primarily managerial or executive capacity.

In its November 28, 2005 response to the director's request for evidence, the petitioner represented that the beneficiary has been employed as the president of the foreign entity since 1997 and continues to occupy the managerial or executive position. The petitioner stated that as "the highest ranking officer of the [foreign] company," the beneficiary's job duties included:

- Developing and promoting the corporate business plan to facilitate revenue and growth while adhering to the business objectives;
- Assembling and overseeing management teams through hiring, firing, promoting and monitoring performance;
- Devising long-term and short-term planning and strategies for future operations of the company;
- Conducting corporate tax planning and consulting with the company's tax professionals;
- Negotiating contracts on behalf of the company;
- Overseeing budgetary requirements in accordance with the company's standards and enforcing budgetary compliance through the management teams;
- Reviewing job cost reports from the management teams and rendering decisions that align with the company's business plans and objectives;
- Selecting and assembling the company's legal team and consulting with the team; and,
- Managing the company's overall finance and operations functions.

The petitioner stated that the beneficiary supervised the company's office manager, planning and logistics manager, marketing and sales manager, administration and finance manager, expedition journeys and courses manager, and equipment dispatch manager.

In his decision, the director concluded that the petitioner had not demonstrated that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director recognized the job description offered by the petitioner in response to his request for evidence, but noted that it "relied heavily on broad, undefined terminology rather than clearly defining the specific duties of the position." The director noted that the foreign entity's organizational chart reflects numerous positions, in addition to the position of president, purportedly held by the beneficiary, and stated that the petitioner had neglected to address the beneficiary's additional roles within the foreign company. The director further noted changes in the organizational chart submitted with the petitioner's initial filing, stating that it is unclear whether the chart reflects the company's organizational hierarchy since the beneficiary's transfer to the United States or whether the organizational chart was changed in an attempt to conform to the statutory requirements of "managerial capacity" and "executive capacity." Consequently, the director denied the petition.

On appeal, counsel for the petitioner again claims that the director failed to provide the petitioner with an opportunity to supplement the record with specific evidence related to the foreign entity's staffing levels or the beneficiary's position as president, which counsel represents the beneficiary has occupied since 1997. Counsel submits a lengthy description of the beneficiary's position in the foreign organization and identifies the job duties performed by the beneficiary's six subordinate managers. As the job descriptions are part of the record, they will not be repeated herein.

Upon review, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity for at least one year in a primarily managerial or executive capacity during the three years prior to the beneficiary's entry into the United States as a nonimmigrant.

While not addressed by the director, the record contains conflicting representations as to the date on which the beneficiary entered the United States as a nonimmigrant. On Form I-140, the beneficiary's date of arrival is identified as March 12, 1998. A September 24, 1999 letter submitted by REINA Properties in connection with an immigrant visa petition previously filed by the company on the beneficiary's behalf indicates that the

beneficiary's first L-1A petition was approved on September 30, 1998. Similarly, the biographical information contained on Form G-325A, which accompanied the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, indicates that the beneficiary has been employed by the petitioning entity from September 1998 until the present. The beneficiary is also identified as residing in Alaska since June 1997.

Conversely, the petitioner and counsel appear to represent the relevant period of consideration for the beneficiary's foreign employment as September 1998 through September 2001, the time at which the L-1A nonimmigrant visa petition was approved for the beneficiary's employment as the petitioner's manager. Based on the record, the beneficiary continued in the position of president of the foreign entity following his transfer to the United States as a nonimmigrant. Counsel, therefore, appears to be focusing on the three years prior to the beneficiary's approval for employment as a nonimmigrant with the petitioning entity as the period during which to establish the beneficiary's qualifying foreign employment.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) allows CIS to look beyond the three-year period immediately preceding the filing of the I-140 petition to determine whether the beneficiary was employed for at least one year in a primarily managerial or executive capacity during the three years prior to his entrance into the United States as a nonimmigrant. In this case, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity for at least one year during September 29, 1995 through September 29, 1998, the date on which the beneficiary was granted an L-1B nonimmigrant petition for employment with REINA Properties.

The record does not clearly depict the capacity in which the beneficiary was employed during September 1995 through September 1998. According to the beneficiary's resume, which was submitted in connection with a prior I-140 petition filed by REINA Properties on behalf of the beneficiary in 1999 and is part of the current record, the beneficiary became the president and owner of the foreign company in 1997. Counsel also claims in the instant appeal that the beneficiary has occupied the position of president and owner of the foreign company since 1997. The beneficiary's current resume, submitted with the instant petition, indicates that the beneficiary served as the general manager of Scouting from 1992 until 1996. Based on the information contained in the beneficiary's older resume, while holding the positions of general manager and president, the beneficiary participated in wilderness expeditions guided by the foreign entity, organized new tours and itineraries, trained team members for future expeditions, and starred as a hunter in a film made for television. The AAO notes that the actions performed by the beneficiary are not typically characterized as being managerial or executive in nature. 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).

Also, the beneficiary is depicted on the foreign company's organizational chart as occupying numerous positions within the company, including planning and logistics manager and expedition journeys and courses manager. Within the planning and logistics and expedition journeys and courses departments, as well as the company's marketing and sales, administration and finance, and equipment dispatch departments, the beneficiary held twelve additional positions related to new projects, calculation, and coordination of planning and logistics, conception and organization of sales and marketing, planning and control, insurance, flight reservations, revisions, conceptualization of tours and courses, selection of equipment and consultations, and

Alaskan tours. The AAO notes that on the revised organizational chart submitted in response to the director's request for evidence the beneficiary's name was removed from the above-named positions and was either supplemented with other employees or the positions were identified as being vacant. The beneficiary was identified as being the president and owner only. Counsel explains on appeal that the organizational chart submitted in response to the director's request for evidence represented "the current updated" organizational hierarchy of the foreign entity, thereby suggesting the original organizational chart accurately depicted the many positions held by the beneficiary while employed in the foreign entity. Moreover, the record suggests that the petitioner's claim in its November 28, 2005 letter that the beneficiary manages six subordinate managers is not relevant to the position held by the beneficiary prior to his entrance into the United States as a nonimmigrant. Rather, it is possible that the beneficiary, who purportedly continues to function as the foreign entity's president, acquired this managerial authority as a result of changes to the foreign company's staffing levels following his transfer to the United States. A petitioner must 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the above discussion, counsel's claim on appeal that the beneficiary occupied a primarily managerial or executive position in the foreign entity is not credible. Also, the AAO notes that despite the director's note in his decision of "broad, undefined" job duties, counsel submitted essentially the same list of overseas responsibilities held by the beneficiary as that previously provided by the petitioner in its response to the director's request for evidence. 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 present record does not demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The matter will therefore be remanded to the director for further action and consideration. The director is instructed to issue a request for evidence directing the petitioner to submit a detailed account of the beneficiary's dates of employment with the foreign entity, the positions occupied by the beneficiary in the foreign entity prior to his approval for L-1B status with REINA Properties Corporation in September 1998, and the specific job duties performed by the beneficiary in the positions held during the three years prior to his transfer to the United States as an L-1A nonimmigrant. As evidence of the beneficiary's employment capacity in the foreign entity, the petitioner should also submit an organizational chart of the staffing levels maintained by the foreign entity during September 1995 through September 1998, as well as a statement clarifying how the foreign entity supported the beneficiary in a primarily managerial or executive position given that the beneficiary held multiple lower-level positions in the company. If the petitioner claims that the beneficiary gained his one year of qualifying employment with the foreign entity after assuming the position of president and owner of Scouting in January 1997, the petitioner should present evidence to corroborate that the beneficiary did in fact reside in Germany in 1997, and explain the beneficiary's statement on Form G-325A that he has resided in Alaska since June 1997. The director should enter a new decision based on his review of the record and any additional documentary evidence.

Counsel emphasizes on appeal that CIS previously approved three nonimmigrant L-1A petitions filed 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. Counsel correctly notes 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. 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 approvals by denying the present immigrant petition.

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

An issue not addressed the director is whether the petitioner demonstrated its ability to pay the beneficiary's proposed annual salary of $87,214 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.

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 an annual salary equal to or greater than the proffered salary. The beneficiary's 2004 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, reflects the beneficiary's salary of $60,000.

The petitioner noted in its July 14, 2005 letter that the beneficiary's proposed "annual compensation" of $87,000 is comprised of his $60,000 salary and profit sharing. The petitioner did not specify from which company the beneficiary would receive a portion of the profits. Schedule E of the beneficiary's 2004 income tax return indicates that the beneficiary received income in the amount of $21,398 from WildTrek, a fifty percent member of the petitioning entity. There is no evidence that the beneficiary received additional income from the petitioner to account for the approximate $27,000 deficiency in the salary actually paid to the beneficiary.

The regulation at 8 C.F.R. § 204.5(g)(2) clearly establishes the petitioner's obligation as the *prospective United States employer* to demonstrate its ability to pay the beneficiary's proffered wages. As the beneficiary does not own a membership interest in the petitioning entity, the record does not establish that the beneficiary would receive the remaining $27,000 in the form of profits from the petitioning entity. The petitioner has not represented that the monies received by the beneficiary from WildTrek should be characterized as profits from the petitioning entity. 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 AAO notes that as the immigrant visa petition was filed in August 2005, the petitioner's 2005 income tax return was not yet available for review and consideration in the instant issue. *See 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)) (finding that the AAO may rely on federal income tax returns as a basis for determining a petitioner's ability to pay); *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).

Based on the foregoing discussion, the petitioner has not demonstrated that on the filing date it possessed the ability to pay the beneficiary's proposed annual salary of $87,214. The director is instructed to request evidence demonstrating the petitioner's ability to pay the beneficiary's proffered annual wages, such as its 2005 federal income tax return, the beneficiary's monthly earnings statements during 2005, IRS Form W-2, Wage and Tax Statement, issued to the beneficiary in 2005, and the beneficiary's 2005 individual income tax return. Based on a review of the offered documentary evidence, the director should issue a decision on the instant issue.

The record as presently constituted does not establish the beneficiary's eligibility for the requested immigrant visa classification, and the petition will therefore be remanded to the director for further action and

consideration. The director should enter a new decision based on her review of the record and additional documentary evidence, and if necessary, the matter shall be certified to the AAO for review.

ORDER: The decision of the director dated March 9, 2006 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.