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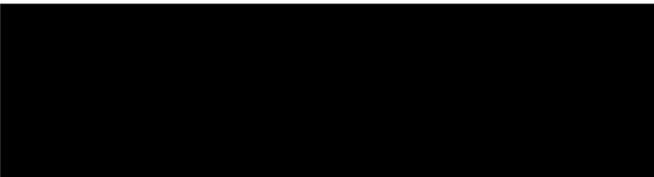
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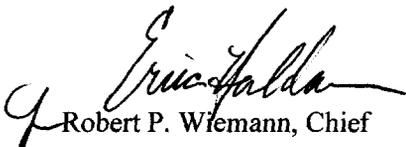
IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:  
[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, California Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant 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, a corporation organized under the laws of the State of Florida and authorized to transact business in the State of California, is engaged in providing software development services. The petitioner seeks to employ the beneficiary as its vice-president of development.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the foreign and United States entities enjoyed a qualifying relationship at the time of filing the immigrant visa petition; or (2) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, present counsel contends that the petitioner's former counsel failed to explain accounting errors on the petitioner's income tax returns, which, counsel states, Citizenship and Immigration Services (CIS) relied upon in finding that a qualifying relationship failed to exist between the foreign and United States entities. Counsel claims that the petitioning entity is a wholly owned subsidiary of the Russian corporation, Corporation Galaktika. Counsel further claims that CIS incorrectly concluded that the beneficiary would not be employed by the petitioner in a primarily managerial capacity. Counsel contends that the beneficiary would be employed as a function manager of the petitioner's FileNet<sup>1</sup> Practice, which counsel identifies as an essential function of the United States company. Counsel submits a letter and additional documentary evidence in support of the appeal.

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render

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<sup>1</sup> FileNet, an IBM company, specializes in offering enterprise content management solutions to customers. Based on information contained on the company's website, FileNet's content and process management solutions "allow customers to build and sustain competitive advantage by managing content throughout their organization, automating and streamlining their business processes, and simplifying their critical and everyday decision-making." The services offered by FileNet are provided through "its own global sales, professional services and support organizations, as well as via its ValueNet Partner network of resellers, system integrators and application developers." FileNet, About FileNet, "FileNet Fact Sheet," 2003-2006, available at [www.filenet.com/English/About\\_FileNet/FileNet\\_Fact\\_Sheet.asp](http://www.filenet.com/English/About_FileNet/FileNet_Fact_Sheet.asp) (accessed on March 26, 2007).

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 petitioner demonstrated the existence of a qualifying relationship between the United States entity and Corporation Galaktika at the time of filing.

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

*Affiliate* means:

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

\* \* \*

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

The petitioner filed the Form I-140 on August 15, 2005. In an appended letter, dated July 27, 2005, the petitioner identified the United States company as a subsidiary of Novy Atlant, a Russian software development company with which the beneficiary was employed prior to his transfer to the United States in March 2001. With respect to the purported qualifying relationship, the petitioner explained:

In 2004, the Board of Directors of Novy Atlant/Russia elected to assign all interests and liabilities in the Russian parent company to Corporation Galaktika, a holding company within the Galaktika/Novy Atlant Group of Companies. Currently, [the petitioning entity] is 100% owned and controlled by Corporation Galaktika/Russia, which, as a result of the above referenced corporate reorganization, also assumed complete ownership of other subsidiaries in Ekaterenburg, Samara, St. Petersburg, and Moscow (Russia), Kiev (Ukraine), Minsk (Belarus), and Almaaty (Kazakhstan). As a result of the aforementioned

reorganization, [the petitioning entity] is 100% owned by Corporation Galaktika, which is the survivor-in-interest of the beneficiary's employer abroad, Novy Atlant/Russia.

As supporting evidence, the petitioner submitted: (1) a corporate chart identifying the petitioning entity in the "Novy Atlant Group" of subsidiaries of Galaktika; (2) a translated copy of the minutes from Novy Atlant, Russia's September 20, 2004 board of director's meeting confirming the transfer of ownership of 1,000,000 shares, or 100 percent, of the petitioner's stock from Novy Atlant, Russia to Galaktika as a result of "corporate restructuring"; (3) a translated copy of a September 22, 2004 letter to the petitioning entity from Galaktika requesting that the petitioner re-issue a stock certificate for 1,000,000 shares in the United States organization to Galaktika as the new owner, as well as instructions for the petitioner to amend its stock transfer ledger accordingly; (4) a copy of stock certificate number two naming Galaktika as the owner of 1,000,000 shares issued by the petitioning entity; and (5) the petitioner's stock transfer ledger noting an original June 10, 1999 stock issuance to Novy Atlant and subsequent issuance of 1,000,000 shares to Galaktika.

The director issued a request for evidence, dated January 26, 2006, directing the petitioner to submit copies of the following documents in support of the purported qualifying relationship between the United States company and Galaktika: (1) the petitioner's minutes from relevant board meetings addressing its shareholders and accompanying shareholder interests; (2) the petitioner's stock transfer ledger and articles of incorporation; (3) a list of the petitioner's shareholders and the percentage of stock owned by each; (4) all stock certificates issued by the petitioner to the present date; and (5) original wire transfer receipts, cancelled checks and bank statements evidencing Novy Atlant, Russia's purchase of the 1,000,000 shares of stock issued by the petitioning entity. The director noted that if the transferred monies originated with a third party, the petitioner should explain the source, the reason for transferring the funds, the names of all account holders, and their affiliation to the foreign or United States company.

The petitioner's former counsel responded in a letter dated April 3, 2006. Counsel again explained that in 2004, five years after the petitioning entity was established as a subsidiary of Novy Atlant, Russia, the foreign company's directors "elected to assign all interest and liabilities in the Russian parent company to Corporation Galaktika, a holding company within the Galaktika/Novy Atlant Group of Companies." Counsel stated that Galaktika is presently the sole owner of the petitioning entity. As evidence of Galaktika's purported stock ownership, counsel again submitted and referenced the minutes from the petitioner's September 20, 2004 board of directors meeting and September 22, 2004 letter from Galaktika. Counsel also submitted copies of the petitioner's stock transfer ledger and number two stock certificate naming Galaktika as the recipient of 1,000,000 shares of the petitioner's stock. Counsel further provided a list of share purchases and loans from third parties to the petitioning entity occurring from April 28, 2000 through December 12, 2000 and the related wire transfer receipts. On the record of transactions, Novy Atlant, Russia's financial director indicated that "[t]he need to use third parties to provide the funding to Novy Atlant, US arose from the fact that at the time Novy Atlant, Russia did not have accounts in US dollars in Russia or abroad."

The director issued a June 6, 2006 decision concluding that the petitioner had not demonstrated the existence of a qualifying relationship between the petitioning entity and Galaktika. The director stated that the petitioner had failed to establish Galaktika's ownership of the United States company, noting that it had not provided a copy of stock certificate number one purportedly naming Novy Atlant, Russia as the company's initial stockholder. The director further identified an inconsistency in the amount of shares purportedly issued by the petitioner and the value of capital stock reflected on the petitioner's 2003 federal income tax return. The director also noted that the record of transactions from Novy Atlant, Russia's financial director indicates

that the petitioner's stock was purchased for \$40,000, while the petitioner's 2002 federal income tax return represents capital stock in the amount of \$10,000. The director further noted the record was devoid of the requested minutes from the petitioner's relevant board of directors' meetings. The director stated that the unresolved inconsistencies precluded a finding that Galaktika is the owner of the United States company. Consequently, the director denied the petition.

On appeal, the petitioner's present counsel contends that CIS' denial is based on unexplained accounting errors in the petitioner's federal tax returns that resulted in the misclassification of the petitioner's capital stock. Counsel asserts that the petitioner's tax returns are not representative of the company's ownership and should not be solely relied upon by CIS in determining its stockholders. Counsel states that Florida law governs the petitioner's ownership, contending that "board authorization of the issuance of stock for a stated amount of consideration is conclusive evidence of the issuance of fully paid, non-assessable stock." Counsel references authenticated minutes from the petitioner's April 3, 2000 meeting of directors as "clear and convincing evidence of Novy Atlant, Russia's sole ownership of [the petitioner], notwithstanding any improper reporting on the [petitioner's] tax returns."

Counsel identifies accounting errors made on the petitioner's federal income tax returns, stating that the company's 2003 tax return incorrectly reflected an increase in the company's capital stock from \$10,000 to \$40,000, rather than an increase in paid-in or capital surplus. Counsel submits a June 26, 2006 letter from the petitioner's certified public accountant explaining adjustments made to the petitioner's tax returns for the years 1999 and 2000 to reflect a \$20,000 stock investment purportedly made by Novy Atlant, Russia on April 28, 2000 and a subsequent stock investment of an additional \$20,000.

Counsel submits a memorandum prepared by corporate attorney Dennis J. Razor, who is employed in the same firm as counsel. Following his review of the record, in which he notes that the minutes from the petitioner's initial April 3, 2000 meeting of directors are not signed, Mr. Razor concludes that if the petitioner "can produce authenticated minutes of the meeting(s) of directors (or written consents in lieu thereof) that authorize the issuance of all one million share of common stock to Novy-Russian, then this should be accepted by [CIS] as conclusive evidence of [Novy-Atlant's] ownership of the [petitioning entity]." Mr. Razor also addresses the errors made by the petitioner's accountant on its federal tax returns, but states that the amount paid for the petitioner's stock or the figures represented on the petitioner's tax returns should not be relevant to determining the company's ownership.

As additional evidence, counsel submits an August 9, 2006 written consent by the petitioner's board of directors, in which the Board adopted resolutions relating to its sale of stock. Specifically, the petitioner's directors acknowledge the following: (1) that on April 3, 2000, the Board approved the sale of 1,000,000 shares of stock to Novy Atlant, Inc. for \$40,000; (2) that the president of the corporation was authorized to act as an agent of Novy Atlant, Inc. with respect to its purchase of the petitioner's stock; and (3) that the petitioner received monies from Novy Atlant, Inc. in the amount of \$20,000, \$10,000, and \$10,000 on April 18, 2000, August 14, 2000 and August 24, 2000, respectively, as payment of the purchase price for the issued stock. Counsel also provides the above-referenced unsigned copy of the minutes from the petitioner's initial April 3, 2000 board of directors meeting naming Novy Atlant, Inc. as the recipient of 1,000,000 of stock in exchange for \$10,000, and an unsigned receipt for Novy Atlant, Russia's purported cash payment. Counsel further submitted copies of the minutes from the petitioner's annual meetings for the years 1999 through 2002 and 2004, on which Novy Atlant, Russia signed as the sole shareholder of the petitioning entity, as well as a copy

of stock certificate number one naming Novy Atlant, Russia as the owner of 1,000,000 shares of the petitioner's stock.

Upon review, the petitioner has not established that Galaktika and the United States entity enjoyed a qualifying relationship at the time of filing.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). In appropriate instances, the AAO may also recognize a qualifying relationship between the United States employer and a successor-in-interest of the beneficiary's foreign employer if the claimed succession is properly documented through corporate and financial documentation.

In the instant matter, the petitioner's claim of a qualifying relationship between Galaktika and the United States company is based on the finding that Novy Atlant, Russia owned and controlled the petitioning entity and subsequently transferred its ownership to Galaktika. The record, however, is deficient in establishing Novy Atlant, Russia's initial ownership and control of the United States organization.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Here, the petitioner submitted a stock certificate, as well as the minutes from both a September 20, 2004 meeting of Novy Atlant, Russia's board of directors and from the petitioner's annual meetings for the years 1999 through 2002 and 2004, recognizing Novy Atlant, Russia as the initial owner of the petitioner's 1,000,000 shares of issued stock. The AAO notes that additional corporate documentation relied upon by counsel, including the August 9, 2006 consent by the petitioner's board of directors, the unsigned minutes from the petitioner's April 3, 2000 meeting of directors, and a receipt for cash payment all identify "Novy Atlant, Inc." not "Novy Atlant, Russia," the beneficiary's foreign employer, as the sole shareholder. Corporate documentation in the record identifies the corporate name of the beneficiary's foreign employer was Novy Atlant, Russia. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

With respect to Novy Atlant, Russia's purported purchase of the petitioner's stock, the petitioner submitted a list of companies that furnished "funding" to the United States entity and copies of the associated wire transfer receipts. In an April 20, 2004 letter, Novy Atlant, Russia identified three transfers from its clients to the petitioner that purportedly represented monies used for its purchase of the petitioner's stock. The financial director of the Russian company stated that the "transactions were made as full or partial settlements of outstanding trade balances for services rendered by Novy Atlant, Russia to the respective companies," and further noted that the transactions were authorized by Novy Atlant, Russia's board of directors.

The record as presently constituted does not demonstrate that Novy Atlant, Russia furnished consideration in exchange for its purported stock ownership in the petitioning entity. Although the petitioner documented its receipt of funds during April through December 2000, there is insufficient evidence establishing that a portion of these transfers constituted consideration furnished on behalf of Novy Atlant, Russia.

As discussed above, the analysis of ownership and control requires a review of such corporate documentation as stock certificates, the corporate stock ledger, and relevant minutes from shareholder meetings, as well as an analysis of documentation reflecting how the stock ownership was acquired. Here, as evidence of its purported stock purchase in the United States organization, Novy Atlant, Russia identified two companies on a list of ten as clients who transferred funds on its behalf as payment on outstanding trade balances. There is no additional evidence, however, such as unpaid invoices or contractual agreements, linking the two transferors as clients of Novy Atlant, Russia, and verifying the clients' outstanding account balances or monies due to Novy Atlant, Russia. This documentation is relevant to characterizing the transferred monies as belonging to Novy Atlant, Russia, and would be probative of Novy Atlant, Russia's purported purchase of the petitioner's stock. 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)).

Novy Atlant, Russia's financial director indicates that the transactions were authorized by the foreign company. However, the petitioner has not presented evidence that the United States company authorized and accepted the three separate transfers from unrelated companies as consideration from Novy Atlant, Russia for its 1,000,000 shares of stock. In fact, the "receipt for cash payment" of the petitioner's 1,000,000 shares of stock is not signed or acknowledged by either company. Similarly, the "shareholder representation letters" to the petitioner and the minutes from the petitioner's first board meeting are not signed. Counsel submits on appeal an August 9, 2006 consent from the petitioner's board of directors acknowledging the three transfers in

2000 as payment for its 1,000,000 shares of stock. The information contained in this document, however, conflicts with the present record, and raises additional questions regarding Novy Atlant, Russia's purchase of the petitioner's stock. In addition to identifying its shareholder as "Novy Atlant, Inc.," the agreement identifies the purchase price of stock as \$40,000, whereas the original unsigned minutes state a purchase price of \$10,000. As addressed by Mr. Rasor in his memorandum, a critical factor in establishing stock ownership is the directors' approval of the issuance of stock "for a stated amount of consideration." The instant record does not clarify the stated amount of consideration or establish that Novy Atlant, Russia was the originator of any monies transferred to the petitioner as consideration for stock. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* Taken as a whole, the petitioner's inconsistent references in corporate documentation to its stockholder, as well as unsigned corporate documentation and inadequate records establishing Novy Atlant, Russia as the originator of transferred monies restrict the analysis of whether Novy Atlant, Russia possessed ownership and control of the petitioning entity, and ultimately whether Novy Atlant, Russia transferred ownership of the United States entity to Galaktika.

With respect to Galaktika's purported current ownership of the petitioning entity, the AAO notes that, regardless of the question as to Novy Atlant, Russia's ownership of the petitioner, the petitioner is obligated to demonstrate Galaktika's qualification as a successor-in-interest to Novy Atlant, Russia. The petitioner represents that as a result of a corporate reorganization, Novy Atlant, Russia assigned all of its interests and liabilities to Galaktika as its successor-in-interest. The petitioner submits only the minutes from Novy Atlant, Russia's September 20, 2004 meeting, in which it noted its decision to transfer its claimed stock interest in the petitioning entity and "all rights to management of all operations" to Galaktika. The petitioner did not submit any corroborating documentary evidence in support of its assertion that Novy Atlant, Russia "elected to assign all interests and liabilities in the Russian parent company to Corporation Galaktika, a holding company within the Galaktika/Novy Atlant Group of Companies."

The AAO stresses the importance of demonstrating Galaktika as Novy Atlant, Russia's successor-in-interest rather than merely a recipient of stock ownership in Novy Atlant, Russia's claimed U.S. subsidiary. In order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it maintains a qualifying relationship with the beneficiary's foreign employer; the foreign corporation or other legal entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C). A multinational executive or manager is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). As the record does not sufficiently demonstrate that Novy Atlant, Russia possessed ownership and control of the United States entity, the AAO need not further address the issue of successor-in-interest.

Based on the foregoing discussion, the petitioner has not demonstrated the existence of a qualifying relationship between Galaktika and the United States entity on the date of filing. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the beneficiary would be employed in 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.

On the Form I-140 petition, the petitioner noted the beneficiary's proposed employment as the company's vice-president of development, and indicated that, at the time of filing, the company employed five full-time workers and three contractors. In an attached July 27, 2005 letter, the petitioner provided the following description of the beneficiary's proposed position:

In this position, [the beneficiary] will personally manage the organization with respect to all software engineering activities including software product development, quality assurance, release management and delivery of proprietary Enterprise Information System. Together with executive personnel of Galaktika/Novy Atlant Group of Companies, [the beneficiary] will formulate software development policies, manage daily operations, and plan the use of human resources in order to maintain the engineering advantage of

companies' product. He will plan, coordinate, and direct research and design activities of the Group.

As the member of managerial and executive body of the Group, [the beneficiary] will determine both technical and business goals and make detailed plans for the accomplishment of these goals. Together with project and software engineering managers, [the beneficiary] will develop the overall concepts of a new product and identify how an organization's computing capabilities can effectively aid project management.

As the US company's [vice-president] of [d]evelopment, [the beneficiary] will plan and coordinate installation and upgrading of hardware and software, programming and systems design, development of computer networks, and implementation of Internet and intranet sites, as well as other activities under his supervision and control.

[The beneficiary] will also be ultimately responsible for upkeep and maintenance and security of [the] company's computer networks. He will be involved in the strategic business planning for the US company and, as part of the Group's worldwide managerial and executive team, [will] be responsible for its coordination and implementation into the global development strategy. He will propose budgets for projects and programs to the Group's executive body and make decisions on staff training and equipment purchases.

[The beneficiary] will confer with top executives; financial, production, marketing, and other managers with the Group, as well as contractors and equipment and materials suppliers, and coordinate software development projects from initialization through delivery and implementation. He will also be responsible for demonstrating to clients how the company's products will be used as a competitive tool that not only cuts costs, but also increases revenue and maintains or increases competitive advantage. In addition, [the beneficiary] will be responsible for the overall technological direction of the organizations.

[The beneficiary] will analyze the computer and information needs of the Galaktika/Novy Atlant worldwide organization, from an operational and strategic perspective, and determine immediate and long-range personnel and equipment requirements. He will assign and review the work of his subordinates, and stay abreast of the latest technology in order to assure the organization does not lag behind its competitors. [The beneficiary] will also evaluate the newest and most innovative technologies and determine how they can help the organization in its strive for technological advantage in the field.

[The beneficiary] will supervise and control the work of other managerial, supervisory and professional employees, including a group of software engineers working on various projects at Novy Atlant/USA, quality assurance and customer support team. [The beneficiary] will also continue to manage the offshore development team in Moscow, Russia, consisting of 12 team members and will be responsible for distributing and controlling the work projects within the Galaktika/Novy Atlant Group of Companies. [The beneficiary] will schedule, track and monitor the performance of development projects and coordinate efforts of the team located in Russia with that of U.S. software developers.

[The beneficiary] will define software development methodologies and processes as well as provide technical and architectural leadership to project managers and professional software developers. He will also direct the work of systems analysts, computer programmers, support specialists, and other computer-related workers. [The beneficiary] will also be responsible for establishing and implementing corporate architectural and engineering standards and guidelines, as well as quality assurance policies and standards at Novy Atlant/USA as well as across the Group of Companies worldwide. [The beneficiary] will also develop professional development plans for professional employees under his supervision and oversee selection and recruitment of professional, supervisory and managerial employees. He will have the authority to hire and terminate employees, as well as recommend these and other personnel actions to the company's board of directors.

[The beneficiary] will be [sic] exercise broad discretion over the day-to-day operations of Novy Atlant/USA, and will report directly to the board of directors of Novy Atlant/USA. In that position he will continue to be instrumental in the design and development of sophisticated software systems. [The beneficiary] will provide technical leadership and supervision to assigned staff, which includes interviewing, hiring, assigning workload, training, and facilitating the performance review process.

Currently, due to high demand for our products, ou[r] company intends to expand its U.S. operation. During the last year of his employment with Novy Atlant/USA, [the beneficiary] interviewed over 40 candidates for various professional positions, and hired 2 permanent employees, as well as several contractors. The company anticipates hiring at least 10 more [s]oftware [d]evelopment [e]ngineers for our [California] office with in the next 6 months.

With the Form I-140, the petitioner's former counsel submitted an organizational chart of the United States company, bearing the date May 15, 2004, which reflected the beneficiary as occupying the position of vice-president of development/practice lead and overseeing a senior consultant, five consultants, and a project lead. The AAO notes that two additional senior consultant positions as well as three consultants positions were identified as being vacant.

Counsel also provided a copy of the beneficiary's resume, which identified the following job responsibilities pertaining to his position as vice-president of development:

- Assign work to the development team, both in the US and abroad, supervise and evaluate performance of employees, set standards and guidelines for the product development.
- Developed technical strategy for [the petitioning entity], new product development strategy and coordinated and implement of global development strategy.
- Supervised international development team for [United States Postal Service] forms processing and Arkansas Blue Cross/Blue Shield medical record request automation projects.
- Managed a team of developers for the credit union project. The objective of the project was to enable WEB access to member statements for credit union members.

- Managed a team of developers for the SMTP mailing component for use from the eProcess Express product, the Acenza Payables V2 project and design of the connector development framework for Acenza for the FileNET Professional Services.
- Managed a team of developers for the Acenza Configuration Tool for the Acenza Payables project for FileNET professional services.
- Coordinated installation and upgrading of software developed by the company and upkeep of and maintenance of computer networks.

In the January 26, 2006 request for evidence, the director directed the petitioner to submit the following evidence of the beneficiary's proposed employment in a primarily managerial or executive capacity: (1) an organizational chart reflecting the United States company's managerial hierarchy and staffing levels on the filing date, and identifying the names, job titles, job duties, educational levels, salaries, and beginning date of employment of the employees supervised by the beneficiary; (2) a "more detailed description of the beneficiary's duties in the United States," identifying the beneficiary's "typical workday," the percentage of time the beneficiary would devote to performing each task, and the education and employment qualifications necessary for the beneficiary's position; and (3) copies of the petitioner's quarterly wage reports beginning with the second quarter of 2005 through the time of the request for evidence. The director noted that the petitioner's original organizational chart identified "significantly more employees" than those listed on the petitioner's first quarter wage report for the year 2005, which included four employees.

The petitioner's former counsel responded in a letter dated April 3, 2006. In her letter, counsel referenced a "detailed description of the beneficiary's duties in the US." Following a careful comparison of the newly submitted job description with that offered with the initially filing, the AAO notes that counsel's "detailed description" states essentially the same job responsibilities as those outlined in the petitioner's July 27, 2005 letter. Counsel also provided a third job description comparable to the two attached to her April 3, 2006 letter. The AAO recognizes the following additional description offered with the petitioner's response:

It is virtually impossible to pinpoint the exact percentage of time [the beneficiary] will spend on each of the above duties. However, it is estimated that he will s[p]end 40% of his time managing day-to-day activities of the company, including meetings with engineering and contracting professionals, and setting development goals, processing methodologies and project timelines. He will also spend 20% meeting with customers and industry peers to ensure timely and satisfactory delivery of the company's products, as well as their technical and technological advantages. He will spend 10% of his time in conferences with the executives from the Galaktika Novy Atlant Group of Companies to determine technical and business goals and making detailed plans for their accomplishment, and 10% of his time on recruiting and training qualified engineering professionals as well as providing technical leadership to the company's engineering staff both in the US and abroad.

In addition, counsel offered a list of nine subordinates purportedly managed by the beneficiary, of which one is proven to have been employed by the petitioner on the date of filing the immigrant petition. Based on the petitioner's third quarter wage report for the year 2005, which was submitted with counsel's April 3, 2006 response, at the time of filing, the United States company employed five workers, a chief executive officer, a president-chairman, the beneficiary, and a senior consultant and consultant, both of whom were identified as subordinates of the beneficiary. According to the wage reports for the fourth quarter of 2005 and the first quarter of 2006, three of the beneficiary's purported subordinates commenced employment with the United

States company after the filing date. The petitioner has not offered documentary evidence substantiating its claim of contracting with four additional workers for software development and programming services during the period that the I-140 was filed. The AAO recognizes that counsel submitted a list of individuals purportedly working for the United States company and in offices located in Belarus and Russia; however, the record does not contain payroll records documenting their claimed employment. 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.

In the June 6, 2006 decision, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the petitioner had provided "a vague and nonspecific description of the beneficiary's job duties that fails to demonstrate what the beneficiary does on a day-to-day basis." The director also noted that the petitioner's wage report for the third quarter of 2005 did not substantiate the organizational hierarchy claimed by the petitioner to have been maintained at the time of filing. The director noted ambiguity regarding "who will perform support functions for the petitioning business." The director concluded that the record failed to demonstrate that the beneficiary "would be relieved from performing primarily operational and administrative tasks." Consequently, the director denied the petition.

In her August 14, 2006 letter on appeal, the petitioner's current counsel contends that the beneficiary qualifies as a functional manager of the United States organization, and suggests that prior counsel's "inability to articulate the nature of the petition" resulted in the denial of the immigrant visa petition. Counsel states that the beneficiary's "key function" in the petitioning entity is "as leader of the company's FileNet Practice." Counsel states:

In this position, he directs and controls the development process, expansion and procedures of the FileNet Practice, an essential function of [the petitioning entity]. FileNet projects can last from a few days to years depending on the client needs. [The beneficiary] reports directly to the Chief Executive Officer, Chief Technology Officer and company board. His primary goal has been and will continue to be building and expanding the FileNet practice of [the petitioning entity] although he is also responsible for other smaller projects.

Counsel describes in further detail the beneficiary's purported role as the function manager of the FileNet Practice. As counsel's letter is already part of the record, it will not be entirely repeated herein.

Counsel also addresses what appears to be the beneficiary's secondary role of vice-president of business development. Counsel states that in this position, "[the beneficiary] is focused on attracting new customers by implementing plans to achieve customer goals, encouraging [the petitioner's] software developers to create new products and negotiating contracts with new and existing customers."

Counsel provides the following outline of the beneficiary's job responsibilities:

- 10% Leads status meetings for FileNet projects under his supervision
- 5% Manage resource allocation and roster of [the petitioner's] consultants aiding FileNet customer projects
- 2-5% Identify potential hiring candidates, review resumes, interview applicants, make job offers to engineers and consulting staff

- 2-5% Approve employee project expense reports
- 10% Mentor, coach, train and provide performance reviews for consultants
- 10% Supervise the design and plans for FileNet projects under his supervision
- 5% Review employee evaluations and research regarding capabilities and emerging methodologies of various software products and platforms for use by [the petitioner]
- 10% Meet with CEO, CTO and company board regarding company development and strategic planning for the FileNet practice
- 40-45% Perform lead architect activity and review work of subordinates relating to FileNet projects (billable work)

Counsel addresses the petitioner's staffing levels, stating that on the filing date, the beneficiary managed one individual, who was employed in the position of consultant. Counsel stresses that since that time, additional consultants have been contracted for work on FileNet projects. The AAO instructs that the petitioner's current staffing levels, and particularly the workers presently supervised by the beneficiary, will not be considered for purposes of the beneficiary's employment capacity at the time of filing the petition. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (stating that 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).

Upon review, the petitioner had 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).

In the instant matter, the record, which contains both conflicting job descriptions and organizational charts, does not contain sufficient independent and credible documentary evidence demonstrating the beneficiary's true position at the time of filing.

As noted by the director and conceded by counsel on appeal, the job descriptions offered with the Form I-140 filing and in response to the director's request for evidence, while lengthy, fail to identify specific managerial or executive job duties to be performed by the beneficiary. In describing the beneficiary's purported managerial position, the petitioner relied on paraphrasing portions of the statutory definitions of "managerial capacity" and "executive capacity," claiming such responsibilities as "manag[ing] the organization," "formulat[ing] software development policies," "plan[ning], coordinat[ing], and direct[ing] research and design activities," "determin[ing] both technical and business goals," "confer[ring] with top executives," "supervis[ing] and control[ing] the work of other managerial, supervisory and professional employees," "exercis[ing] broad discretion over the day-to-day operations of [the petitioning entity]," and "hiring, assigning workload, training, and facilitating the performance review system." *See* §§ 101(a)(44)(A) and (B) of the Act. Additionally, although the director requested a more detailed job description, counsel twice provided essentially the same general account of the beneficiary's position in her response. 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). The AAO notes that a petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Also, a review of the staffing levels maintained by the petitioner on the filing date undermines the claim that the beneficiary would be employed in a primarily managerial 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.

Based on the petitioner's third quarter wage report for 2005, on the filing date, the petitioner employed a chief executive officer, a president-chairman, and the beneficiary, as well as a senior consultant and consultant who are both subordinate to the beneficiary. The AAO notes that while the petitioner claimed to employ the beneficiary in the position of vice-president of development since 2001, a February 1, 2005 Master Services Agreement between the petitioner and FileNet Corporation identifies the petitioner's chief executive officer as also possessing the title of vice-president of development. The petitioner has not addressed the inconsistent representations as to the job titles held by the beneficiary and its chief executive officer. 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).

The noted staffing levels do not corroborate many of the petitioner's claims as to the beneficiary's managerial or executive authority. Specifically, the petitioner states that the beneficiary would "supervise and control the work of other managerial, supervisory and professional employees" on quality assurance and customer support teams, manage twelve offshore team members, and "direct the work of systems analysts, computer programmers, support specialists, and other computer-related workers." The record does not contain documentary evidence of the beneficiary's purported managerial authority over the named support teams and workers. The petitioner's May 2004 through April 2005 balance sheet<sup>2</sup> does not reflect expenses paid by the company for outside computer consultants. Also, while counsel provided with her April 3, 2006 letter a list of employees and 1099 contract workers purportedly utilized by the petitioner in its United States, Belarus and Russia offices, the record is devoid of documentary evidence verifying the use of outside contractors or the employment of offshore support and development teams, such as personnel records from any of the three offices, copies of the petitioner's Internal Revenue Service Form 1099 reflecting miscellaneous income paid to outside consultants or contractors, income statements, or balance sheets. 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.

In light of the beneficiary's minimal subordinate staff, the petitioner's assertions as to his primarily managerial employment remain questionable, particularly since approximately 40 percent of the beneficiary's time would purportedly be spent managing "engineering and contracting professionals" who have not been established as employees or contractors of the petitioner. In addition, the AAO notes that while the senior consultant and consultant are identified as working subordinate to the beneficiary, the quarterly wage reports indicate that each is receiving compensation greater than the wages received by the beneficiary. The undocumented claims that the beneficiary would direct "systems analysts, computer programmers, support specialists, and other

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<sup>2</sup> The petitioner did not provide income statements or balance sheets pertaining to the period during which the Form I-140 was filed.

computer-related workers" do not demonstrate the beneficiary's employment in a primarily managerial or executive capacity. Moreover, the record, as presently constituted, casts doubt on whether the reasonable needs of the petitioning entity, which is in the business of providing software development services, might plausibly be met through the services of its five employees, three of which are claimed to be in either managerial or executive positions. 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.

Counsel attempts to resolve these discrepancies on appeal, explaining that the petitioner's former counsel did not accurately describe the beneficiary's position as a function manager of the petitioner's FileNet Practice. Counsel emphasizes the beneficiary's role in directing and controlling the processes, procedures and development of the FileNet Practice, which counsel identifies as an essential function of the petitioning entity. Counsel suggests that the beneficiary's role as vice-president of business development is secondary to his responsibility of managing the FileNet function.

On 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 the 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. *See id.*

Here, counsel's representations of the beneficiary's primary role as a function manager of the FileNet Practice do not corroborate or clarify the statements initially made regarding the beneficiary's position as vice-president of development. The petitioner's original job description does not mention FileNet or any managerial or executive responsibilities held by the beneficiary with respect to this project. Other than the beneficiary's resume, which notes a supervisory role held by the beneficiary with respect to FileNet projects with the United States Postal Service and Arkansas Blue Cross/Blue Shield, and the beneficiary's management of a team for FileNet's Acenza program, the original record does not corroborate counsel's suggestion that the beneficiary be considered a function manager of the petitioner's FileNet project or practice area. Rather, given the limited discussion of FileNet prior to the appeal, the record suggests that after the instant filing, the beneficiary may have assumed greater responsibility with the petitioner's FileNet project; however, there is insufficient evidence that the position of vice-president of development originally offered to the beneficiary encompassed primarily managerial job duties with respect to the FileNet function. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (stating that 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).

The AAO acknowledges counsel's claim on appeal that the petitioner's former counsel failed to articulate the true nature of the beneficiary's position. The AAO notes, however, that the first job description offered with the original filing was written by the petitioner, not counsel. Counsel merely restated the same job responsibilities in the petitioner's response to the director's request for evidence. Considering the petitioner has purportedly employed the beneficiary in the position of vice-president of development since 2001, it is

reasonable for the AAO to accept the petitioner's initial description as a reliable and accurate account of the position of vice-president of development.

Even if the AAO were to consider the position of function manager, the record does not support counsel's claims.

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.

Counsel describes the beneficiary's responsibility of managing the FileNet software development projects "from initialization until delivery to the client," addressing such related job duties as regularly meeting and interacting with the petitioner's clients to demonstrate software capabilities and access the customers' needs, determining cost-effective products for the petitioner's clients, and customizing software to meet client expectations. Counsel indicates that the beneficiary also holds a critical position in the supervision of the FileNet Practice team, in which he spends approximately 40-45 percent of his time providing "technical and architectural leadership" to the practice group in the United States and software developers located in Belarus and Russia.

Counsel's representations suggest that at least a portion of the beneficiary's time would be spent personally performing tasks related to the petitioner's FileNet project. Specifically, it appears that the beneficiary would be involved in the presentation and sale of FileNet software projects, as he is identified as demonstrating products to potential clients, analyzing the needs of customers, and customizing software development. Also, based on January 4, 2005 and April 12, 2005 invoices for services from the petitioner to FileNet Corporation, the beneficiary personally acted as the consultant on two separate projects. The AAO notes 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).

Moreover, the beneficiary's purported employment as function manager relies significantly on his supervision of the FileNet practice team in the United States and overseas. However, as discussed earlier, only two of the five subordinate employees identified by counsel on appeal were employed on the date of filing. Furthermore, as noted previously, the evidence offered by the petitioner in its response to the director's request for evidence is comprised of an updated organizational chart reflecting positions filled since the filing date and revised position titles. Again, 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. at 49. The record does not demonstrate that at the time of filing, the beneficiary would have been employed as a function manager.

Based on the foregoing discussion, the petitioner has not established that at the time the immigrant petition was filed, the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

On appeal, counsel also contends ineffective assistance on the part of the petitioner's former counsel.

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 her 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 instant record does not demonstrate that the above conditions have been satisfied. Accordingly, the AAO need not address the instant allegation.

The AAO recognizes that CIS previously approved two L-1A nonimmigrant petitions filed by the petitioner on behalf of the beneficiary. It should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

In addition, 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.

Moreover, 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).

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.