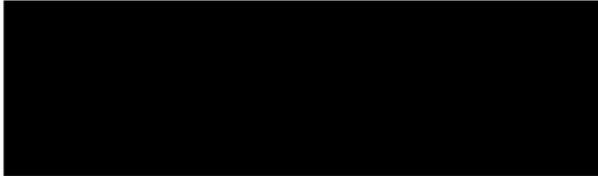




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FILE: SRC 06 093 51081 Office: NEBRASKA SERVICE CENTER Date: **MAY 15 2007**

IN RE: Petitioner:  
Beneficiary:



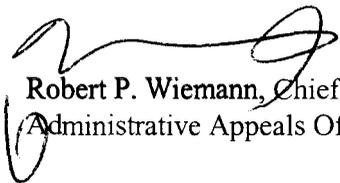
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Michigan limited liability company organized in 1997. It states that it designs, manufactures and markets specialty dental products. The petitioner seeks to employ the beneficiary as its Latin America export manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on July 19, 2006. The director determined that the petitioner had not established: (1) that the beneficiary is employed by the foreign entity in a primarily managerial or executive capacity; or (2) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner submits additional evidence in an attempt to establish its claim that the beneficiary has been and would be employed in a managerial capacity, specifically as a function manager. The petitioner emphasizes that the beneficiary was granted status as an L-1A nonimmigrant intracompany transferee subsequent to the filing of the instant immigrant petition. The petitioner submits a brief and additional evidence in support of the appeal.

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

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

\* \* \*

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

The language of the statute is specific in limiting this provision to only those executives and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue addressed by the director is whether the petitioner established that the beneficiary has been employed by the foreign entity in a qualifying managerial capacity. The petitioner does not claim that the beneficiary has been employed in an executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or 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.

The immigrant petition was filed on January 31, 2006. In a letter dated January 27, 2006, the petitioner described the beneficiary's employment with the petitioner's German branch office as follows:

[The beneficiary] was hired . . . on October 9, 2003. From this 2-person sales office [the beneficiary] and one other colleague were able to increase sales from \$516,000 in 2002 to \$1,210,000 in 2006.

On April 5, 2006, the director issued a request for additional evidence, instructing the petitioner as follows:

[P]lease submit a detailed, comprehensive description of the beneficiary's position abroad. . . . Clearly define the specific duties of [the] position and delineate the proportion of time

devoted to such duties. Clearly discuss the overall structure of [the foreign entity] and indicate the beneficiary's placement within such structure. If the beneficiary had . . . any subordinate employees, clearly discuss such employees, including the job titles, job duties, minimum position requirements, actual qualifications held, and a sample weekly work schedule.

In a response received on June 19, 2006, the petitioner submitted copies of the beneficiary's employment contracts indicating that she was hired by the petitioner's German branch office as a marketing assistant in October 2003, and subsequently assumed the positions of junior key account manager on April 1, 2004, and her current role as key account manager on January 1, 2005. The beneficiary's duties as key account manager were described as follows:

- Plan and manage sales for Spain, Portugal and the Nordic countries – 15 hours per month
- Create and manage profit and loss statements for above countries – 10 hours per month
- Management of necessary information for export/customs/regulatory affairs – 6 hours per month
- Meet and negotiate with International dealers on site and via phone. – 24 hours per month
- Implement marketing and sales activities with a focus on Spain, Portugal and the Nordic countries – 14 hours per month
- Train sales representatives and dealers in Europe on the sales of products. – 16 hours per month
- Organization of trade show and congress participation as well as product trainings throughout Europe. – 10 hours per week
- Development, design and coordination of marketing and sales tools, such as mailings, brochures, promotions, flyers, advertisements and press releases. – 18 hours per week
- Promote and sell product at trade shows/congresses – 16 hours per month

Of the above duties, the petitioner identified the first three responsibilities as "management" and indicated that the beneficiary's remaining duties are in the "sales/marketing" area. The petitioner indicated that the beneficiary is also required to "create and submit reports to General Manager of the European branch office."

The petitioner did not provide the requested information regarding the organizational structure of the foreign entity, nor provide evidence related to any subordinate staff supervised by the beneficiary in her current position.

The director denied the petition on January 19, 2007. The director determined that the petitioner did not establish that the beneficiary is employed by the foreign entity in a primarily managerial or executive capacity. The director noted the petitioner's failure to describe the structure of the foreign entity, the beneficiary's placement within the structure, or to address whether the beneficiary supervises any subordinate employees who relieve her from performing non-qualifying tasks. The director also found that several of the described responsibilities were overly general and undefined, and that many of the beneficiary's duties

appeared to be functional sales duties. Finally, the director observed that the petitioner had indicated that the beneficiary allocates 98 hours per month to "Sales/Marketing" duties and only 31 hours per month to "Management duties."

On appeal, the petitioner attempts to clarify the nature of the duties performed by the beneficiary while employed by the foreign entity. The petitioner asserts that she "managed the important subdivisions" of Spain/Portugal and the Nordic countries, which in 2005 accounted for 30 percent of the company's Western Europe business unit. The petitioner asserts that the beneficiary thus meets the statutory requirements as a manager of a subdivision of the company, and that the subdivision is also an "essential function" within the organization.

The petitioner asserts that because the petitioner is primarily a sales and marketing company, "most of our key managers in the business units have a sales and marketing focus as a critical part of their managerial function." The petitioner asserts that management of the company's dealer distribution network and marketing strategies requires the services of a sales manager and not lower-level sales personnel. The petitioner asserts that the beneficiary functioned at a senior level within the organizational hierarchy, noting that employees who are responsible for large territories or subdivisions have a high standing in the organization. The petitioner acknowledges that due to the relatively small number of employees in the company, senior level personnel hold broad responsibilities, including high-level and some lower-level tasks. Finally, the petitioner asserts that the beneficiary exercised direction over the day-to-day operations of the subdivision of the business she managed.

The petitioner submits an organizational chart for the petitioner's international organization which indicates that the Western Europe division employs three employees, including the general manager for Europe, the beneficiary, and a sales and marketing assistant. The beneficiary's position is depicted as lateral to the general manager position, and the chart shows that the assistant reports to both the beneficiary and the general manager of the branch office. The petitioner states that the beneficiary reported to the general manager and to the managing partner of the petitioning company. The petitioner states that the sales and marketing assistant performed administrative, customer service and lower level sales and marketing tasks under the supervision of the beneficiary and the general manager of the German branch office.

The petitioner addresses the director's determination that many of the beneficiary's duties appeared to be sales functions, rather than duties that were managerial in nature. The petitioner states that "most of the functional sales duties, especially those related to dealer relations, contracts etc. are those which our organization would only trust to be performed by someone in a key sales manager acting at a high level in our sales organization."

In support of the appeal, the petitioner also provides a three-page job description for the position of key accounts manager as well as a job description and sample weekly schedule for the sales and marketing assistant position. These descriptions are part of the record of proceeding and will not be repeated here.

Upon review of the record in this matter and for the reasons discussed herein, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

As noted by the director, the petitioner failed to submit a detailed job description explaining the managerial or executive job duties performed by the beneficiary on a day-to-day basis in response to the director's request for evidence, and instead submitted a broad overview of the position indicating that she devoted 31 hours per month to "management" duties and the remainder of her time to the "sales/marketing" area. The duties listed were broad and poorly defined, and even the duties claimed to be managerial in nature were not clearly shown to be managerial as that term is defined in the statute. *See generally*, section 101(a)(44)(A) of the Act. For instance, the petitioner stated that the beneficiary created and managed profit and loss statements for her assigned countries, and was responsible for "management of necessary information" for export/customs/regulatory affairs. However, the petitioner did not indicate who is actually responsible for non-qualifying duties associated with product exports and customs, or who is responsible for the day-to-day financial functions of the foreign branch office. Without this information, it is unclear that the beneficiary's duties with respect to these functions would be primarily managerial in nature.

Further, as noted by the director, the beneficiary's broadly-described responsibilities for meeting with dealers, implementing marketing and sales activities, training sales representatives and dealers, organizing trade show participation and product trainings, designing marketing and sales tools, and promoting and selling products at trade shows, could not be distinguished from the basic operational sales and marketing functions of the European branch office. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The director specifically advised the petitioner that "stating that the beneficiary will have 'responsibility' for various areas without defining her specific responsibilities or duties is not sufficient." Any 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).

Without a detailed description of the beneficiary's duties, the director reasonably looked to the organizational structure of the foreign entity in order to determine whether the record as a whole supported a conclusion that the beneficiary performs primarily managerial duties in her role as key account manager. The director specifically requested that the petitioner "clearly discuss the overall structure" of the foreign entity and the beneficiary's placement within that structure, clearly identify the beneficiary's subordinates, if any, and clearly discuss the job titles, duties, and qualifications of any subordinates. The petitioner neither acknowledged nor responded to this request. Again, 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).

Therefore, the director relied on the petitioner's initial assertion that the foreign entity is a "two-person sales office." Since the job description submitted indicates that the beneficiary, as key account manager, reported to the general manager of the German branch office, the director reasonably concluded that the beneficiary did not supervise any subordinates while employed by the foreign entity. Accordingly, the director concluded that

the beneficiary was not relieved from performing non-qualifying duties associated with the sales, marketing, export, regulatory, customs, and financial functions she was claimed to manage, and would therefore be required to perform primarily non-qualifying duties. 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).

Based on the evidence before the director, the AAO finds that the director properly concluded that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

The petitioner now offers a very detailed description of the beneficiary's duties for her former position of key account manager for the foreign entity, an organizational chart for the foreign entity, and a job description for the beneficiary's claimed subordinate employee, a sales and marketing assistant. However, the AAO observes that the petitioner provides no explanation for its initial statement that the foreign entity is a two-person office, and its current claim that the foreign office had three employees in 2005, nor does the petitioner clarify why it would fail to mention this employee when responding to the request for evidence. The position description submitted in response to the request for evidence made no reference to the beneficiary's responsibility for supervising this employee. 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). Given these unexplained inconsistencies, the petitioner has not established that sales and marketing assistant worked under the beneficiary's supervision at the time the petition was filed.

On appeal, the petitioner claims the beneficiary's duties previously claimed to be in the "sales and marketing area" are actually "managerial with a focus on marketing and sales." The petitioner asserts that due to the nature of the petitioner's business, most of its "key managers" have a focus on sales and marketing functions. The petitioner asserts that the beneficiary is responsible for managing an essential function, i.e., the Nordic and Spain/Portugal sales regions. 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 in managing the essential function, 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. *See* 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. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir,

1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner failed to clearly document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner acknowledges that the beneficiary performs both managerial and "lower level" tasks, yet failed to provide a detailed description of the beneficiary's duties, or a clear account as to how much time the beneficiary allocates to managerial versus non-managerial tasks. This failure of documentation is important because the petitioner specifically indicated that the beneficiary spends the majority of her time on poorly defined "sales and marketing" responsibilities. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial or executive, nor can it determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The beneficiary will not be considered to "manage" her assigned sales regions simply because she is the only employee responsible for coordinating all sales, marketing, trade show, dealer relations, export, customs and regulatory activities for this area. It is the petitioner's obligation to establish that someone other than the beneficiary performs the day-to-day non-managerial tasks of the function managed. As discussed above, the petitioner failed to establish that the beneficiary's duties are primarily managerial as that term is defined in the statute. The actual duties themselves 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity, and the appeal will be dismissed.

The second and final issue to be discussed is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

In its letter dated January 27, 2006, the petitioner described the beneficiary's proposed position as follows:

In her new position as Export Manager – Latin America, [the beneficiary] will have sole responsibility for finding suitable dealers and distributors, contract development, promotion and co-marketing activities, dealer and dentist training, and meeting regulatory requirements for the various countries. She will have complete profit and loss responsibility for the Latin American region.

The petitioner noted that the beneficiary would work from a home office in the Miami, Florida area and travel throughout Latin America and Mexico, while working with the petitioner's head office in Michigan.

In a request for evidence dated April 5, 2006, the director instructed the petitioner as follows:

[P]lease submit a detailed, comprehensive description of the beneficiary's . . . proposed position in the United States. Clearly define the specific duties of [the] position and delineate the proportion of time devoted to such duties. Clearly discuss the overall structure of [the U.S. entity] and indicate the beneficiary's placement within such structure. If the beneficiary will have . . . any subordinate employees, clearly discuss such employees, including the job titles, job duties, minimum position requirements, actual qualifications held, and a sample weekly work schedule.

In response, the petitioner submitted the following description of the beneficiary's proposed duties:

Plan and manage sales in Latin America through distributors.– 10 hours per month  
Profit and loss responsibility for the region. – 8 hours per month  
Organization and supervision of product registration and regulatory affairs. – 32 hours per month  
Manage and negotiate contracts with dealers to enable effective trading and customer relations. – 16 hours per month  
Manage the necessary documentation for the efficient, cost-effective and lawful execution of all export activities. – 16 hours per month  
Acquisition of new dealers: contact via phone/mail/fax and set up meetings. – 18 hours per month.  
Visit dealers and key influencers for contract development. – 16 hours per month  
Lecture and give hands-on training to dealers, sales reps, and the dentists. – 12 hours per month  
Negotiate and support dealers with sales activities. – 24 hours per month  
Visit exhibitions and promote products. – 8 hours per month

The petitioner indicated that the first five duties are in the "management" area, while the remaining duties are in the "sales/marketing" area. The petitioner did not indicate whether the beneficiary would supervise any subordinate personnel, nor did it provide a description of the U.S. company's organizational structure or the beneficiary's placement within that structure.

The director denied the petition on July 19, 2006, again noting that the petitioner provided no information regarding the structure of the U.S. entity, the beneficiary's placement within such structure or whether any subordinate employees would relieve the beneficiary from performing non-qualifying tasks. The director observed that the petitioner included several overly general responsibilities, as well as a number of duties that are clearly functional or operational, rather than managerial, in nature. The director acknowledged the petitioner's representation that the beneficiary would spend 82 hours per month on "management" and 78 hours per month on "sales/marketing" duties, but noted that the claimed managerial duties were so broadly defined that it was not clear that they were managerial or executive duties as defined by the regulations.

On appeal, the petitioner confirms that the beneficiary will not supervise any subordinates in her role as Latin America export manager, but asserts that the beneficiary will manage an essential function. The petitioner

again asserts that the "top managerial positions in a sales organization are going to focus heavily on sales and marketing duties, and thus meet the definition for 'managerial capacity.'"

In support of the appeal, the petitioner submits a detailed, three-page description of the beneficiary's proposed position that identifies the duties associated with each of the above-referenced responsibilities identified in response to the director's request for evidence. As this evidence is part of the record, the contents of the job description will not be repeated herein.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

While the petitioner claims that the beneficiary will serve in a managerial capacity, specifically as a "function manager," the petitioner's description of the beneficiary's duties submitted in response to the request for evidence was general. It is not possible to determine from the description provided whether the beneficiary's duties are primarily managerial duties or whether the beneficiary's duties will involve the routine daily tasks associated with the sales, market research, export, and regulatory affairs that are inherent in the beneficiary's responsibility for establishing a new export sales territory for the petitioner. The position description provided does not sufficiently demonstrate that the beneficiary's tasks are the high-level responsibilities that are specified in the definition of managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

As noted by the director, the petitioner failed to submit a detailed job description explaining the managerial or executive job duties performed by the beneficiary on a day-to-day basis in response to the director's request for this specific evidence, and instead submitted a broad overview of the position. The responsibilities identified by the petitioner as being in the "management" area and accounting for slightly more than half of the beneficiary's time included such vague language as "plan and manage sales in Latin America," "profit and loss responsibility," "organization and supervision of product registration and regulatory affairs," "manage and negotiate contracts with dealers," and "manage the necessary documentation for . . . export activities." 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. 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 director could not determine based on this job description what duties would be performed by the beneficiary, such that they could be classified as managerial or executive in nature. The director specifically advised the petitioner that "stating that the beneficiary will have 'responsibility' for various areas without defining her specific responsibilities or duties is not sufficient."

Further, as noted by the director, the beneficiary's stated responsibilities for acquiring new dealers and contacting them to arrange meetings, visiting dealers for contract development, supporting dealer sales activities, and providing hands-on training were neither claimed nor shown to be managerial in nature. Rather,

these duties appear to be the operational tasks necessary to establish export, sales and distribution activities in a new geographical region. 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).

Absent the requested evidence of a subordinate staff to assist the beneficiary with operational tasks related to sales, marketing, identifying potential dealers, promoting and demonstrating products to potential dealers, export activities, product registration and regulatory affairs, finances, market research, training and other activities associated with the beneficiary's overall responsibilities for establishing a new sales region, the director reasonably concluded that the petitioner failed to establish that she would be employed in a primarily managerial capacity.

The petitioner now offers a detailed description of the beneficiary's proposed duties on appeal, and confirms that the beneficiary will not supervise any subordinates in the United States. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the information in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Counsel asserts that although the beneficiary will not supervise any subordinates, her proposed position still meets the requirements for managerial capacity as defined in the statute because "she manages a division of the business, she manages all the essential functions of that division, she acts at a senior level in the organization and she exercises direction of all the day-to-day operations of the division." As discussed above, 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 in managing the essential function, 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. *See* 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. 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. *Boyang*,

*Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

In this matter, the petitioner has not provided evidence that the beneficiary would manage an essential function. The petitioner's description of the beneficiary's job duties does not clearly establish that her duties will be primarily managerial in nature, as her role includes responsibility for market research required to identify potential dealers, marketing and promotion activities, sales contracts in her region, providing hands-on training to dealers and end user, registering products, and coordinating export activities. While the beneficiary may have overall authority for sales and export activities in her assigned region, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of her duties are related to operational or policy management, not to the performance of non-managerial duties. Here, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

The AAO acknowledges the petitioner's argument that "the top managerial positions in a sales organization are going to focus heavily on sales and marketing duties, and thus they meet the requirements for "managerial capacity." The fact that the beneficiary has been given a managerial job title and has responsibility for a division of the business, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive." *See* section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. at 5740. Again, the beneficiary will not be considered to "manage" her assigned sales region simply because she is the only employee responsible for coordinating all sales, marketing, trade show, dealer relations, export, customs and regulatory activities for this area.

While a function manager does not normally directly supervise subordinate employees, it is the petitioner's obligation to establish, through independent documentary evidence, that someone other than the beneficiary performs the non-managerial duties associated with the registration, marketing, export and sale of the petitioner's products in the Latin American region. Here, the petitioner has not met that burden, and has thus failed to establish that the beneficiary's duties will be primarily managerial 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).

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

The AAO acknowledges that USCIS approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary while the instant immigrant petition was pending adjudication. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 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).

It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approval by denying the instant immigrant petition.

If the nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS 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).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.