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FILE:

SRC 07 012 54920

Office: TEXAS SERVICE CENTER

Date: **NOV 06 2007**

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

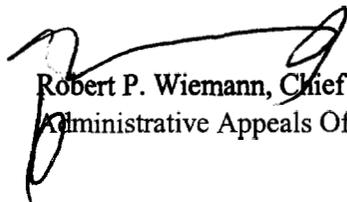
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of New York that is engaged in the import and wholesale of leather apparel and accessories. The petitioner seeks to employ the beneficiary as its president and chief executive officer.

The director denied the petition on February 27, 2007. The director determined that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States company; or (2) that the beneficiary was employed in a primarily managerial or executive capacity with the petitioner's foreign affiliate.

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, counsel for the petitioner asserts that the director is mistaken in his assumption that the beneficiary is not performing managerial or executive functions and misunderstood the nature of the staff, their duties and the beneficiary's function as an executive of the U.S. office. Counsel submits a brief in support of the appeal.

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

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

* * *

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

The language of the statute is specific in limiting this provision to only those executives 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 would be employed in a managerial or executive capacity for the United States entity.

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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

The immigrant petition was filed October 16, 2006. The petitioner stated on Form I-140 that the beneficiary would be employed as the president and chief executive officer of the four-person company. In a letter dated October 9, 2006, the petitioner provided the following description of the beneficiary's proposed duties:

[The beneficiary] exercises wide latitude and discretionary authority relating to his duties as the Country Head for the Company's United States Branch Office, including the hiring, retaining and firing of employees under his control. [The beneficiary] reports to the owner and CEO of the India based business. [The beneficiary's] detailed job duties with [the petitioner] are listed below:

Sales and Marketing (30% of time on a weekly basis)

- (i) **The Petitioner sells directly to customers and through Buyer's agents and at trade shows.** [The beneficiary] meets with the Sales representatives to review marketing, sales and distribution matters to ensure the efficient marketing & distribution of the Company's products across the United States.
- (ii) Meet with sales and buyer agents re marketing strategy and market penetration.
- (iii) Attend Trade Shows and meet with clients and customers;
- (iv) Meetings and Discussions with Customers (existing and potential), and Business Associates to establish business relations, ascertain customer needs, complaints, market perception, and current competition in the Company's products.
- (v) Supervise product Advertising and placement – the beneficiary in consultations with advertising agencies decides upon the appropriate vehicles for advertising, product catalogues and other marketing vehicles.

Strategic planning (30%)

- (vi) **Strategic planning** for the United States operations including:
 - Expansion of product lines offered by the Company
 - Choosing geographical markets for entry
 - Expansion plans in existing geographical markets,
 - Varying the Company's product offerings in different markets
 - Market definition & Segmentation for Company's product offerings – (daily wear, party wear, men's, women's and children's lines
 - Maximizing market share in current markets by using additional advertising, pricing, discounting and sales incentives for retailers and sales representatives

General Management Duties (20%)

- (vii) Head of U.S. operations;
- (viii) **Plan, develop and establish** policies and organizational goals and objectives for United States operations;
- (ix) Make all final judgments and decisions relating to United States operations;
- (x) Handle all legal matters, corporate, product licensing, pending litigation, warehouse and office leases and taxation matters.
- (xi) Represent the business to all agencies and organizations.
- (xii) Interact with vendors to review product offerings and making purchase decisions.
- (xiii) Maintain business image and good relations with clients, and general public.
- (xiv) Prepare Management Reports for Board of Directors.

Financial (15%)

- (xv) Manage all financial operations for United States Company.
- (xvi) Sole Authorization for financial and banking matters, set and approve budgets and authorize expenditures;
- (xvii) Authorize payments.
- (xviii) Establish banking relationship, open lines of credit;
- (xix) Approve Lines of Credit for Company's wholesalers and retailers;
- (xx) Review activity reports and financial statements to determine progress of US operations.

Personnel (5%)

- (xxi) **Recruitment** and Hiring of US employees and establishment of US personnel policies.
- (xxii) Selection of employees, assignment of job duties, tasks and responsibilities, evaluation and performance review of employees, retention and promotion decisions.

The petitioner explained that "substantially all" of the listed duties are executive/managerial in nature, while the day-to-day business operations, office administration, accounting management, and shipping and warehouse functions are carried out by full-time employees and contract staff. The petitioner stated that the beneficiary "facilitates the smooth interaction between the two entities relating to the sourcing, shipping, new product design and sales and marketing functions between the United States and India."

The petitioner submitted an organizational chart identifying the beneficiary as president and chief executive officer, with responsibility for supervising an office manager, [REDACTED], and "non-employee professionals" including attorneys, accountants, customs agent/brokers and banks. The chart indicates that the office manager supervises: (1) [REDACTED] accounting/administration; (2) [REDACTED], operations and imports; and (3) [REDACTED] warehousing. The chart depicts "contract warehousing staff," under the warehousing employee, and additional non-employees such as credit agencies, banks, customs agents and brokers under the supervision of the other employees.

The petitioner included a position description for each subordinate employee in its letter dated October 9, 2006. It stated that the accounting/administration employee's time is allocated as follows: 20% on "general administration" of the U.S. office; 40% of his time on accounting management duties, including performing credit investigations, setting credit limits, reviewing collection reports, collecting delinquent accounts, and making referrals to collection agencies or attorneys; and 40% of his time on customer service duties, including resolving customer problems concerning merchandise, service and billing, reviewing correspondence, and following up with customers.

The petitioner stated that the import operations employee supervises the import of products from the manufacturing facilities in India and onward shipping of company products to its buyers and distributors, including responsibility for: expediting import-export arrangements; ensuring compliance of merchandise with customs regulations; import documentation, shipping and freight documentation; liaison with customs and import/export agents in the U.S. and India; liaison with US customs officials to effect release of incoming freight; and coordinating activities of exporting merchandise from India to the United States. The petitioner

further stated that this employee works with buyers and sales representatives to review sales and distribution matters, and is responsible for sale order tracking, packaging and labeling, and quality control issues.

The petitioner stated that its warehousing employee supervises workers engaged in receiving, warehousing, shipping and freight; verifies incoming shipments, loads and unloads inventory, cleans and maintains the warehouse, shipping and delivery, performs packing marketing and price labeling, handles sales returns, and is responsible for inventory control. Finally, the petitioner stated that the company's office manager supervises the other employees.

The petitioner provided a copy of its New York Form NYS-45, Quarterly Combined Withholding, Wage Reporting, And Unemployment Insurance Return, for the second quarter of 2006, which indicates wages paid to the employees paid on the organizational chart. The beneficiary earned \$12,000 during the quarter while the four other employees earned wages between \$700 and \$2,800.

The director issued a request for additional evidence on November 20, 2006. In part, the director requested a statement from the petitioner describing the beneficiary's proposed U.S. job assignment in greater detail, including additional information regarding all duties/functions he will perform, and information regarding subordinate employees. The director instructed the petitioner to explain how the reasonable needs of the organization in light of its overall purpose and stage of development would allow the beneficiary to function primarily as an executive or manager. In addition, the director requested evidence of the petitioner's current staffing level, including federal and state quarterly reports for 2005 and 2006. Finally, the director requested that the petitioner identify all contract workers utilized by the company, provide evidence of their employment in the form of employment contracts, and evidence of compensation paid to each worker, and specify the number of hours each contractor works and the duties they perform.

In a response dated February 8, 2007, the petitioner submitted essentially the same position description for the beneficiary as that provided in its previous letter. The petitioner explained that the U.S. company uses trade shows, direct marketing and sales representatives "who are highly specialized in leather apparel and related accessories" for the sale of the company's products. The petitioner emphasized that the beneficiary's focus is exclusively on executive responsibilities that will enable the company to increase its customer base and establish new business relationships.

The petitioner explained that the company had experienced substantial staff turnover, leading to a restructuring of employee duties. The petitioner provided an updated organizational chart which depicts [REDACTED] "manager," reporting to the beneficiary. The manager is depicted as supervising: [REDACTED] customer service/administrative assistant; (2) [REDACTED] credit control/bookkeeping; [REDACTED] operations and imports; and (4) non-employee professionals. The chart shows that the operations and imports employee supervises customs agents/brokers and "warehouse trucking shipping companies."

Although [REDACTED] is depicted as "manager" on the new organizational chart, the petitioner stated in its letter that he is the "office administrator" responsible for "general administration," including correspondence and records maintenance; assisting the president in meetings with buyers and sales representatives, attending trade shows, working with customs brokers, maintaining relations with clients and troubleshooting problems. The petitioner stated that the credit and bookkeeping employee divides his time equally between credit control

and bookkeeping matters. The petitioner indicated that [REDACTED] is responsible for import operations and warehousing matters, and devotes 40% of his time to import operations, 40% of his time to sales and distribution, and 20% of his time to warehousing functions. Finally, the petitioner indicated that the customer service representative resolves customer problems and complaints.

The petitioner submitted its New York Form NYS-45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the third and fourth quarters of 2006. All of the employees identified on the updated organizational chart appear on the quarterly report for the last quarter of the year, which includes the month in which the petition was filed. The AAO notes, however, that the employee originally identified as the petitioner's warehousing employee, was not employed by the company after June 2006, while the customer service representative appears to have been hired in July 2006, but was not included on the original organizational chart. The petitioner's Forms W-2 for 2006 show that the beneficiary earned \$48,000; [REDACTED] earned \$10,600; [REDACTED] earned \$10,600; [REDACTED] earned \$3,500; and [REDACTED] earned \$5,950.

The director denied the petition on February 27, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the majority of the beneficiary's time would be devoted to sales, marketing, financial matters and sales strategy development, rather than to managerial duties. The director further noted that the petitioner's "limited number of employees would require the beneficiary to perform a wide range of daily functions associated with running a business," and noted that such conclusion was exemplified by the petitioner's indication that the beneficiary must perform duties related to marketing and contract negotiation.

The director further concluded that the evidence of wages paid to the beneficiary's subordinate employees does not support the petitioner's statements that all of the company's workers are full-time employees. The director found that a supporting staff of four part-time employees would not be sufficient to relieve the beneficiary from performing primarily non-qualifying duties. The director noted that the petitioner had also failed to establish that the beneficiary's subordinates would be professionals, managers or supervisors.

The director determined that while the beneficiary's position description includes both qualifying and non-qualifying tasks, the totality of the record supports a conclusion that the beneficiary would devote the majority of his time to non-managerial tasks, especially sales and marketing duties.

On appeal, counsel for the petitioner asserts that the director is "mistaken" in assuming that the beneficiary would not perform primarily managerial or executive duties. Counsel contends that the day-to-day business operations, including office administration, account management, bookkeeping, customer service, imports, sales, shipping and warehousing functions are carried out by full-time employees and contract staff. With respect to the director's finding that the beneficiary would perform sales and marketing duties, counsel states:

Given that the U.S. office facilitates the sales function of the company, its [sic] ludicrous for the Service to contend that sales and marketing duties performed by [the beneficiary] are not executive or managerial in nature. In fact the sales and marketing duties go to the core of the duties to be performed by [the beneficiary] in the United States.

Counsel states that the petitioner never contended that the beneficiary performs exclusively executive or managerial functions, and notes that the small percentage of time he may devote to "day-to-day operations" is normal for his position and the size of the organization in question.

Finally, counsel emphasizes that U.S. Citizenship and Immigration Services (USCIS) has approved a total of three L-1 nonimmigrant visa petitions filed on behalf of the beneficiary which were based on similar facts.

Upon review of the record in this matter and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed 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 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.*

Here, while the petitioner submitted a lengthy description of the beneficiary's proposed duties and the percentage of time he would devote to his various areas of responsibility, the job description fails to establish that the beneficiary's duties would be primarily managerial or executive in nature.

The petitioner indicates that the beneficiary devotes 30 percent of his time to sales and marketing duties, including attending trade shows to meet with clients and customers, holding discussions with existing and potential customers, and consulting with advertising agencies. The petitioner did not adequately clarify how the beneficiary's attendance at trade shows and discussions with existing and potential customers rise to the level of managerial or executive capacity, or how such duties differ from the routine, day-to-day sales and marketing functions of the petitioner's import and wholesale business. 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).

Furthermore, while the petitioner has consistently stated that the company uses "trade shows, direct marketing and sales representatives" for the sale of its products, the petitioner's organizational charts and descriptions of its organizational structure do not, in fact, include sales representatives or marketing employees. The petitioner had an opportunity to identify and document the company's use of contract workers and did not respond to this request, so the AAO has no reason to conclude that independent contractors perform the sales and marketing function. 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)). Similarly, the petitioner's corporate tax returns indicate no payments for commissions, which further precludes a finding that outside employees actually perform the company's sales.

On appeal, counsel implies that the beneficiary's sales and marketing duties must be considered executive or managerial in nature, "given that the US Office facilitates the sales function of the company." Counsel states that "the sales and marketing duties go to the core of the duties to be performed by [the beneficiary]." However, the fact that the beneficiary is essentially solely responsible for the sales and marketing function is insufficient to elevate his sales and marketing duties to the level of a manager or executive. The AAO does

not doubt that such duties are key to the success of the company, but notes that an employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). In addition, given that the primary purpose of the U.S. company is to market and sell its foreign affiliate's products in the United States, the AAO is left to question whether the beneficiary, as the sole employee responsible for sales and marketing functions, devotes only 30 percent of his time to such duties.

The petitioner indicated that the beneficiary allocates an additional 30 percent of his time to "strategic planning," including "expansion of product lines," expansion into new geographical markets, market definition and segmentation, and implementing various sales incentives. The specific managerial or executive tasks associated with these general responsibilities have not been adequately described, and it cannot be concluded that these duties would be qualifying in nature. 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 "planning" functions described would necessarily require marketing research and analysis tasks that have not been allocated to any of the beneficiary's subordinate personnel.

In addition, the AAO notes that the director reviewed the initial position description and found it insufficient to establish the beneficiary's eligibility as a multinational manager or executive. However, when requested to provide additional explanation regarding the beneficiary's specific duties and functions in the company, the petitioner merely re-submitted the same job description. 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).

The AAO does not doubt that the beneficiary devotes some of his time performing the described "general management duties," and overseeing financial operations, or that he has the authority to hire and fire employees. However, the definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940, F.2d 1533 (Table) 1991 WL 144470 (9th Cir. July 30, 1991). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are “primarily” managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The word “primarily” is defined as “at first,” principally,’ or “chiefly.” *Webster's II New College Dictionary* 877 (2001). Where an individual is “principally” or “chiefly” performing the tasks necessary to produce a product or to provide a service, or other non-qualifying operational or administrative tasks that individual cannot also be “principally” or “chiefly” performing managerial or executive duties. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary’s time.

The petitioner’s description of the beneficiary’s duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary’s duties represents a credible perspective of the beneficiary’s role within the organizational hierarchy. Therefore,

when examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

In this matter, the petitioner's description of the beneficiary's job duties does not clearly establish his employment in a managerial or executive capacity, so the director reasonably looked to the petitioner's staffing levels at the time of filing to determine whether the company could reasonably support a primarily managerial or executive position. However, there are several key discrepancies in the petitioner's descriptions of its staffing levels that remain unexplained. First, the petitioner claimed to employ [REDACTED] as its warehouse employee as of October 2006 when the petition was filed. However, a review of the petitioner's quarterly wage reports shows that this individual was no longer employed with the company after June 2006. Similarly, the petitioner did not initially claim to employ [REDACTED] at the time of filing, but the company reported paying wages to her as early as July 2006. Although the petitioner refers to "substantial turnover," in its staffing, it is reasonable to expect a company with four to five employees to be able to provide an accurate and documented account of its staffing levels on a given date. The discrepancy between the petitioner's initial organizational chart and its quarterly wage report for the same period has not been explained. 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). 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. *Id.* at 591.

Therefore, while the petitioner later attributed the warehousing function to its import and operations employee, it is unclear who was responsible for performing the warehouse duties at the time the petition was filed. Nor is it clear how a single employee would consistently be able to perform all import, warehousing, inventory and distribution tasks associated with the petitioner's business, particularly when the petitioner initially claimed that these duties were divided between two full-time employees.

Second, the AAO notes that the petitioner revised the position descriptions of all of its employees in response to the request for evidence, and attributed the changes to "substantial staff turnover," and "re-structuring of employee duties." A review of the submitted quarterly wage reports shows no such staff turnover, other than the departure of one employee in June 2006 and the hiring of an additional employee in July 2006. The position descriptions submitted in response to the director's request for evidence suggest that the petitioner was attempting to attribute a broader range of non-qualifying duties to the beneficiary's subordinate employees than initially indicated. 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). The inconsistency in the petitioner's statements regarding its staffing levels limits the probative value of its evidence. Regardless, none of the submitted position descriptions for the beneficiary's

subordinates suggested that the lower-level employees would relieve the beneficiary from primarily performing sales and marketing duties.

Finally, although the director prominently addressed the petitioner's failure to establish that the beneficiary's subordinates work on a full-time basis, on appeal, counsel continues to offer unsupported statements that all of the petitioner's workers are full-time employees. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). At most, it appears that the customer service representative and import and operations employee were employed on a full-time basis during the quarter in which the petition was filed, although it is not clear whether they maintain a consistent full-time work schedule. For example, [REDACTED] received \$2,100 in the third quarter of 2006, but \$3,850 in the fourth quarter. [REDACTED] received \$2,400 during the second quarter of 2006, \$3,200 in the third quarter and \$5,000 in the fourth quarter. However, the company's "manager," [REDACTED] was employed by the company all year and received only \$3,500, and [REDACTED] also worked for the company all year, earning a salary of \$10,600 which is not consistent with full-time employment, even at minimum wage.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the petitioner was a three-year-old import and wholesale company that claimed to have a gross annual income of nearly \$600,000. The firm employed the beneficiary as president, a part-time office manager or administrator, a part-time accounting/credit employee, an import and operations employee, and a customer service representative. It has not documented the use of contract employees or otherwise submitted evidence that it employs sales representatives. The petitioner has not established that it has a reasonable need for the beneficiary to perform primarily managerial or executive duties, particularly in light of the lack of a sales and marketing staff to perform the company's primary function of marketing and selling the company's product to existing and new clientele. As discussed above, given the petitioner's indication that the beneficiary would devote a significant portion of his time to this function, it has not been established that he would be relieved from primarily performing sales and marketing duties that do not rise to the level of managerial or executive capacity.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying

duties. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

The petitioner has not submitted evidence on appeal to overcome the director's determination with respect to this issue. Accordingly, the appeal will be dismissed.

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

The petitioner did not submit a position description for the beneficiary's last overseas position in support of the initial petition. The beneficiary was identified as "General Manager Exports" on an organizational chart for the foreign entity, which shows that he supervised three managers, four supervisors, 10 staff, 150 "labor" and 15 commissioned sales representatives. The petitioner submitted a letter from the foreign entity dated August 23, 2003, in which the beneficiary was described as "export manager," however, the letter did not provide a detailed list of the duties performed by the beneficiary in that role within the three years preceding the filing of the petition.

Therefore, in the request for evidence, the director requested a detailed statement describing the beneficiary's previous foreign assignment in greater detail, including all duties/functions he performed. The director instructed the petitioner to provide the number of employees he supervised, their job titles and their job duties, and to provide an organizational chart clearly identifying the beneficiary's last position abroad.

The petitioner provided a letter from the foreign entity dated February 8, 2007, in which the beneficiary's duties were described as follows:

[The beneficiary] last served as General Manager of Export Sales where his job duties encompassed [the foreign entity's] operations, exports, overseas sales and marketing matters with other responsibilities ranging from Production to Design and Development. . . .

[The beneficiary's] job duties with [the foreign entity] can be summarized as follows:

- i. Direct export sales and marketing operations, including global marketing plans, market penetration, expansion plans in existing markets, determination of product offerings, market definition and segmentation for company's product offerings.
- ii. Direct Product Advertising and Placement, and Catalogue production, and work outsourced to local Advertising Agencies.
- iii. Meet with overseas sales and commission agents re marketing of company products.
- iv. Direct managerial and subordinate staff in exporting merchandize from India to foreign markets, prepare reports of transactions to facilitate billing of shippers and foreign carriers, export correspondence and delivery requests, packaging according to export market standards and specifications, export tariffs, licenses, and restrictions.
- v. Ensure compliance with India's export and foreign exchange regulations.

- vi. Develop relationships with government officials, banking officials, shipping companies, customs brokers, shipping agents, freight forwarders, freight insurers and other personnel customarily involved in international trade;
- vii. Attend Trade Shows and meet with clients and customers;
- viii. Meetings and Discussions with customers and business associates to establish business relations, ascertain customer needs, complaints, market perception, and current trends in the leather export industry.
- ix. Prepare Management Reports for Board of Directors.

The petitioner did not submit evidence regarding the job titles and duties of the beneficiary's subordinates while employed by the foreign entity. The petitioner provided an organizational chart depicting the foreign entity's current staff structure.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director stated that the petitioner failed to provide a description of the beneficiary's foreign employment which demonstrates that he was employed in either capacity.

The AAO observes that counsel for the petitioner has not addressed this issue on appeal and has therefore not submitted evidence to overcome the director's determination. Upon review, the AAO concurs with the director's determination and will dismiss the appeal for this additional reason.

The AAO acknowledges that the foreign entity's organizational chart shows the beneficiary at the second highest level in the organizational hierarchy of the company and supervising, directly and indirectly, over 180 subordinates, including the managers of the production, design and finance departments. However, the foreign entity's description of the beneficiary's duties is insufficient to establish that he actually supervised all lower-level employees in the foreign organization, as suggested by the organizational chart.

Rather, the position description suggests that the beneficiary's responsibility was limited to the areas of exports and sales activities. The foreign entity's organizational chart does not include an export department, or a sales and marketing department, which raises questions regarding who actually performed non-qualifying duties associated with these functions. At most, the beneficiary may have supervised commissioned sales representatives, but according to the position description, he was also responsible for performing direct sales during trade shows and customer meetings. Furthermore, the petitioner did not establish that the beneficiary directed a "managerial and subordinate staff," in performing his export-related duties. Since the organizational chart does not include lower-level marketing or export employees or full-time sales staff, the AAO cannot conclude that the beneficiary actually "directed" or managed subordinate staff within these functions that relieved him from performing non-qualifying duties. Although requested by the director, the petitioner failed to provide the requested job titles and position descriptions for the beneficiary's subordinates. 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). Based on the lack of evidence in the record with respect to the beneficiary's foreign employment, the AAO concurs with the director that the petitioner's burden was not met. Accordingly, the appeal will be dismissed.

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

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

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

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

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

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.