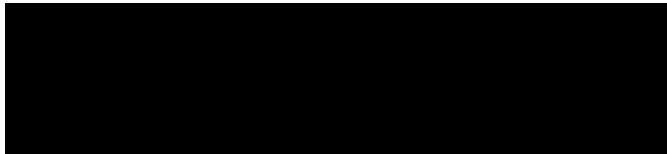




U.S. Citizenship
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Services

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FILE: [REDACTED]
WAC 04 114 53762

Office: CALIFORNIA SERVICE CENTER

Date: DEC 21 2005

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:



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
Robert P. Wiemann, Director
Administrative Appeals Office

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

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 California that is doing business as a travel and tour operator. The petitioner seeks to employ the beneficiary as its vice-president of administration and controller.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal¹, counsel claims that the beneficiary's position in the United States company would be both managerial and executive in nature. Counsel stresses the beneficiary's role in creating the company's quality control manual as evidence of his employment in an executive and managerial capacity. Counsel submits an appellate brief 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 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

¹ The AAO notes that counsel filed Form I-290B, and noted in an attached letter, dated May 18, 2005, that an appellate brief and evidence would be subsequently submitted. Counsel submitted a brief in support of a motion to reconsider with the petitioner's notice of appeal. The director declined to treat the appeal as a motion and forwarded to the AAO for review. Counsel subsequently submitted a brief in support of the appeal on July 5, 2005. The AAO will rely on counsel's appellate brief for analysis of the instant issue.

statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

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

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

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

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

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

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

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

The petitioner filed the instant immigrant petition on March 10, 2004 requesting employment of the beneficiary as its vice-president and controller. In an appended letter, dated February 18, 2004, the petitioner

identified the beneficiary's proposed position as "Vice-President/Controller" and "Overseer" of the petitioner's Los Angeles branch office and outlined the following job duties:

- Continue to develop organizational management plans for U.S. operations.
- Develop marketing strategies.
- Develop business and market entry plans.
- Direct the preparation of business plans necessary to counter any and all problems arising from airline problems, cancellations, closures, and bankruptcies.
- Continue analysis of travel sites, competition's pricing and market acceptance.
- Formulate and devise business strategies that will increase sales and minimize overhead costs.
- Extensively analyze, monitor [sic], study, research current travel trends among Filipino Americans.
- Formulate policies and objectives pursuant to the business purposes of the company.
- Oversee and manage operations at the Los Angeles branch.
- As Controller, will devise measures to ensure that all tickets issued are accordingly paid and no ticket is released unless payment is assured and all papers required for recovery or collection of any unpaid ticket are in place.
- Promptly send out Statements to sub-agents and ensure payment of amounts due so as to generate a satisfactory cash flow for the company.
- Ensure that all accounts receivables from sub-agents are paid on time and that all commission payables to sub-agents are also paid on time.
- Exhaust all means to effect prompt collection of receivables.
- In charge of all administrative matters of the company, such as human resources management, bad debt collection, disposition of personnel rules and regulations, office leases, etc.
- In charge of all personnel matters, starting from recording of all personnel data, providing training whenever they are wanting, evaluating performance of personnel, effecting new hiring, removing or transferring or promoting employees, or such other personnel-related matters.
- In charge of the enforcement of the company's rules and regulations.
- Institute a Quality System Management program for the company, inclusive of procedures for an internal auditing program, and provide orientation to all personnel on the documentation and internal auditing tasks inherent in the Quality System Management.
- Handle all refund requests and all legal matters of the company.
- Handle all prepaid ticket advises (PTA) which need to be issued at the [foreign entity] and all hotel vouchers for prepaid accommodation in selected Philippine hotels.

The petitioner attached an additional job description for the beneficiary's proposed position of controller/vice-president of administration, in which it noted essentially the same job responsibilities as those outlined above. The petitioner also noted that as the "overseer" of the Los Angeles office branch, the beneficiary would have the following responsibilities:

1. He shall oversee the day to day operation of the office and, in so doing, he shall be guided by the company's Quality Management System and Rules and Regulations.

2. He shall motivate every employee so that they will all perform their assigned tasks in an outstanding manner.
3. He shall ensure that all tools and materials needed in the performance of tasks by all employees are duly made available at all times.
4. He shall attend to the day to day problems brought up by employees in the performance of their work.
5. He shall perform such other duties assigned to him by the President.
6. He shall report directly to the President on all matter pertaining to the branch office's operation.
7. He shall represent the office/branch on all travel agency business matters in his area of jurisdiction.
8. He shall lead the employees in his jurisdiction in the attainment of the company's objectives.

The petitioner submitted an organizational chart identifying the beneficiary as controller/vice-president of administration and overseer of the Los Angeles branch. The petitioner's additional employees included the company's president, accountant, head office manager, San Jose branch manager, three ticket controllers, as well as five salespersons.

In a request for evidence, dated December 23, 2004, the director asked that the petitioner submit the following documentary evidence related to the beneficiary's proposed employment in a primarily managerial or executive capacity: (1) a detailed description of the beneficiary's job duties, including an allocation of the amount of time the beneficiary would spend on each task; (2) a list of the education and employment qualifications for the beneficiary's proposed position; (3) an organizational chart identifying the managerial hierarchy and staffing levels of the United States organization on the date of filing the I-140 petition; (4) a brief description of the positions subordinate to the beneficiary including the employees' job titles, duties, educational levels, dates of employment, and annual salary; (5) a list of "the specific goals and policies" established by the beneficiary and the "the specific discretionary decisions" exercised by the beneficiary during the last six months; (6) evidence that the beneficiary requires only general supervision from the organization's higher-level executives or board of directors; (7) Quarterly Wage and Withholding Reports for all workers employed by the petitioner during the last three quarters; (8) Internal Revenue Service (IRS) Form 941, Quarterly Wage Report, for all employees during the last three quarters; and (9) a copy of the petitioner's payroll summary and IRS Forms W-2, W-3 or 1099-MISC evidencing wages and compensation paid during 2003. The director also noted that if applicable, the petitioner should provide evidence that the beneficiary, as a functional manager, manages a function of the company and does not directly perform the function.

Counsel responded in a letter dated March 15, 2005, and included a comprehensive description of the job responsibilities held by the beneficiary in the position of "vice president for administration-controller-quality management coordinator," and an outline of the amount of time devoted by the beneficiary to each task. Counsel also submitted a "job analysis" explaining the beneficiary's employment as a functional manager in both an executive and managerial capacity, and provided a revised organizational chart of the petitioner's staffing levels as of the date of the petitioner's response. As the outline of job duties and the job analysis are already part of the record, they will not be entirely repeated herein. In the documentary evidence provided, the petitioner indicated that the beneficiary no longer acts as the "overseer" of the Los Angeles office, but directly supervises three office managers, a web coordinator, and an accounting manager.

In a decision dated April 21, 2005, 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 focused on the petitioner's quarterly wage and withholding reports for the last three quarters of 2004, noting the beneficiary did not receive wages from the petitioner during the third quarter and was paid minimal compensation during the fourth quarter. The director concluded that the beneficiary was not a full-time employee of the petitioning entity during the year 2004. The director consequently noted that "[i]f the beneficiary was not a full-time employee it is unclear how he carried out his executive or managerial duties or could even be considered a full-time employee in any capacity." The director also concluded that the company's president, who was employed on a full-time basis, could perform the majority of the beneficiary's job duties.

The director further stated that, following a comparison of the petitioner's organizational chart and its quarterly wage and withholding reports, the petitioner did not substantiate employment of all workers identified on its organizational chart. The director noted the relevance of this evidence, stating that "evidence is required to prove that the beneficiary is actually supervising other managers." The director also noted that the petitioner had not provided salary amounts for the managers subordinate to the beneficiary. The director concluded that the beneficiary would not manage or direct the management of a department, subdivision, function or component of the organization. Consequently, the director denied the petition.

In an appeal filed on May 20, 2005, counsel contends that the evidence submitted by the petitioner demonstrated the beneficiary's employment in both a managerial and an executive capacity. In a brief subsequently submitted, counsel expresses disbelief in the denial of the petition for the beneficiary, who counsel stresses is second "rank" next only to the company's president. In her appellate brief, counsel outlines the statutory criteria for "managerial capacity" and "executive capacity," and addresses the beneficiary's eligibility under each requirement. In particular, counsel emphasizes the beneficiary's responsibility of drafting the company's quality manual, in which he "formalized his recommended and approved corporate policies [sic] and guidelines for the compliance of the employees to ensure more efficient procedures and operations." Counsel claims that the quality manual "speaks for itself" in demonstrating the beneficiary's employment as an executive, noting that the company's policies and goals are outlined within. Counsel addresses the beneficiary's responsibility of drafting the quality manual, as well as creating its confidentiality and distribution policy, quality system documentation and control, ticketing order procedures, and procurement policy. With regard to the beneficiary's eligibility as an executive, counsel provides the following examples of the discretionary decisions made by the beneficiary: (1) whether to file a suit against the company's sub-agent or contractor in bankruptcy court; (2) which benefits, such as health insurance, should be offered to the petitioner's employees; (3) whether to settle a pending legal action; and (4) whether to terminate and hire employees in the Los Angeles office.

Counsel further notes that in accordance with the criteria of "managerial capacity," the beneficiary directly supervises three branch managers, each of whom holds a bachelor's degree. Counsel claims that the beneficiary's subordinate managers therefore qualify as professionals. Counsel states that as vice-president of administration, the beneficiary exercises administrative management over the three branch offices, and as controller, "he is involved in the release of tickets, as well as other internal audit requirements of the company."

Counsel clarifies that the beneficiary was employed by the petitioner in 2004, but took medical leave during the third quarter. Counsel provides a copy of a memorandum from the beneficiary to the company's president

requesting medical leave from July 1, 2004 through September 30, 2004, and a memorandum from the president confirming the beneficiary's medical leave. Counsel states that during his medical leave, the beneficiary continued to work on the company's quality manual. Counsel emphasizes that the "trust and confidence" given to the beneficiary to create the quality manual establishes the beneficiary's position of importance in the company. Counsel also contends that with regard to the beneficiary's full or part-time employment, the regulations require only "productive employment," not necessarily full-time employment.

Counsel addresses the discrepancies between the petitioner's organizational chart and its quarterly wage and withholding reports, noting that an "outdated" organizational chart had inadvertently been submitted. Counsel contends that regardless of the discrepancy, the record demonstrates that the beneficiary would be employed in a primarily managerial and executive capacity.

Counsel notes skepticism of the director's "objectivity and impartiality" in his denial of the petition. Counsel states that prior to receiving the denial decision, the petitioner received from Citizenship and Immigration Services (CIS) a decision for an unrelated matter. Counsel also notes that immediately following the petitioner's request for information on the status of the instant matter, CIS issued its denial of the petition, despite the fact that CIS records indicated an additional 270 to 300 days of processing.

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

Of specific importance is the requirement dictated by case law that a petitioner establish eligibility for the requested immigrant classification at the time of filing. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Here, the record does not demonstrate that at the time of filing the petition, the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity.

At the time of filing, the beneficiary's position was identified on both Form I-140 and in the petitioner's February 18, 2004 letter as "vice-president/controller" and "overseer." The petitioner subsequently added the additional title of "quality management coordinator" in its response to the director's request for evidence² and hired an employee to assume the beneficiary's position as "overseer" of the Los Angeles office. This is particularly relevant, as, in its March 15, 2005 response and appellate brief, counsel relies on the beneficiary's responsibility of drafting the company's quality control manual, which the petitioner noted would consume 60 percent of the beneficiary's time, as evidence of his employment as a manager and an executive. In sum, the initial description appeared to have the beneficiary doing more of the actual administrative functions of the business, while the second iteration of the job has the beneficiary managing the company's quality management system.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of

² The AAO recognizes that the outline of the beneficiary's job duties submitted at the time of filing included the responsibility of "institut[ing] a Quality System Management program for the company." However, the petitioner did not provide any additional description of the quality system program or explain the beneficiary's role in its development.

authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

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). As represented by the petitioner in its February 18, 2004 letter, the beneficiary would be responsible for such non-qualifying tasks as researching, monitoring, and analyzing trends in travel, creating "measures" for proper payment or the collection of payments for issued tickets, mailing payment invoices to sub-agents, ensuring "prompt" collection of accounts receivable, handling refund requests and legal matters, and issuing "prepaid ticket advises" and hotel vouchers. In addition, the beneficiary would handle the company's administrative and personnel matters, including human resources, debt collection, office leases, recording personnel data, and training employees. The petitioner's appended "personnel job description" restates the non-managerial and non-executive job duties to be performed by the beneficiary, noting that as the controller, the beneficiary would be largely responsible for payments, collections, and commissions.

According to the time allocations provided by the petitioner in its response to the director's request for evidence, the beneficiary would devote approximately 40 percent of his time to performing the above-outlined non-qualifying job duties. The AAO notes, however, that these time allocations were provided one year after the filing of the petition, when, as noted previously, the beneficiary's position appears to have metamorphosed into that of quality management coordinator. Based on the evidence presented at the time of filing, it appears that the beneficiary would devote more than 40 percent of his time to non-qualifying job duties, as this does not take into account the additional tasks performed by the beneficiary in his role as "overseer" of the Los Angeles office, which, while vague, includes representing the office "on all travel agency business matters." An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record does not demonstrate that the petitioner's staff employed a staff of professional workers who would relieve the beneficiary from performing the above-outlined non-qualifying job duties. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of

endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. At the time of filing, the beneficiary's subordinate staff consisted of a ticket controller and two sales personnel. It does not appear that the beneficiary also directly supervised the "head office manager" and "San Jose branch manager," as the beneficiary's job description did not reference any responsibilities related to these two branches or their employees. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the company's ticket processing or sales. 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)). Counsel contends on appeal that the beneficiary manages branch managers, who may be considered professional employees. The AAO notes that counsel's claim alleging supervision of professionals is based on the petitioner's staffing levels after the filing of the petition when the beneficiary was identified as managing the activities of the three branch offices. 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 beneficiary's subordinate staff at the time of filing was not responsible for performing the lower-level tasks associated with payments, collections, and refunds, or handling refund requests and legal issues. Despite the employment of ticket controllers, the employees' responsibilities did not encompass the specific functions performed by the beneficiary, such as ensuring ticket payments, collecting unpaid tickets, sending payment statements to sub-agents, and handling refund requests. Also, while the petitioner identified tasks performed by its accountant, some of which included collecting on unpaid accounts, the overlap of the accountant's job duties with the beneficiary's creates confusion as to the actual tasks performed by the accountant, and more importantly, those to be performed by the beneficiary. 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).

As addressed above, the petitioner has not submitted a clear description of the job duties related to the beneficiary's role of overseer of the Los Angeles office. The petitioner provided such vague responsibilities as "oversee[ing] the day to day operation of the office," "motivat[ing] every employee," ensuring that necessary materials are made available to employees, "attend[ing] to the day to day problems," performing duties assigned by the president, and leading employees to achieve the office objectives. The petitioner has not identified the specific managerial or executive tasks to be performed by the beneficiary as "office manager/overseer." 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).

Counsel contends on appeal that CIS already adjudicated the issue of the beneficiary's employment in a primarily managerial or executive capacity when it approved a previously filed L-1A nonimmigrant petition. 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 at 29-30 (recognizing that CIS approves some petitions in error).

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 approval by denying the present immigrant petition.

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

Counsel further challenges the director's statement that the beneficiary was not a full-time employee, claiming instead that the applicable operating instructions do not require a beneficiary's full-time employment in the United States. Counsel's reference to the Foreign Affairs Manual is misplaced. The instruction at 9 FAM 41.54 N 8.5, which addresses classification as a nonimmigrant manager or executive, indicates that while the beneficiary does not have to perform services entirely in the United States, the alien must be employed by the

petitioner on a full-time basis. In other words, "full-time employment by the beneficiary is anticipated," but the beneficiary is not required "[to] perform full-time services within the United States." *Id.* At the time of filing, the beneficiary was employed by the petitioner on a full-time basis. The beneficiary's medical leave, which the beneficiary did not take until approximately four months after the filing of the instant petition, need not be addressed herein.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the petitioning entity at the time of filing the petition. Accordingly, the appeal will be dismissed. The AAO notes that the petitioner is not precluded from filing a new immigrant petition for the benefit of the beneficiary.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner represented in documentation submitted with its March 15, 2005 response that the beneficiary devoted 67 percent of his time to his role as the company's quality management representative. The beneficiary's related job duties, however, do not fall directly under traditional managerial or executive duties as defined in the statute. See §§ 101(a)(44)(A) and (B) of the Act. For example, the beneficiary would be orienting supervisors and employees on the quality management system, assisting employees in preparing each department's "business process," collecting, reviewing, and revising data obtained from employees, and auditing and guiding employees on failures to comply. Based on the petitioner's representations, it appears that the beneficiary performed the specific functions associated with the foreign entity's quality management rather than managing the quality control system. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. Accordingly, the petition is denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The 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.