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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 26 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon subsequent review, the director issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an organization incorporated in the State of California in June 1990. It claims to provide consulting services to importers and exporters, and in addition, to do business as an employment agency, insurance broker, and accounting and tax service. It seeks to employ the beneficiary as its general 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 petitioner filed the petition on March 23, 1994 and it was approved April 18, 1994. Upon subsequent review of the record, including information obtained from an overseas investigation, the director issued a notice of intent to revoke approval on July 8, 2002. The petitioner submitted a rebuttal on August 5, 2002. In addition, a second company, L.E. Lorine, Inc., filed a Form I-140, Immigrant Petition for Alien Worker, (WAC 02 271 52124) on behalf of the beneficiary. The Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS) received the second Form I-140 on August 30, 2002.[1]

On May 15, 2005, the director issued a second notice of intent to revoke questioning: the beneficiary's managerial and executive capacity for the petitioner; the petitioner's qualifying relationship with the beneficiary's foreign employer; and, the petitioner's ability to pay the beneficiary the proffered annual wage of $36,400.

In a June 14, 2005 rebuttal, counsel for the beneficiary indicated that the beneficiary was requesting consideration of the portability provisions pursuant to the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000), section 106(c) of AC21 which amended section 204 of the Act, codified as 8 U.S.C. § 1154(j). In addition, counsel for the petitioner argued: that an approved Form I-140 petition could only be revoked if CIS had committed gross error with the approval; that revocation of this petition would constitute a denial of due process; that equitable remedies under the law should be considered; and the spirit of AC21 and CIS guidelines in porting employment should be considered. Further, counsel for the petitioner asserted that the beneficiary's job duties for the petitioner comprised managerial duties, that the petitioner had a qualifying relationship with the beneficiary's foreign employer, and that the petitioner had the ability to pay the beneficiary the proffered wage. Counsel also submitted documentation in support of the rebuttal.

[1] WAC 02 271 52124 is currently pending. The director issued a request for further evidence on June 6, 2005, and a response was received August 29, 2005. The record of proceeding for both WAC 94 118 50331 and WAC 02 271 52124 are contained in the beneficiary's A file, [redacted] which is currently located at the AAO.

On July 22, 2005, after review of the information and argument submitted in rebuttal,[2] the director revoked approval of the petition. The director determined that the petitioner had not established: (1) that the beneficiary would be performing primarily managerial or executive tasks for the U.S. petitioner; (2) that the petitioner and the beneficiary's foreign employer enjoyed a qualifying relationship; or (3) that the petitioner had the ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner requests oral argument. Counsel contends that the director's decision was an abuse of discretion, as the director did not apply the AC21 portability provisions or use the proper standard when evaluating the evidence. Counsel asserts: that the beneficiary's position is managerial and that the petitioner employed a professional employee from 1994 to 2001; that the petitioner employed individuals on commission; that the record contains ample evidence of the petitioner's qualifying relationship with the beneficiary's foreign employer; and that the petitioner has the ability to pay the beneficiary the proffered wage.

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):
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> * * *
>
> (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).

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[2] The director initially revoked approval on June 6, 2005 but reopened the matter on June 24, 2005, because of a failure to consider the timely submitted rebuttal.

The AAO acknowledges counsel's request for oral argument. Counsel bases his request for oral argument on the director's claimed abuse of discretion. The regulations at 8 C.F.R. § 103.3(b)(l) provide that the requesting party must explain in writing why oral argument is necessary. Claiming that the director abused his discretion is insufficient. CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Regarding counsel's assertion that the director used the wrong standard when adjudicating this matter, counsel should note that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As discussed in full below, the petitioner has not established eligibility for this visa classification.

The first issue in this matter is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

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

> *Affiliate* means:
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> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
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> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
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> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner initially submitted a February 4, 1994 letter stating that it "is a subsidiary of [redacted] a Philippines entity. The petitioner's 1993 IRS Forms 1120 indicated that [redacted] owned a 51 percent interest in the petitioner.

The director did not question the petitioner's relationship with the foreign entity and approved the petition.

On July 8, 2002, based upon an overseas investigation,[3] the director issued a notice of intent to revoke questioning whether the foreign entity existed or ever existed. In an August 5, 2002 response, the beneficiary claimed that the foreign entity used her residence as a manufacturing and business site and that the foreign entity's majority stockholder's residence was used as the foreign entity's corporate records office. The petitioner also provided a Certificate of Registration of Business Name for the foreign entity dated September 5, 1989, as well as other documents relating to the foreign entity also dated in September 1989. The petitioner further provided a 1993 income tax return for the foreign entity. The petitioner submitted a certification that Porkland Farms, Inc., a Philippines corporation, had purchased the 10,000 shares of the foreign entity in January 1995 and that Porkland Farms, Inc. owned a majority interest in the foreign entity.

On May 15, 2005, the director issued a notice of intent to revoke. The director observed that the record contained copies of the petitioner's stock certificates one through eight issued to Metro Export Link, Inc. and one individual in varying amounts. Although the stock certificates indicated that Metro Export Link, Inc. owned a total of 51,000 shares and the individual owned a total of 49,000 shares, the director concluded that the record lacked documentary evidence that a parent/subsidiary relationship existed.

In a June 13, 2005 rebuttal, counsel for the petitioner argued that the qualifying relationship between the petitioner and the foreign entity had been established in 1994. The petitioner also submitted copies of the petitioner's California Notice of Transaction, dated June 10, 2005 showing stock issued for the consideration of $100,000; Minutes of the Meeting re: stock ownership, resolving that on January 3, 1996, the stock issued to Metro Export Link (Philippines) be voided and that replacement shares of 51,000 be issued to Porkland Farms, Inc.; the petitioner's Articles of Incorporation; and the petitioner's treasurer's June 10, 2005 Certification of Receipt of Funds to confirm receipt of funds transferred at various dates from 1990 to 1995 from Metro Export Link Philippines in the amount of $51,000 for the purchase of 51,000 shares of the petitioner's stock.

In a July 22, 2005 revocation decision, the director determined that the petitioner's IRS Forms 1120, Schedule L, Line 22(b) listing the value of the petitioner's issued stock did not comport with the number of outstanding shares of the petitioner's stock. The director also questioned the validity of the petitioner's California Notice of Transactions created some time after the issuance of the petitioner's stock. The director further noted that the petitioner's Certificate of Receipt of Funds was not sufficient to independently establish that the foreign entity had paid for its purchase of the petitioner's stock. The director determined that the petitioner had not established by independent, objective evidence that the claimed parent/subsidiary relationship existed.

On appeal, counsel for the petitioner points out that the director misread the number of shares issued on stock certificate number 9, the stock certificate issuing shares to Porkland Farms, Inc. Counsel notes that if the

[3] The director recited the information taken from the overseas investigation report in full, so the information will not be repeated here.

stock certificate is correctly read as issuing 51,000 shares, not 100,000 shares – the number of authorized shares, the value of the stock issued and the petitioner's IRS Forms 1120 are reconcilable.

Counsel's assertion is persuasive. Upon review of the totality of the record, the record contains sufficient evidence to establish a qualifying relationship between the beneficiary's foreign employer and the petitioner when the petition was filed. The director should note that a California Notice of Transactions, although a useful document is not required of all corporations, thus the absence of such or late submission is not necessarily derogatory. In addition, in this matter the length of time that has passed since the initial filing and approval of the petition requires some leeway in accepting secondary evidence of the foreign entity's purchase of the petitioner's shares. The director's decision on the issue of qualifying relationship will be withdrawn.

The next issue in the revocation decision is whether the petitioner established that the beneficiary's position for the United States entity would be in a managerial or executive capacity.

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

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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), 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 Form I-140, Immigrant Petition for Alien Worker, was filed on March 23, 1994. On an attachment to the Form I-140, the petitioner described the beneficiary's responsibilities as:

> Responsible for the overall management of the company's business which includes import/export consulting, and doing the business of employment agency, insurance brokerage and accounting and tax services. Responsible for hiring, training, supervising and terminating company employees.

In a March 16, 1994 letter appended to the petition, the petitioner stated that the beneficiary "is an experienced import/export consultant, a licensed life and health insurance agent, a licensed tax preparer and experienced travel agent." The petitioner added that among other things, the beneficiary:

> [N]egotiate[s] with clients and customers for their import/export needs including the taking of new orders, price negotiations, product specifications and terms of payment. She also supervises the other business of the company such as employment agency, insurance brokerage, and accounting and tax services. She is responsible for the hiring, training, supervising and terminating the company's employees. This position requires the skills of an experienced manager with a broad understanding of clients and customers preferences.

The petitioner included its California Form DE-3, Quarterly Contribution Report for the last quarter of 1993, listing the beneficiary and one other employee. The petitioner also attached its 1993 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, showing $32,832 paid in salaries, $8,210 paid in secretarial services, and $650 paid in commissions. The petitioner indicated that it had three employees on the Form I-140.

On the basis of this limited information, the director approved the petition.

In the July 8, 2002 notice of intent to revoke, the director observed that an overseas investigation and interviews had revealed information showing that the beneficiary was not eligible for this visa classification. The petitioner provided a rebuttal on August 5, 2002 that remains part of the record.

On May 15, 2005, the director issued a second notice of intent to revoke indicating: that the petitioner's description of the beneficiary's duties was vague and nonspecific; that portions of the description suggested that the beneficiary would be performing the tasks necessary to produce a product or provide a service; that the record did not contain an organizational chart so that it could not be determined if the petitioner possessed the organizational complexity to warrant having an executive; that the petitioner had failed to provide evidence regarding the beneficiary's subordinate employees; and that the record did not contain evidence that the beneficiary would be a functional manager.

In a June 13, 2005 rebuttal, counsel for the petitioner contended that the petitioner had requested consideration of the beneficiary as a manager. The petitioner indicated that the beneficiary spent: 20 percent of her time managing the organization by coordinating the activities of the export agency and travel agency departments; 15 percent of her time managing the staff, preparing work schedules, and assigning specific duties, as well as recruiting, hiring, and training personnel; 15 percent of her time supervising and controlling the work of an accountant and administrative manager, coordinating the organization's budget activities, administering fiscal operations, establishing rates for the travel agency and export prices, reviewing financial statements and other performance data; 12 percent of her time establishing and implementing departmental policies, goals, objectives and procedures for the travel agency and export department, maintaining communication between governing boards and department heads; 8 percent of her time developing and maintaining computerized record management systems to store and process data; 15 percent of her time supervising the work of a travel agency supervisor and export supervisor, overseeing activities related to providing services to various customers and importers; 15 percent of her time monitoring the travel agency and export departments to insure they are efficient and effectively provide needed services.

The petitioner also provided an organizational chart showing the beneficiary in the position of general manager over a travel agency supervisor, an export/taxes/insurance supervisor, and an accounting and administration manager. The chart depicted three individual travel agents subordinate to the travel agency supervisor, three unfilled positions subordinate to the export/taxes/insurance supervisor, and one bookkeeper/clerk subordinate to the accounting and administration manager. The petitioner indicated that the travel agency supervisor was paid with a wage and commission, the export/taxes/insurance supervisor was paid with a wage and commission, and the accounting and administration manager was paid a salary.

Counsel asserted that the beneficiary was not involved in routine duties and that the routine duties were assigned to outside contractors such as secretarial and other support services. Counsel referenced the petitioner's IRS Forms 1120 to substantiate that the petitioner paid for secretarial and other support services.

The record also contains: the petitioner's 1994 IRS Form 1120 showing $28,832 paid in salaries, $9,966 paid in secretarial services, and $3,370 paid in commissions; the petitioner's California Forms DE-3, for the 1994 year showing that the petitioner had employed the beneficiary and one other individual; and, the beneficiary's IRS Forms 1040, U.S. Individual Income Tax Return for the 1994 year wherein the beneficiary indicates that her principal business or profession is "life insurance agent."

On July 22, 2005 the director revoked approval of the petition. The director observed that the petitioner's IRS Forms 1120 did not support the petitioner's claim that it employed the individuals listed on its organizational

chart. The director determined that the record did not contain evidence that the petitioner actually employed the persons described as subordinates of the beneficiary. The director also noted that the petitioner had not provided evidence that any of the beneficiary's claimed subordinates were employed in professional positions and had not provided evidence that the beneficiary managed a function rather than performing the operational activities associated with a function.

On appeal, counsel for the petitioner asserts that the director improperly considered the organizational chart for L.E. Lorine, Inc. and did not consider that the petitioner's organizational chart included a professional accountant who was on the petitioner's payroll from 1994 to 2001. Counsel also noted that the petitioner's IRS Forms 1120 showed that the petitioner utilized secretarial services. Counsel asserts that the petitioner had submitted evidence sufficient to prove that the beneficiary's position is a managerial position.

Counsel's assertions are not persuasive. 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 first iteration of the beneficiary's duties on the Form I-140 is nonspecific. 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. 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 petitioner's indication that the beneficiary "is an experienced import/export consultant, a licensed life and health insurance agent, a licensed tax preparer and experienced travel agent" suggests that the beneficiary will be providing these services to clients and customers. The petitioner's further indication that the beneficiary would negotiate with clients and customers regarding their import/export needs, would supervise an employment agency, insurance brokerage, and accounting and tax services, also suggests that the beneficiary would be performing the petitioner's services or at most would be providing first-line supervisory duties of non-professional employees. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604.

In addition, the initial record contained evidence that the petitioner employed only the beneficiary, one other individual, and intermittently used secretarial services. The approval of the petition based on the information contained in the record when the petition was filed was clearly a matter of gross error on the part of the director.

The petitioner's second iteration of the beneficiary's duties, in rebuttal to the director's notice of intent to revoke and on appeal, does not provide further detail regarding the beneficiary's actual duties. The petitioner again generally describes the beneficiary's duties. Conclusory assertions regarding the beneficiary's

employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Further, petitioner's description of the beneficiary's duties does not reference the beneficiary's duties as a life insurance agent, although the record contains the beneficiary's indication that her primary profession is life insurance agent. 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).

Moreover, the petitioner's second iteration of the beneficiary's duties and the petitioner's purported organizational chart allude to the beneficiary's supervision of a travel agency supervisor, travel agents, an export/taxes/insurance supervisor, export clerk, tax preparer, and insurance clerk, an accounting/administration manager, and a bookkeeper/clerk, as well as preparing work schedules and **assigning duties. . However, as observed above, the petitioner has failed to provide evidence that it** employed individuals in these positions for the beneficiary to supervise when the petition was filed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel's reference to the petitioner's 1994 IRS Form 1120, only confirms that the beneficiary performed the operational tasks of the petitioner's business(es). Paying a secretarial service $9,966 and commissions totaling $3,370 in the 1994 year is insufficient to establish that the petitioner employed an adequate number of employees, agents, or contractors to relieve the beneficiary from performing the petitioner's operational tasks. The petitioner has not provided adequate documentary evidence substantiating the identity of its paid employees other than the beneficiary and one other individual.

On appeal, counsel for the petitioner references the petitioner's description of the beneficiary's duties and the petitioner's organizational chart and asserts that the director failed to consider that the beneficiary supervised a professional accountant. However, the AAO observes that the petitioner indicated that the beneficiary spent a minimal amount of time supervising and controlling the work of an accountant/administrative manager (15) percent). Moreover, the petitioner's description of the "accountant's" duties is not sufficient to establish that the position is a professional position. The AAO's focus in this regard is on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

The record in this matter does not contain evidence to establish that the beneficiary performed primarily managerial or executive tasks for the petitioner. Instead, the record contains inconsistencies, unsupported claims, and evidence that the beneficiary performs many of the petitioner's day-to-day operational and administrative tasks. For this reason, the appeal will be dismissed.

The next issue in these proceedings is to determine whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of $36,400.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record contains: the beneficiary's 1994 IRS Form W-2, showing that the petitioner had paid the beneficiary $20,000 for the year; and the petitioner's 1994 IRS Form 1120, showing $28,832 paid in salaries, a negative net income of $3,944, and net assets of $10,955.

On May 15, 2005, the director issued a notice of intent to revoke determining that the evidence submitted did not establish that the petitioner had the ability to pay the beneficiary the proffered wage of $36,400.

In a June 13, 2005 rebuttal, counsel for the petitioner asserted that the petitioner had paid $28,832 in salaries and had $13,269 in net current assets for a combined total of $38,157, an amount sufficient to pay the beneficiary the proffered wage. Counsel also listed the salaries, net income, and his version of net current assets for the 1995 through 2001 years, to show that the petitioner had the ability to pay the proffered wage in all years except the year 2000.

On July 22, 2005, the director revoked approval of the petition, determining that the petitioner's IRS Forms 1120 for 1994 through 2001 showed that the petitioner had paid significantly less than the proffered wage in salaries for these years. The director noted that the salaries paid by the petitioner were from a low of $15,746 in 1996 to the high of $28,932 in 1994. The director determined that the petitioner had not established its ability to pay the beneficiary the proffered annual wage of $36,400.

On appeal, counsel for the petitioner again submits a list of the petitioner's salaries paid, its net income, and counsel's version of the petitioner's net current assets.

When analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner employed the beneficiary but never paid her the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on March 23, 1994, the AAO must examine the petitioner's tax return for 1994. The petitioner's IRS Form 1120 for calendar year 1994 presents a net taxable income of negative $3,944. The petitioner's net income for the 1994 year does not assist in establishing the petitioner's ability to pay the beneficiary the proffered wage.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. In this matter, the AAO determines that the petitioner's net current assets in 1994 equaled $10,955. Even with adding this figure to the $20,000 the petitioner paid the beneficiary in 1994, the petitioner has not established that it had the ability to pay the beneficiary the proffered wage. In addition, the AAO observes that the petitioner's subsequent tax returns continue to reflect that the petitioner's margin of net current income or net assets is insufficient to establish an inability to pay the beneficiary the proffered wage. The petitioner has not established that it had the ability to pay the proffered wage when the petition was filed. For this additional reason, the petition will not be approved.

The last issue in this matter regards counsel's reference to past approvals of the beneficiary in an L-1A classification and the initial approval of this Form I-140 petition. Counsel should note that prior nonimmigrant approvals do not preclude CIS from denying an extension or a separate immigrant petition. *See* e.g. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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, the initial approval of the Form I-140 without a request for further evidence to clarify or explain the substantial deficiencies in the record, is clear error on the part of the director.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form 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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form 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).

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. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by revoking approval of the immigrant petition.

In addition, if the previous nonimmigrant petitions were 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 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).

Further, 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 petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Of note, the beneficiary's new job and the portability considerations of AC21 are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 revocation decision. No

appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii).

However, the AAO observes that for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added). Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. It would also be absurd to suppose that Congress enacted a statute that would encourage large numbers of ineligible aliens to file immigrant visa petitions, if the legislation was actually meant to be an impetus for CIS to reduce its backlogs. To construe section 106(c) to include unadjudicated, denied, and revoked petitions would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

In this instance, the petitioner failed to demonstrate the beneficiary's eligibility when the petition was filed. The director's initial approval was clearly a matter of gross error. The director properly issued a notice of intent to revoke based on the deficiencies in the record. The record does not contain adequate rebuttal or explanation to the director's notice of intent to revoke. The director's decision to revoke approval will be affirmed.

Counsel should note that generally, a director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. at 590.

CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding

the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Finally, the AAO acknowledges counsel's reference to the doctrine of equitable estoppel. However, the AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The AAO's jurisdiction is limited to that authority specifically granted by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

Beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity comprised primarily managerial or executive tasks. The record does not contain a detailed description of the beneficiary's duties for the foreign entity nor does it contain information regarding the duties of the beneficiary's subordinates, or confirmation of the employment of the beneficiary or her subordinates. It is not possible to conclude based on the record that the beneficiary's duties for the foreign entity comprise primarily managerial or executive tasks. For this additional reason, the petition will not be approved.

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 approval of the petition will be revoked 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.