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U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: LIN 05 093 51576 Office: NEBRASKA SERVICE CENTER Date: AUG 29 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, Nebraska Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant visa 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 Michigan that is engaged in software development. The petitioner seeks to employ the beneficiary as its director of engineering.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity.

On appeal, the petitioner's current counsel contends that the beneficiary occupied a primarily managerial position in the foreign entity.[1] In support of the appeal, counsel submits documentary evidence, including a letter from the petitioner addressing the positions held by the beneficiary prior to his entrance into the United States as a nonimmigrant.

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.

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[1] The petitioner's former counsel timely filed the instant Form I-290B, Notice of Appeal. On Form I-290B, counsel claims that Citizenship and Immigration Services (CIS) failed to consider the beneficiary's "current position" and "evaluated the [b]eneficiary's prior positions with the [p]etitioner as the primary basis for its determination [of] the petition." As counsel's argument focuses on the beneficiary's "current position," it is unclear whether he misinterpreted the director's denial and construed it as being based on the beneficiary's employment capacity in the United States. Regardless, the petitioner is presently represented by new counsel. Therefore, the instant decision will be based on the appellate brief and documentary evidence submitted by the petitioner's current counsel.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary was employed by the foreign 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-
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> (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;
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> **(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
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> **(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 petition on February 18, 2005. In an appended letter, dated January 20, 2005, the petitioner addressed the beneficiary's former employment in the foreign entity, stating that "[f]rom March 1999 until August 2001, [the beneficiary] was employed in Canada by [the foreign entity], first as an [a]pplications [e]ngineer and eventually as [e]ngineering [m]anager." The petitioner further stated:

> [The beneficiary] was originally hired in March 1999 as an [a]pplications [e]ngineer. . . . In January 2000, [the beneficiary's] exceptional performance resulted in his promotion to [s]enior [a]pplications [e]ngineer. As such, he managed the [a]pplications [e]ngineering function (each team consisted of three employees) and was responsible for the following:
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> 1. Working with [the foreign entity's] research and development department to establish CAD/CAM specifications;
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> 2. Overseeing the activities and scheduling of engineering teams dispatched to customers;
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> 3. Implementing and managing software development projects from inception to completion, including definition, concepting, prototyping, testing, and final implementation;
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> 4. Conducting engineering analyses and relaying results to research and development and senior management;
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> 5. Evaluating product performance;
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> 6. Managing customer relations and overseeing product demonstration deployment; and
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> 7. Communicating with management of software redesign efforts.
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> One year later, in January 2001, [the beneficiary] was promoted to [e]ngineering [m]anager. In that position, he was responsible for managing the activities for all of [the foreign entity's] engineering departments. Moreover, [the beneficiary] had an engineering staff of five employees. While [employed as the engineering manager], [the beneficiary's] duties included:
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> 1. Overseeing all engineering functions, including the administration of beta process for new products;
>
> 2. Managing customer relations and product support deployment; and
>
> 3. Overseeing all training and technical support efforts.

The petitioner explained that in August 2001, following a decision on the part of the foreign and United States entities "to consolidate functions that were previously managed separately by [the] [p]etitioner and [the

foreign entity]," the beneficiary "was granted L-1 status in order to ensure the consistency of specialized, technical and engineering functions throughout North America."

The director issued a request for evidence, dated May 10, 2005, asking that the petitioner submit the foreign entity's organizational chart depicting the position held by the beneficiary and the names, job titles and job duties of all employees who were employed in positions subordinate to the beneficiary. The director requested that the petitioner also submit a description of the "specific job duties" associated with the position held by the beneficiary in the foreign entity, as well as a list of the levels of education completed by each of the foreign organization's employees.

Counsel for the petitioner responded in a letter dated August 1, 2005 and submitted three organizational charts, one of which counsel identified as that of the foreign entity. The AAO notes, however, that it is not clear which chart depicts the staffing levels of the foreign entity prior to the beneficiary's transfer to the United States entity, as the beneficiary is represented as holding the same position in each chart. In an attached resume, the beneficiary indicated that he held the position of senior application engineer in the foreign entity from January through December 2000 and the position of engineering manager from January 2001 "till date[2]." The AAO notes that the beneficiary's resume is already part of the record, and therefore, will not be entirely repeated herein.

The director issued a second request for evidence on August 15, 2005, addressing the two positions – senior applications engineer and engineering manager – held by the beneficiary during the year prior to his transfer to the United States as a nonimmigrant. The director states that the petitioner's descriptions of each position "vary significantly from the beneficiary's description of his duties abroad as presented in his [curriculum vitae]." The director asked that the petitioner clarify the "actual day-to-day tasks" related to the positions of senior applications engineer and engineering manager and note the percentage of time the beneficiary devoted to each of the related responsibilities. The director further noted ambiguity in the three organizational charts previously submitted by the petitioner, and asked that the petitioner provide an organizational chart that reflects the beneficiary's two former positions in the foreign entity and employees supervised by him in each position.

Counsel subsequently responded in a letter dated November 2, 2005. In the attached documentation, counsel provided the following outline of the job duties associated with the beneficiary's position of senior applications engineer:

1. Demonstration of [the foreign entity's] solution to prospective customers and proposing them proper solutions: [15-20%]

   Generally, after working on leads, the [s]ales [t]eam will establish an initial visit to the prospect site with the [e]ngineer or arrange a conference call with the prospect to understand his or her business needs. Then, depending on the business needs of the prospect, the [b]eneficiary's team will spend [a] few days and prepare a detailed presentation. Once completed, the [b]eneficiary's team will visit the customer and demonstrate the [foreign entity's] software solution while highlighting the benefits.

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[2] Counsel explains on appeal that the resume provided for the director's review was inaccurate as it had not been updated to reflect the beneficiary's new position in the United States entity.

2. Implementation of the software solutions to new customers by providing onsite training and support: [10-25%]

   Once a prospect has purchased the proposed solution, and after proper training, the [b]eneficiary's team will spend [a] few days with the customer onsite and implement the software and customize various settings and methods to suit to the customer's needs and also help the customer start using the software. This could vary from 2 days to 2 weeks depending up [sic] on the number of licenses sold to the customer.

3. Testing of the software versions and proposing changes and enhancements to meet the market demand: [15-20%]

   This task involves testing of new versions of software for quality for the new functionality and updates. Reporting 'bugs' found in the software and proposing enhancement requests based on customer input, market needs and competitiveness.

4. Taking up [b]enchmark [p]rojects especially on [h]igh [s]peed [m]achining: [10-15%]

   The [b]eneficiary has specialized skills in NC machining and high-speed machining. 'Benchmark' projects require the performance of real customer work onsite to prove the advantages and capabilities of [the foreign entity]. The prospect may compare the results of the benchmark with other competitors or may compare it with the existing software being used presently. The task involved NC programming using high-speed machining techniques and generating NC codes to cut the part on a high-speed machining center and establishing the results.

5. Undertaking special benchmark projects to deal with the strategic customers: [5-10%]

   This task involved additional work of implementation with the existing customers apart from the work involved with Item 4. The main difference is that item 5 was more involved with the existing customers to establish best practices and implementation of new mehods [sic].

6. Worked on [p]roject to develop joint venture relationship with a multinational machine tool company:

   This was a one-time project which took between two and three weeks. The [b]eneficiary has worked very closely with the [a]pplication [e]ngineer of Mikron Machine tools who are manufacturers of Mikron High Speed Machining centers to establish a strategic relationship to promote [the foreign entity] together with Mikron High Speed Milling Machines. This task involved optimizing the tool path techniques to suit the Mikron machines and prove the benefits of using [the foreign entity's] software together with the Mikron High Speed Machines.

7. Worked closely with the [research and development] team in proposing enhancements to the products and also in testing the software: [10-15%]

   This task involved communicating with [the research and development] team in proposing enhancements and testing of software. This is not a 'day-to-day' activity, but it is recurring. Mainly this task involves attending numerous conference calls and meetings to give input to [research and development] about the required enhancements in the product, prioritizing the [research and development] projects and testing the beta version of the software.

In an attached organizational chart, the beneficiary was identified as supervising an application engineer and programmer.

Counsel also provided the following job description of the beneficiary's subsequent position as the company's engineering manager:

1. Overseeing all engineering functions, including the administration of beta process for new products: [50-60%]

   a. Scheduling of [e]ngineering personnel.
   b. Running of day to day customer support activity.
   c. Establish [b]eta [c]ustomer sites for beta testing of the software.
   d. Visit [b]eta customers to discuss the product requirements and enhancements.
   e. Discussions with [the foreign entity's] [headquarters] in Israel about the [p]roduct support and bug fixes.
   f. Follow up with the [research and development] to get the bugs fixed.
   g. Custom post processor development follow-up.

2. Managing [c]ustomer [r]elations and [p]roduct [s]upport [d]eployment: [25-30%]

   a. Discussions with the customers and prioritizing the resources to address the support issues.
   b. Negotiations with customers for paying annual maintenance and support fees.
   c. Scheduling customer visits for [e]ngineers to provide pro-active support and to resolve any onsite support requirements.

3. Overseeing all training and technical support efforts: [20-30%]

   a. Schedule customer training.
   b. Discuss and come up with training programs for various modules.
   c. Improvements to the web support system.
   d. Manage the day-to-day requirements for the [e]ngineering and support functions.
   e. Discussions with the sales department to provide better service to customers.

In an additional organizational chart, the petitioner noted that as of January 1, 2001, the beneficiary occupied the position of engineering manager, during which he supervised a front line support person, two support

engineers, an information technology support person and a programmer. Counsel submitted a brief description of the responsibilities held by each of the five subordinate employees.

In a decision dated December 9, 2005, the director concluded that the petitioner had not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director noted that the beneficiary held two different positions in the year preceding his transfer to the United States as a nonimmigrant and stated that Citizenship and Immigration Services (CIS) must therefore consider both positions. The director addressed the beneficiary's employment as a senior applications engineer and noted that the petitioner failed to clarify the beneficiary's related job duties. Specifically, the director noted that counsel had disregarded differences in the job duties provided by the petitioner with those identified by the beneficiary on his curriculum vitae. The director rejected counsel's explanation that the difference in job descriptions was insignificant and merely a change in verbiage. The director concluded that in the position of senior applications engineer, the beneficiary devoted at least ninety percent of his time to personally meeting with and providing services to the petitioner's customers. Noting that the beneficiary had been supervised by a "pre-sales manager" in his position as senior applications engineer, the director also determined that the beneficiary was not managing or directing an essential function of the foreign entity.

The director further concluded that the beneficiary was not employed in a primarily managerial or executive capacity as the foreign entity's engineering manager. The director stated that the vague job duties associated with the beneficiary's position were not sufficient to demonstrate that the beneficiary primarily performed managerial or executive tasks. The director also noted that the beneficiary's responsibility of "visit[ing] beta customers to discuss the product requirements" is not managerial or executive in nature. Consequently, the director denied the petition.

The petitioner's former counsel filed an appeal on January 10, 2006. The petitioner's present counsel subsequently submitted a letter dated February 8, 2006, claiming that the beneficiary was employed by the foreign entity in a primarily managerial capacity. In an appended letter, dated February 7, 2006, the petitioner contends that CIS improperly relied on the beneficiary's outdated resume and "incomplete organizational charts" in its denial of the visa petition. The petitioner claims that the resume previously offered "is not an accurate and complete description of [the beneficiary's] duties as a [s]enior [a]pplication [e]ngineer and [e]ngineering [m]anager," and notes that it dates from before the beneficiary completed his employment in the position of engineering manager. The petitioner states that the job duties associated with the beneficiary's two positions were primarily managerial in nature. In support of the beneficiary's purported employment as a manager, the petitioner submits: (1) a January 3, 2001 letter appointing the beneficiary to the position of engineering manager; (2) a press release by the foreign entity announcing the beneficiary's appointment as engineering manager and the related job responsibilities; (3) an April 30, 2001 "authorized resell agreement" completed by the beneficiary in his capacity as engineering manager; (4) a September 11, 2001 letter from the foreign entity's Israeli affiliate inviting the beneficiary to a "[t]echnical [r]ound [t]able meeting"; (5) a letter noting the beneficiary's right to receive stock options as the foreign entity's engineering manager; and (6) a list of projects completed by the beneficiary while employed in the position of engineering manager.

On May 24, 2006, counsel subsequently submitted a "corrected" curriculum vitae for the beneficiary and an affidavit from the beneficiary "explaining why the previously filed [curriculum vitae] was incorrect and outdated." Counsel contends that the revised curriculum vitae demonstrates that the beneficiary was employed by the foreign entity in a primarily managerial capacity for at least one year prior to entering the United States as a nonimmigrant.

Upon review, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year during the three years preceding his entrance into the United States as a nonimmigrant.

The petitioner represents that the beneficiary entered the United States on August 16, 2001 under an L-1B nonimmigrant visa[3]. As a result, the appropriate period under consideration is March 1999, the month the beneficiary was hired by the foreign entity, through August 16, 2001. During this time, the beneficiary held the positions of applications engineer, senior applications engineer and engineering manager. The record does not demonstrate that any of the three positions held by the beneficiary in the foreign entity were primarily managerial or executive in nature[4].

The AAO will first consider the beneficiary's position of senior applications engineer. 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 record does not demonstrate that the beneficiary was primarily *managing* or *directing* the engineering applications function of the foreign entity as claimed by the petitioner in its January 20, 2005 letter and noted in the beneficiary's revised curriculum vitae. The petitioner contends that the beneficiary oversaw "the activities and scheduling of engineering teams," supervised a team of engineers involved in the company's "pre-sales," and "[m]anaged pre-sales activities of a region working closely with the sales [representative] of the region." The beneficiary noted that he also managed and participated in projects with an outside tool company, which were geared towards developing a joint venture relationship between the two companies. The record, however, does not corroborate the blanket claims made by the petitioner and the beneficiary. The organizational chart offered by counsel in her November 2, 2005 response does not represent that the beneficiary, in the position of senior application engineer, managed or directed "engineering teams" or sales representatives. In fact, the organization's five sales representatives were identified as subordinates of the company's sales manager; the beneficiary was identified as supervising an application engineer and programmer only. 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).

Additionally, the record does not contain a sufficient description of the beneficiary's role in the foreign entity's relationship with the referenced outside tool company to substantiate the claim that he managed projects between the two companies. 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)).

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[3] On the Form I-140, the petitioner notes the beneficiary's date of arrival in the United States as August 16, 2001. A copy of a July 29, 2003 letter submitted by the petitioner in connection with its petition to extend the nonimmigrant visa filed on behalf of the beneficiary indicates that CIS previously granted the beneficiary classification as an L-1B nonimmigrant.

[4] As the petitioner did not provide a job description of the position of applications engineer, the AAO cannot consider the nature of the beneficiary's employment in this position.

Based on the job description offered by the petitioner, the beneficiary, in the position of senior applications engineer, spent at least 55 percent and as much as 80 percent of his time performing non-managerial and non-executive tasks related to the foreign entity's engineering applications. Specifically, the beneficiary personally visited prospective customers, including those related to "benchmark" projects, to demonstrate the organization's software capabilities, provided training following the purchase of the company's software, tested software for "bugs," proposed software changes and enhancements according to customer and market demands, conducted engineering analyses, evaluated product performance, and assisted in the research and development of software projects. The record clearly demonstrates that the beneficiary primarily performed the non-qualifying tasks associated with marketing, selling, and developing the foreign entity's software applications, rather than managing or directing the performance of such functions by other workers. As a result, the beneficiary is ineligible for the classification as a manager or executive. 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). The petitioner has not demonstrated that as the foreign entity's senior applications engineer the beneficiary was employed in a primarily managerial or executive capacity. Accordingly, as the beneficiary occupied this position for twelve of the twenty months preceding his transfer as an L-1B nonimmigrant[5], the petitioner has not demonstrated that the beneficiary was employed in a primarily qualifying capacity for at least one year during the three years prior to his entrance into the United States as a nonimmigrant. For this reason alone, the appeal may be dismissed.

Although the beneficiary was not employed in his subsequent position of engineering manager for at least one year[6], for purposes of completeness, the AAO will also consider the beneficiary's employment capacity in this position.

Again, when examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In support of the managerial nature of the position of engineering manager, the petitioner submitted a description of the associated job duties, as well as copies of correspondence from the foreign entity's president and the beneficiary's resume. The AAO acknowledges, in particular, the January 3, 2001 letter from the company's president to the beneficiary addressing his role as the engineering manager and the president's subsequent public announcement on February 19, 2001 addressing the beneficiary's "primary responsibilities" associated with this position. This documentation, however, is not entirely consistent with the job description offered by the petitioner with counsel's November 2, 2005 letter. Specifically, the petitioner's job description suggests that the beneficiary occupied a more "hands-on" role to the petitioner's engineering functions rather than a managerial role, noting that the beneficiary spent approximately 45 to 60 percent of his time discussing support issues with customers, prioritizing unresolved issues, negotiating annual fees, scheduling on-site support visits, scheduling training for customers, devising training programs and "[i]mprovements to the web support system," and collaborating with the sales department to enhance the company's customer service. In addition,

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[5] The AAO again notes that the first ten months of the beneficiary's employment in the foreign entity was in the non-qualifying position of applications engineer.

[6] The petitioner represents on the Form I-140 and in its January 20, 2005 letter that the beneficiary was appointed to the position of engineering manager in January 2001 and subsequently entered the United States as a nonimmigrant on August 16, 2001. As a result, the beneficiary occupied this position for only eight months prior to transferring to the United States entity as a nonimmigrant.

the petitioner indicated that the beneficiary was responsible for personally following up with the company's research and development team regarding "bugs" in the software and the "[c]ustom post processor development." Based on the petitioner's representation, the beneficiary was personally responsible for primarily performing operational tasks of the engineering department, which are not typically deemed to be managerial or executive in nature. *See* sections 101(a)(44)(A) and (B). The AAO 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not resolved these representations with the claims of the company's president, who asserted that the beneficiary "[oversaw] all engineering aspects of the company" and "provid[ed] leadership to the engineering staff." 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. at 591-92. Absent a clear and comprehensive depiction of the beneficiary's role as engineering manager and his specific managerial or executive job duties associated with the position, the AAO cannot conclude that the beneficiary's position was primarily managerial or executive in nature.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year preceding his entrance into the United States as a nonimmigrant. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not demonstrated its ability to pay the beneficiary his proffered annual salary of $125,000.

In 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, although the petitioner employed by the beneficiary at the time of filing it did not present documentary evidence that it had previously compensated the beneficiary his proffered salary. The petitioner submitted the beneficiary's 2004 IRS Form W-2, Wage and Tax Statement, indicating that he received wages of $105,189.

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 February 18, 2005, the AAO must examine the petitioner's tax return for 2005. The petitioner, however, did not provide for the director's review its 2004 or 2005 income tax return. The record contains only the petitioner's 2002 and 2003 tax returns, which are not probative of the petitioner's ability to pay the proffered wages at the time of filing. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Accordingly, the petitioner has not demonstrated its ability to pay the beneficiary's annual salary of $125,000. For this additional reason, the appeal will be dismissed.

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 AAO acknowledges that CIS previously approved an L-1A nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary.[7] It should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, 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,*

[7] The record reflects that following the expiration of the beneficiary's L-1B nonimmigrant visa on August 15, 2003, CIS approved an L-1A visa petition filed by the petitioner on the beneficiary's behalf.

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 petition 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).

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.