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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 29 2006

SRC 05 260 50950

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based 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 Florida that is operating an air conditioning business and a Subway fast food sandwich and salad shop. The petitioner seeks to employ the beneficiary as its president.

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.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. In his appended appellate brief, counsel contends that the director incorrectly concluded that the beneficiary would not be employed in the United States company as a manager or executive, and claims that Citizenship and Immigration Services (CIS) overlooked the concept of function manager in its denial of the immigrant visa petition. Counsel also claims that CIS' denial violates the petitioner's right to due process.

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 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 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 Form I-140 on September 26, 2005, noting that the beneficiary would be employed as its president. In an appended letter from the beneficiary's foreign employer, the company's proprietor discussed the following job responsibilities related to the beneficiary's proposed position:

> In his capacity as [p]resident of [the petitioning entity], [the beneficiary] is responsible for directing the overall management and administration of the company, including decisions

> regarding investment of capital. [The beneficiary] is charged with ensuring the company's successful operation, which consists of establishing goals and policies and implementing strategies relating to the acquisition and operation of our holdings. He has also been delegated with the exclusive authority to negotiate and enter into contracts on behalf of the company, as well as the hiring and firing employees, independent contractors, and other related personnel. [The beneficiary] has played – and will continue to play – an integral role in investigating further business investments and ventures in the United States. In fact, since undertaking the position of [p]resident, [the beneficiary] attended numerous meetings to review and consider alternative investment opportunities and made several proposals to purchase businesses on behalf of the company. In short, [the beneficiary's] services are essential for [the petitioning entity's] continued growth and future success.

On October 6, 2005, the director issued a notice of intent to deny requesting that the petitioner provide the following documentary evidence: (1) "an analysis of the day-to-day responsibilities of the beneficiary" explaining how the beneficiary's job duties would be primarily managerial or executive in nature, as well as the amount of time the beneficiary would devote to each; (2) a list of the employees directly supervised by the beneficiary, their titles, and job duties; (3) a description of the beneficiary's supervisory duties; (4) an organizational chart reflecting the names, titles, job duties and educational levels of the employees subordinate to the beneficiary; and (5) copies of the petitioner's quarterly reports for 2005.

Counsel responded in a letter dated November 2, 2005. In his letter, counsel claimed that the beneficiary would be employed as a function manager, as he is authorized to manage the following functions:

> (1) [E]stablishing and negotiating contracts and other related matters; (2) hiring/firing of employees and independent contractors; (3) establishing goals and policies and implementing marketing strategies and plans; (4) investing capital; and (5) investigating and undertaking investment opportunities.

In an attached letter bearing the same date, the foreign entity's proprietor provided the following outline of the beneficiary's proposed job duties:

> [The beneficiary] is responsible for directing the management and administration of our subsidiary to ensure its successful operation, which includes designing and researching investment opportunities and investing company funds in new or existing business ventures (15-20%); designing and executing strategies to improve efficiency, productivity and to reduce expenses and costs, which includes attending office meetings, reviewing financial/expense/operating reports, and resolving/handling miscellaneous corporate activities (15%); establishing objectives and guidelines related to investments, structure organization, and business development (10-15%); identifying financial goals and devising financial strategies to reach targets. (10%); hiring and firing employees and independent contractors (5-10%); reporting to our office in Pakistan (5-10%).
>
> Supervisory duties: [The beneficiary] supervises all of our U.S. subsidiary's employees. He holds the highest position within our U.S. subsidiary and has been delegated with complete authority over our subsidiary's business operations, direction, policies and expansion.

The proprietor further provided a list of the nine employees to be supervised by the beneficiary, noting that two are employed as the manager and secretary of the air conditioning company, while the remaining seven employees would occupy the positions of manager, assistant manager and sandwich artist in SubwayOne. He also included a brief description of the job duties to be performed by each. An attached organizational chart reflected the beneficiary's position of president over the above-noted subordinate positions.

Counsel also submitted the requested quarterly wage reports for the petitioning entity and SubwayOne.[1] The petitioner's quarterly report ending on September 30, 2005 identified a staff of two, while SubwayOne's quarterly report for the same period reflected the employment of seven workers during this time.

The director subsequently issued a second notice of intent to deny; however, as the director did not address the issue of the beneficiary's employment capacity in the United States entity, it will not be discussed herein.

The director issued a decision on January 25, 2006, concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. In her decision, the director outlined the job duties to be performed by the beneficiary and stated that it lacked specificity as to the beneficiary's employment in a primarily managerial or executive capacity. The director recognized the employment of two individuals subordinate to the beneficiary who were purportedly employed in managerial positions, but stated that "[t]he record has not established that the two managers are professionals or supervisors." The director concluded that instead the beneficiary would be primarily employed as a first-line supervisor. The director further stated that the beneficiary's title alone is not sufficient to establish eligibility for the requested immigrant visa petition, and instructed that "it must be shown the beneficiary is primarily engaged in [the] performance of qualifying duties." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on February 24, 2006. In an appended appellate brief, counsel contends that the petitioner has demonstrated that the beneficiary's employment would comport with the criteria outlined in the statutory definitions of "managerial capacity" or "executive capacity." Counsel restates the beneficiary's job duties previously provided for the record by the foreign entity's proprietor, and states that as the company's president, the beneficiary "has been instrumental in initiating and implementing the petitioner's operations as well as overseeing the petitioner's acquisition of the [air conditioning business and SubwayOne] within the past three years." Counsel further provides:

> The beneficiary holds the senior most position in the petitioning entity and has been delegated with the absolute authority to exercise a wide range of discretion over company policy and decision-making, including investments, expansion, planning, staffing and budget. The beneficiary has played a key and vital role in the growth of the petitioner and has created a solid foundation from which the petitioner can further expand and continue to succeed. Under the beneficiary's leadership and direction, the petitioner acquired a controlling interest in two businesses, an air conditioning sales, repair and installation business located in Hollywood, Florida and a Subway Sandwich and Salad restaurant located in Ft. Lauderdale,

[1] Counsel explained in his November 2, 2005 response to the director's notice of intent to deny that the petitioner elected to file a separate income tax return for SubwayOne rather than reporting income generated from the business on the petitioner's corporate income tax return.

> Florida. The beneficiary also actively continues to seek out additional investment and business opportunities.

Counsel challenges the director's "factual conclusions regarding the scope and nature of the beneficiary's duties," claiming that the beneficiary would not be employed as a first-line supervisor, but rather, would manage the "entire" petitioning organization, which counsel stresses consists of the two businesses and a combined subordinate staff of nine workers. Counsel contends that the director's finding that the beneficiary would be employed as a first-line supervisor overlooks the concept of function manager and the evidence offered in the record. Counsel states that the director ignored "the fact that the beneficiary manages the entire organization, manages an essential function within the organization, and functions at a senior level with the organizational hierarchy and with respect to the function managed." Counsel also states that even if the beneficiary does not qualify as a manager, CIS failed to consider his classification as an executive of the United States company.

Counsel also contends that the beneficiary's employment capacity may not be based on the size of the petitioning entity. Counsel states that the petitioning entity, which operates two businesses, maintains a firm corporate hierarchy "with the beneficiary clearly acting in a managerial or executive capacity by overseeing all business activities and essential functions of the petitioner." Counsel questions that if not for the beneficiary, who would have managed the petitioning entity and led the company in the acquisition of two separate businesses. Counsel also raises the question of how the petitioning entity can continue to operate if not for the beneficiary's employment and "leadership" as a manager or executive. Counsel claims that the beneficiary's "most senior position in the petitioner," in conjunction with "the totality of the circumstances," demonstrate the beneficiary's eligibility for the requested classification.

Counsel further claims that the director's decision violates the petitioner's due process rights as she did not "adequately provide a specific explanation regarding the basis for denial" and ultimately based the denial on issues raised only in the first notice of intent to revoke. Counsel states that the petitioner provided the documentary evidence requested by the director in her first notice of intent to deny, which addressed the issue of the beneficiary's employment capacity. Counsel notes that the director's subsequent notice did not address the beneficiary's employment capacity, therefore leading the petitioner to conclude that "[CIS] was satisfied with the petitioner's response to the first [notice of intent to deny], and that the issues raised in the second [notice of intent to deny] were the only remaining issues to be resolved." Counsel contends that if the petitioner's response to the first notice of intent were "insufficient or failed to satisfactorily address the issues" CIS should have either denied the petition or addressed the unresolved issues in the second notice of intent to deny. Counsel also contends that the director's decision violates the regulation at 8 C.F.R. § 103.3(a)(1)(i) in that the director did not explain the specific reasons for the denial of the I-140 petition.

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.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5).

Here, when describing the job duties to be performed by the beneficiary the petitioner references portions of both statutes defining "managerial capacity" and "executive capacity." Specifically, the petitioner stated that the beneficiary would direct the management of the United States company, establish goals and policies, implement strategies, devise investment and organizational objectives, and report to the Pakistani office - responsibilities which are typically deemed to be executive in nature. *See* section 101(a)(44)(B) of the Act. Alternatively, the petitioner also represented that the beneficiary would exercise such managerial responsibilities as hiring and firing employees and possessing authority over the petitioner's business operations, direction, policies and expansion. *See* section 101(a)(44)(A) of the Act. Counsel also asserts that the beneficiary would qualify as a function manager as he "manages the entire organization, manages an essential function within the organization, and functions at a senior level with the organizational hierarchy and with respect to the function managed." A petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Similarly, counsel's claim on appeal that CIS, in rejecting the proposition that the beneficiary would be employed as a manager, "failed to address or even mention the possibility" of the beneficiary employment as an executive is misplaced. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. CIS should not be expected to interpret the record so as to determine the proposed employment capacity of the beneficiary. 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). As discussed below, the petitioner has not satisfied this requirement.

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 limited job descriptions offered by the petitioner fail to document the beneficiary's proposed employment in a primarily managerial or executive capacity. For example, the petitioner identified such broad job responsibilities as "directing the overall management and administration of the company," "ensuring the company's successful operation," "establishing goals and policies and implementing strategies," negotiating contracts, "hiring and firing employees," "designing and implementing financial and marketing plans," "researching investment opportunities," and "identifying financial goals." The AAO notes, in particular, that the petitioner offered similar job descriptions both in its November 2, 2005 response to the director's notice of intent to deny and its appellate brief, even after the director requested "an analysis of the day-to-day responsibilities" held by the beneficiary. The job descriptions offered by the petitioner do not identify the specific managerial or executive job duties to be performed by the beneficiary in his position as president. In fact, many of the noted job duties essentially restate the criteria outlined in the statutory definitions of "managerial capacity" and "executive capacity" without specifically addressing his day-to-day job duties. The petitioner's recitation of 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). Additionally, 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. *Id.* at 1108.

Also, counsel's blanket assertion on appeal as to the beneficiary's employment as a function manager is not sufficient to establish such classification. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

Here, counsel contends that CIS overlooked the concept of function manager. Yet, in support of the claim that the beneficiary would be employed as a function manager counsel provided a limited statement that the beneficiary would perform such vague job duties as negotiating contracts, hiring and firing employees, developing and implementing marketing strategies, and determining investment opportunities for the petitioner. Counsel has not identified a specific *function* of the business to be managed by the beneficiary; rather, he merely notes broad job responsibilities held by the beneficiary. Counsel's assertion is not sufficient to establish the beneficiary's classification as a function manager. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

At the time of filing the instant I-140 petition, the petitioner claimed to operate an air conditioning business through its wholly-owned subsidiary, [redacted], and a Subway restaurant, through its 51 percent-owned subsidiary, SubwayOne, Inc. The petitioner represented the employment of two individuals on its September 30, 2005 quarterly report. Alternatively, a staff of seven was identified on the September 30, 2005 quarterly report for SubwayOne. The beneficiary's 2004 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, and state quarterly reports indicate that the beneficiary is being compensated by SubwayOne. Such an arrangement raises uncertainty as to the true position held by the beneficiary in the United States and doubt that the beneficiary is performing primarily managerial or executive tasks for the petitioning entity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In any event, the financial documentation associated with the two businesses does not support the proposition that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the wages reported on SubwayOne's June 30, 2005 state quarterly wage report and its September 30, 2005 federal quarterly wage report, each of which included the beneficiary's salary, suggest that several of SubwayOne's employees are employed on a limited or part-time basis. In particular, the June 30, 2005 quarterly wage report indicates that two of SubwayOne's workers, including its assistant manager, worked approximately eight of the thirteen weeks in the second quarter. As the petitioner has not provided its state quarterly report for the third quarter of 2005, which is the period during which the instant petition was filed, the AAO cannot determine the full or part-time status of each of its employees. However, as the wages paid in the second and third quarters are relatively the same, it is reasonable to assume that at least a portion of its workers is employed part-time. As the petitioner has not addressed the full or part-time status of its employees with respect to its day-to-day operations, the AAO cannot determine whether the reasonable needs of the sandwich shop might plausibly be met without the services of the beneficiary in a non-managerial or non-executive manner.

Likewise, it is questionable whether the petitioner employs a staff sufficient to perform the non-qualifying tasks related to its air conditioning business. The petitioner represented that it employed a manager and a secretary. The AAO notes, however, that the petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company, such as its sales, marketing and inventory, as well as the repair and installation services offered by the business. Moreover, the limited amount in wages reported on the petitioner's September 30, 2005 quarterly report also raises the question of whether the petitioner's two workers work less than a full-time forty-hour workweek. Regardless, based on the petitioner's representations with respect to its two businesses, the record does not support a finding that the reasonable needs of either might plausibly be met by the services of the beneficiary and the remaining eight employees.

Consequently, counsel's assertion on appeal that the combination of the beneficiary's position as president and "the totality of the circumstances" represent the beneficiary's eligibility for the immigrant visa classification remains unsubstantiated. The AAO stresses that a managerial or executive title alone is not sufficient to demonstrate the beneficiary's employment in a primarily qualifying capacity. *See* 8 C.F.R. § 204.5(j)(5) (requiring that the petitioner submit with the Form I-140 a clear description of the managerial or executive duties to be performed by the beneficiary). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further claims on appeal that CIS violated the petitioner's due process rights. Counsel, however, has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioner. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. In particular, the director referenced the beneficiary's job responsibilities and noted that the record was devoid of the specific managerial or executive job duties to be performed by the beneficiary. Additionally, the director correctly concluded that, by itself, a managerial or executive title is not sufficient to demonstrate the beneficiary's employment in a primarily qualifying capacity. As a result, the director satisfied her affirmative duty to explain the reasons for the denial of the

immigrant visa petition. *See* 8 C.F.R. § 103.3(a)(1)(i) (stating that when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial). The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

Counsel's additional claim that the director's denial of the petition on grounds not addressed in her second notice of intent to deny violated the petitioner's due process rights is also without merit. In the instant case, the petitioner is granted an automatic right to appeal the decision of the service center. *See* 8 C.F.R. § 103.3. Therefore, the petitioner is given an opportunity to establish eligibility in the appropriate forum, that being the AAO. The fact that the director did not indicate in the second notice of intent to deny that she would later address the issue of the beneficiary's qualifying employment in the denial in no way precludes the petitioner from establishing eligibility for the desired immigration benefit. In fact, the petitioner had already been given an opportunity to address the beneficiary's employment capacity in its response to the director's first notice of intent to deny. Consequently, the petitioner has not demonstrated a violation of its due process rights.

Counsel also notes that CIS previously approved three L-1A nonimmigrant petitions filed by the petitioner on behalf of the beneficiary. 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*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava,* 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and

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

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

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

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner stated that the beneficiary had been employed as the foreign entity's finance manager during which he "prepar[ed] financial analyses, reports and budgets," "[made] administrative plans and policies," "[dealt] with governmental departments and organizations [to ensure] compliance with local and federal laws and regulations," "review[ed] firm policies with respect to workforce, human resources and labor," and "maintain[ed] relationships with financial institutions." Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This omission is particularly relevant because several of the beneficiary's responsibilities, such as preparing financial reports and personally working with governmental departments and financial institutions do not fall directly under traditional managerial or executive duties as defined in the statute. *See* §§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 remaining job description for the beneficiary's former position as finance manager is particularly vague and does not identify his specific day-to-day managerial or executive tasks. For example, the petitioner stated that the beneficiary directed the foreign entity's financial affairs "to ensure that our operations remained efficient and profitable," and "was responsible for overall financial planning, implementation and follow-up." As noted in the previous discussion, 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). As a result, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner demonstrated its ability to pay the beneficiary's proffered annual salary of $35,100.

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, the petitioner did not establish that it had previously employed the beneficiary. The beneficiary's 2004 IRS Form W-2 indicates that the beneficiary was compensated by SubwayOne, rather than by the petitioning entity.

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 September 26, 2005, the AAO must examine the petitioner's tax return for 2005. The record does not contain the petitioner's 2005 income tax return. Regardless, SubwayOne's 2005 quarterly wage reports identify the beneficiary as an employee. As a result, there is no evidence that the beneficiary was being compensated by the petitioning entity at the time of filing. The regulation at 8 C.F.R. § 204.5(g)(2) states:

> Any petition filed by or for any 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added). In the instant matter, the prospective United States employer is the petitioning entity, not SubwayOne. The record does not contain documentary evidence related to the petitioner's ability to pay the beneficiary's proposed annual salary. 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)). Consequently, the petition will be 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.