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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 08 2006

SRC 06 008 51198

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.

obert 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 California that is importing, designing and marketing handicrafts, including jewelry, home furnishings and ethnic gift items. 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.

On appeal, counsel for the petitioner contends that the director erred in her denial of the immigrant visa petition. Counsel submits an appellate brief and documentary evidence in support of the claim that the beneficiary would be employed by the United States entity in a primarily managerial capacity.

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 instant petition on September 30, 2005 noting that the beneficiary would be employed in the United States as the president of the petitioner's four-person company. In an appended letter, dated September 27, 2005, the petitioner addressed the beneficiary's "knowledge and vast experiences of the company's home products" in support of his qualification for the proposed position, and explained:

> Functionally, [the beneficiary] is the head of the US operations and to this end he has full authority for exploring and developing into new lines of business, secure contractual assignments for the corporation, oversee its execution, plan and arrange the infrastructure required, decide on the business premises, arrange the finances required, devise the pricing structure, hire and fire staff as are required, and overall supervision and management of the operations. He is responsible for all the major decision making. At present [the beneficiary]

is supervising a staff of 4 persons, and the work force is expected to increase as and when the need arises.

In a Request for Evidence, dated October 26, 2005, the director noted that the job description offered by the petitioner was "not specific" and "to[o] broad to determine whether the beneficiary is functioning in a managerial/executive capacity." The director asked that the petitioner submit a description of the beneficiary's specific job duties and identify the percentage of time the beneficiary would devote to each. The director also noted that several of the beneficiary's job responsibilities are not considered to be primarily managerial or executive in nature, and asked that the petitioner present evidence that the beneficiary is in fact primarily performing "high-level functions" of the organization. The director further requested that the petitioner submit an organizational chart reflecting the beneficiary's position in the United States entity and the positions held by his subordinates, as well as the subordinates' names, educational levels, and job descriptions.

The petitioner responded in a letter dated January 24, 2006 and provided the following description for the beneficiary's position as president:

> [The beneficiary] is the head of the US operations and to this end he is the [k]ey decision maker in the US. He has full authority and responsibility for deciding new lines of business, continuing/discontinuing any existing products, new business development, finalize short term and long term budgets and business plans in consultation with the senior partners of [the] parent organization, secure contractual assignments for the corporation, oversee it execution, plan and arrange the infrastructure required, plan and arrange the finances required, devise marketing plans for the organization, devise advertising and business promotion plans, devise the pricing structure, hire staff as are required, and supervise and manage subordinate staff performing the say to day operations. He is also giving directions to outside professional organizations rendering services to the corporation, such as CPAs, [a]ttorneys, and other [o]utside [c]onsultants. As specific examples, [the beneficiary] [m]akes the following decisions regarding [the] opening of specific office locations, decided new product lines, including adding granite and marble imports, hired staff, planned financial arrangements with the parent organization, [g]ave [d]irections [to] outside professional organizations doing payroll, accounting and legal functions, besides several other major decisions for the US entity. At present [the beneficiary] is supervising a staff of 4-5 persons, and the work force is expected to further increase as and when the need arises.
>
> [The beneficiary] spends the following time [on] various functions:
>
> - Planning & developing [p]olicies: About 25%
> - Directing [l]egal affairs – About 5%
> - Planning & supervising marketing – About 25%
> - Supervising [f]inancial & [a]dministrative matters [–] About 15%
>
> However, the percentage of time spent by the beneficiary in all the above managerial and executive functions could vary from time to time depending upon the need and importance of each of the functions in various situations and at different times. Besides, he has to take care of [a] lot of other issues pertaining to the business. For example[,] he has to take care of the

> imports coming in into [sic] the US, device [sic] a pricing strategy, arrange infrastructure required, office management, other day-to-day operations and any other managerial duties etc. which he performs with the assistance of all his subordinates.

In its January 24, 2006 letter and on an appended organizational chart, the petitioner identified four subordinates of the beneficiary who occupied the positions of operations manager, marketing supervisor for the leather division, marketing supervisor for the granite division, and shipping supervisor. In an attached list of "employees working in the US under [the beneficiary]," the petitioner identified the four above-named workers, as well as three additional workers, two of which held the position of marketing supervisor, while the third was employed as a shipping supervisor. The petitioner's 2005 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, and its third quarter employer's quarterly tax return confirmed the employment of the beneficiary and the four workers originally identified by the petitioner on its organizational chart. The petitioner did not provide documentary evidence, such as payroll records or copies of Form W-2, confirming its employment of the three workers subsequently identified on the petitioner's list of employees.

In a decision dated February 15, 2006, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director referenced the beneficiary's job description, stating that the tasks of "deciding new lines of business, deciding on products to sell or discontinue, securing contracts, [and] devising pricing structures are not high[-]level managerial duties." The director determined that the beneficiary's performance of these duties, in addition to the lack of a subordinate staff who would perform the petitioner's advertising and marketing demonstrated that the beneficiary would be "primarily involved in the direct marketing[,] advertising and promotion of the company." The director also noted that the outline of the beneficiary's job responsibilities only accounted for 70 percent of his time. The director determined that the beneficiary would spend the remaining 30 percent of his time performing non-managerial and non-executive tasks. The director further concluded that the beneficiary would not supervise managerial, supervisory or professional personnel, stating that the petitioner had not demonstrated that any of the lower-level positions require a professional and that the petitioner has not presented evidence of the subordinates' educational levels. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on March 17, 2006. In a subsequently submitted appellate brief, counsel contends that the director erroneously concluded that the beneficiary's "involvement" in the petitioner's marketing, advertising and promotions suggests that he would be primarily performing a task of the petitioning entity that was necessary to produce its product or provide its service. Counsel states that the director's conclusion is "legally incorrect and factually flawed." Counsel claims that the beneficiary's "[m]ere 'involvement' entails the presence of others in the same activity," and that "such involvement is not an automatic indication of one who produces a final product or service." Counsel addresses the employment of four other employees as evidence of the existence of subordinate workers.

Counsel also addresses the petitioner's business operations, which counsel stresses is selling products, rather than providing marketing services, as the petitioner's name suggests. Counsel states that because the petitioner is not a marketing company, the beneficiary's "involvement" in its marketing could not be deemed to be primarily performing a task of the business that is necessary to provide the petitioner's services. Counsel claims that "[t]he legal standard is not whether a [b]eneficiary is involved (as a manager no less) but whether such involvement rises to the level of producing the final product." Counsel contends that the

beneficiary's role as a manager is evidenced by the lower salaries paid to the four employees who are working in positions subordinate to the beneficiary.

In addition, counsel addresses the director's "bureaucratic stance" that at least 30 percent of the beneficiary's time would be spent performing non-qualifying tasks of the business. Counsel explains that because the time spent on each responsibility could vary, the remaining 30 percent of time is not "really unaccounted," as noted by the director, but rather "the numbers represent a 'weighed ranking' of the four major areas of managerial responsibility." Counsel states:

> In short, percentage of time is not defined in regulations as weighted rankings or fractions that must add up to a whole. Evidence in the record shows other employees are paid less, have less seniority, and less experience with the foreign parent, and thus such evidence is preponderate of the [b]eneficiary's managerial role. The presentation of four areas of major managerial responsibility, respectively ranked in a day's importance, substantiates that evidence.

Counsel also challenges the director's requirement that the beneficiary supervise other managerial, supervisory or professional personnel in order to qualify as a manager. Counsel raises the concept of function manager, noting that the beneficiary's senior level position in the United States organization, in which he "manages the essential function of presidency" and "exercises discretion over the day-to-day operations of the executive activities" demonstrates that the beneficiary would be employed as a function manager.

Counsel further notes Citizenship and Immigration Services' (CIS) duty to consider the petitioner's "overall stage of development" in its analysis of the nature of the beneficiary's employment. Counsel states that the director ignored the petitioner's early stage of development and the fact that the business "does not require large staffing levels yet." Counsel also notes a shift in the United States retail business from "labor intensive tasks to technological components," and contends that the employment of only one lower-level worker may be sufficient to perform the functions of the business thereby allowing the beneficiary "to manage the function."

Lastly, counsel emphasizes that CIS previously approved three L-1A nonimmigrant visa petitions filed on behalf of the beneficiary, all of which "presented the same set of facts or ones slightly less impressive."

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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The petitioner did not provide a comprehensive description of the specific managerial or executive job duties to be performed by the beneficiary in the position of president. Following the director's request for a description of how the beneficiary would allocate his time on a daily basis, the petitioner outlined four broad job responsibilities, stating he would plan policies, direct legal affairs, and plan and supervise the organization's marketing, finances, and administrative matters. The petitioner did not identify what "policies" or "legal affairs" the beneficiary would plan and direct. The accompanying job description offered by the petitioner was equally limited and vague, stating that the beneficiary would hire and fire staff, supervise

"overall" operations, "arrange" finances, decide "new lines of business," finalize budgets, secure and oversee the execution of contracts, manage the subordinate staff, and "[give] directions to outside professional organizations." 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). The petitioner has not complied with the regulatory requirement that the petitioner clearly describe the managerial or executive job duties to be performed by the beneficiary. *See* 8 C.F.R. § 204.5(j)(5).

As properly noted the director, the record suggests that the beneficiary would be primarily performing non-managerial and non-executive tasks of the business. 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).

Here, many of the responsibilities held by the beneficiary are not typically deemed to be high-level managerial or executive job duties. For example, the beneficiary would perform such non-qualifying tasks as securing contracts, obtaining financing, devising marketing, advertising and promotional plans, determining the petitioner's pricing structure, "tak[ing] care of [ ] imports," and "other day-to-day operations." As several of these job responsibilities do not fall directly under the four "functions" for which the petitioner provided time allocations, it is not clear what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). A review, however, of the petitioning entity's staffing levels in conjunction with its reasonable needs and "overall stage of development" demonstrate that the beneficiary would not occupy a primarily managerial or executive position in the United States company.

Counsel correctly observes on appeal 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.*

The AAO first notes inconsistencies in the petitioner's representations with regard to its staff at the time of filing. Based on the petitioner's third quarter quarterly tax return, at the time of filing, the petitioner employed five workers, including the beneficiary. The petitioner's suggestion in the documentation attached to its January 24, 2006 letter of employing a staff of seven when the petition was filed is undermined by its quarterly tax returns and 2005 IRS Forms W-2, both of which identify the above-noted five workers only. Additionally, despite the petitioner's notation on its organizational chart of business functions purportedly outsourced to professionals, as well as counsel's claim on appeal that the beneficiary "managed" outside professional organizations, the record does not contain evidence establishing its use of independent

contractors to perform the petitioner's payroll, accounting, and financial functions or legal matters. 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). 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)). The AAO further notes uncertainty in the true position purportedly held by the petitioner's operations manager, as he was also identified in the petitioner's September 20, 2005 and January 24, 2006 letters, respectively, as the company's "secretary" and "director." 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. at 591.

Despite the above-addressed inconsistencies, the record demonstrates that at the time of filing the petitioner employed the beneficiary, as well as a manager of operations, two marketing supervisors and a shipping supervisor. The AAO notes that all of the employees have managerial or supervisory titles. 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, particularly those related to its warehouse and showroom, which the petitioner failed to even address. Many of the petitioner's supplementary representations, such as the claim that the beneficiary would devise its marketing, advertising and promotional plans, conflict with the job duties assigned to the subordinate employees, thereby raising questions as to who would in fact be responsible for performing these non-qualifying functions. The AAO notes, incidentally, that based on the low amount of wages paid to the petitioner's two marketing supervisors and shipping supervisor during 2005, each worker was likely employed on a limited or part-time basis. While counsel notes on appeal that neither the Act nor regulations discuss the employment status of a subordinate employee as a consideration in determining the employment capacity of a beneficiary, counsel fails to recognize that an employee's part-time or full-time work status is a relevant factor in analyzing whether the petitioner employs a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. In this case, as the two marketing supervisors and shipping supervisor make up more than half of the petitioner's workforce and are not supervising lower-level employees who would otherwise perform the non-qualifying marketing tasks of the business, the AAO may reasonably conclude that the beneficiary would assume the responsibility of personally performing these non-managerial and non-executive tasks during the times when the supervisors are not working. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, as mentioned previously, other than mentioning the use of outside contractors to perform its payroll, accounting, finance and legal functions, the petitioner has not accounted for the performance of these administrative tasks. The AAO notes that the record is devoid of documentary evidence, such as canceled checks or IRS Form 1099, Miscellaneous Income, documenting that the petitioner in fact paid compensation for outside services. Again, 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. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and four managerial and supervisory employees.

Counsel addresses on appeal the concept of function manager, stating that the director improperly determined that the beneficiary was not supervising managerial, supervisory or professional workers without considering whether he would manage an essential function within the organization. Counsel states that the beneficiary would qualify as a function manager due to his employment "at a senior level of the organization," his management of "the essential function of presidency," and his "discretion over the day-to-day operations of the executive activities." Counsel's assertions, however, are not persuasive.

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). Absent an explanation describing the "presidency" function and the specific job duties associated with the "function of presidency," counsel's brief statement on appeal that the beneficiary would manage the "presidency" function is not sufficient to establish his classification as a function manager. Counsel appears to rely on the statutory definition of "managerial capacity" and the beneficiary's title of "president" to establish that the beneficiary would be a function manager without defining the "executive activities" that the beneficiary would manage as the company's president. 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. at 1108. 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 also addresses on appeal the director's finding that the beneficiary would be "involved" in the company's marketing, advertising and promotion, claiming that the beneficiary's mere "involvement" implies that others are performing the related non-qualifying tasks. Counsel's argument relies largely on semantics. While the director's reference to the beneficiary's involvement may have been misleading, it is clear from her decision that she concluded that the beneficiary would personally perform the marketing, advertising and promotion activities of the petitioning entity, a finding that counsel has not overcome on appeal. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Similarly, counsel's argument on appeal with respect to how the beneficiary's time would be allocated is unpersuasive. Counsel suggests that the petitioner intentionally accounted for only 70 percent of the beneficiary's time, stating that "the numbers represent a 'weighed ranking' of the four major areas of managerial responsibility" held by the beneficiary. While not conclusive of the beneficiary's employment in a primarily managerial or executive capacity, it is reasonable to expect that the percentages offered by the petitioner would account for the full 100 percent of the beneficiary's time. As a result, the director was correct in pointing out the petitioner's incomplete outline of the beneficiary's job responsibilities. Moreover, as discussed above, in addition to being broad and nonspecific, the job descriptions offered by the petitioner

suggest that the beneficiary would not spend his time primarily performing managerial or executive job duties.

Further, counsel notes on appeal that CIS previously approved three L-1A non-immigrant visa petitions filed 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, the record is not persuasive in demonstrating that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner stated that the beneficiary was the company's senior partner, during which he supervised the marketing and production departments of the organization. The petitioner represented that in this position, the beneficiary spent eighty percent of his time planning marketing and production plans and policies and supervising the company's marketing and production staff and the related functions. Among other workers, the petitioner identified on the foreign entity's organizational chart a manager, assistant manager of production and four lower-level workers who were employed subordinate to the beneficiary. The petitioner noted that the assistant manager of production was a contract employee. The record, however, is devoid of documentary evidence corroborating the petitioner's claim of employing a production manager, sales and marketing manager, and four lower-level workers for the "production" function, as well as evidence of compensating a contract worker for his services as the assistant manager of production. Based on the employee records submitted for review, the foreign entity employed eight workers at the time of the beneficiary's transfer to the United States as a nonimmigrant, of which two were working subordinate to the beneficiary in the positions of salesman and shipping clerk. As a result, the petitioner has not identified that the foreign entity maintained a subordinate staff sufficient to relieve the beneficiary from performing the non-managerial and non-executive tasks associated with the foreign company's production function. 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).

Additionally, as the beneficiary's subordinates occupied the positions of salesman and shipping clerk, the record does not establish that he was supervising managerial, supervisory or professional employees. *See* § 101(a)(44)(A)(ii) of the Act (requiring that the petitioner demonstrate that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees). Moreover, the record does not contain evidence that the beneficiary was employed as a function manager. Consequently, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the petition will be denied for the additional reason.

An additional issue not addressed by the director is whether the petitioner was doing business for at least one year prior to filing the instant immigrant visa petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). In its September 27, 2005 letter, the petitioner explained its business of "designing and marketing handicrafts, artificial jewelry and home furnishings," and noted its use of a showroom and distribution center in Texas. It is questionable, however, based on the documentary evidence in the record, whether the petitioner was doing business in the United States for the appropriate time period. In particular, the petitioner submitted an expired commercial lease agreement, bank statements that were over two years old, and listed only a projected gross annual income on the Form I-140. The record is devoid of evidence such as sales invoices, receipts, or a current

lease or bank statements, establishing that the petitioner was doing business in the United States during September 30, 2004 through September 30, 2005, the instant filing date. As a result, the AAO cannot conclude that the petitioner complied with the above-cited regulation, requiring that it demonstrate it had been doing business for at least one year prior to filing the Form I-140. For this additional reason, the petition cannot 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 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.