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U.S. Citizenship
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File:



Office: VERMONT SERVICE CENTER

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IN RE:

Petitioner:

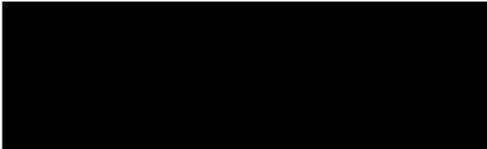


Beneficiary:

Petition:

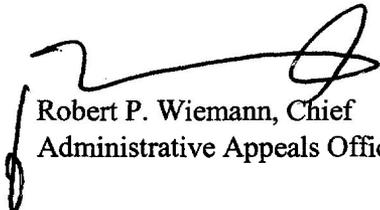
Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Virginia corporation, states that it is engaged in the manufacture, import, and export of diamonds, gemstones and gold jewelry, as well as operation of a retail jewelry store. The petitioner seeks to employ the beneficiary as its vice president of sales and marketing.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director denied the petition without considering all of the facts submitted, and suggests that the director misinterpreted the nature of the petitioner's business and the beneficiary's role within the organization. Counsel submits a brief and additional documentary evidence in support of the appeal.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a 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 sole issue addressed by the director is whether the petitioner established that 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), defines the term "managerial capacity" as 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) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as 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 immigrant visa petition was filed on March 20, 2006. The petitioner indicated on Form I-140 that the beneficiary would be employed as vice president of sales and marketing for the U.S. company, and stated that the U.S. company had five employees as of that date. In a letter dated March 3, 2006, the petitioner described the beneficiary's proposed duties as follows:

Vice President for Sales and Marketing is responsible for providing and directing Sales and Marketing efforts. Market, develop, and deliver special orders ranging from creating a new cut of diamond for our clients to conceptualizing and furnishing custom-order jewelry as per our clients' requirement. Our services include pre-sale and post-sale services for all our customers. Our sales and marketing individuals have both technical and business expertise in loose diamonds and jewelry, and are intimately familiar with [the Indian parent company's] products and services from both a business and technical perspective. They are responsible for assisting clients in educating, training and guiding all our clients to understand and acquire unique and fine diamonds and jewelry of [the petitioning company].

The Vice President for Sales and Marketing will perform at the highest level in designing and creating [the foreign entity's] state-of-the-art jewelry. As it is not an entry-level position, it requires both professional education and sophisticated background understanding of business commerce with particular emphasis on technical knowledge from recognizing a rough diamond through all stages of polishing. It also requires technical knowledge to select a polished diamond for various styles and nature of jewelry, settings and creations. Combining with essential experience in international business management, with particular focus and wholesale and retail diamond and jewelry sales and marketing.

The petitioner stated that the U.S. company's activities include: import of polished diamonds and jewelry from its parent company in India and promotion of these products; export of the latest techniques and machines to India to improve the foreign entity's manufacturing processes; and provision of professional services, including jewelry repair, special occasion planning, design and craftsmanship of fine jewelry. The petitioner's lease agreement and county license indicate that the petitioner operates a retail jewelry store.

Despite stating on the Form I-140 visa petition that the firm employed five employees, the petitioner submitted an organizational chart for the U.S. company that reflected a total of nine employees. The chart indicated that the beneficiary, as vice president of sales and marketing, reports to the **company** president, [REDACTED], who also supervises a vice president for finance and accounting, [REDACTED], and an accounting employee, [REDACTED]. The chart shows that the beneficiary supervised the following personnel as of March 1, 2006:

- [REDACTED] Sales
- [REDACTED] Sales
- [REDACTED] Sales
- [REDACTED] (the company president), Marketing
- [REDACTED] Goldsmith

On July 14, 2006, the director issued a request for additional evidence in which he instructed the petitioner to submit, in part,: (1) a more detailed description of the beneficiary's duties and the amount of time the beneficiary devotes to each duty on a weekly basis; (2) additional evidence regarding the management and personnel structure of the U.S. company, including the job titles and job duties of the beneficiary's subordinates; (3) copies of the company's 2005 IRS Forms W-2, Wage and Tax Statement; and (4) copies of

the petitioner's complete IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2006.

The petitioner's detailed response to the director's request for evidence, which comprised more than 50 exhibits, was received on October 2, 2006. In a letter dated September 27, 2006, the petitioner provided the following description of the beneficiary's proposed duties:

- He will guide and manage the development and delivery of special orders ranging from creating a new cut of diamond for our clients to conceptualizing and furnishing custom-order jewelry as per our client's requirement for exclusive lines of custom jewelry for corporate clients.
- He will ensure that service plans include pre-sale and post-sale for all our customers are adhered to and executed as per the company guidelines established the managing partners of our parent company, [REDACTED], and that these policies are localized as per the market in Northern Virginia.
- Provide leadership and training to employees in both technical and business expertise of loose diamonds.
- Provide leadership and training to employees in both technical and business expertise of designing, creating, manufacturing all types of jewelry.
Leads the development of products and services from both a business and technical perspective.

The petitioner indicated that the beneficiary spends 26 hours per week performing management tasks for the U.S. company and 14 hours per week "monitoring, advising, guiding and directing the Indian team on daily business activities of [the parent company], along with training them on adapting new design concepts and strategies." Finally, the petitioner provided a detailed account explaining how the beneficiary's time is allocated on a weekly basis. As this document is contained in the record, it will not be recited in full here.

The petitioner submitted a revised organizational chart, which incorporates both the foreign and United States entities for a total of 3,452 employees. The chart represents the beneficiary as supervising every employee of the U.S. company, including those previously depicted as direct subordinates of the company president, as well as seven managerial employees, ten supervisors, and fifty workers and salespeople located in India. The record is devoid of evidence supporting the claimed personnel in India.

In a separate statement, the petitioner indicated that the beneficiary supervises five managers and one consultant, and provided the following information regarding his claimed subordinates:

- 1) [REDACTED]
Even though he is officially the President of [the petitioner], [REDACTED] is mainly in a supportive role to [the beneficiary] as the management decisions are made by [the beneficiary] due to his industry experience. [REDACTED] assists [the beneficiary] in creating his briefs and presentations for targeting new clients. [REDACTED] handles the daily business chores of [the petitioner] so that [the beneficiary] can focus exclusively on

the bigger picture of growing and marketing the business via his sales and marketing skills.

- 2) [REDACTED], Loose Diamonds and Diamond Jewelry Sales
[REDACTED] is in charge of all the sales loose diamond and diamond jewelry related sales activity in the store. She reports directly to [the beneficiary] for what is in stock and what may be needed for the upcoming seasons or shows etc. She deals with clients on a one on one basis and is responsible for most of the in-store diamond sales.
- 3) [REDACTED] Market Research and Customer Satisfaction – Polished Diamonds and Jewelry
Ami joined [the petitioner's] team on August 01, 2006. She assists [the beneficiary] in devising marketing material and campaigns that [the petitioner] undertakes. She also is an active salesperson in [the petitioner's] showroom during peak business hours.
- 4) [REDACTED]
[REDACTED] is in charge of all the sales gold jewelry related sales activity in the store. She reports directly to [the beneficiary] for what is in stock and what may be needed for the upcoming seasons or shows etc.
- 5) [REDACTED] Master Goldsmith and an Expert Watch Repairer
[REDACTED] single handedly manages the jewelry repair department of [the petitioner] and reports directly to [the beneficiary] on his department's needs, goals, and targets.
- 6) [REDACTED] Vice President of Finance
[REDACTED] primarily assists [the beneficiary] in finance and budget matters for approximately 6 to 8 hours a week. . . . As a stockholder in the company [REDACTED] has elected not to draw any salaries in the company at the current time.
- 7) [REDACTED] CPA
[REDACTED] is a CPA to whom [the beneficiary] has outsourced the accounting responsibility of [the petitioner].

The petitioner further explained that in addition to these seven employees, the beneficiary has seven direct employees in India with whom he works on a daily basis, who in turn supervise 10 supervisors and 50 additional workers.

The petitioner submitted copies of its 2005 IRS Forms W-2, Wage and Tax Statement, which confirmed payments to five employees, including the beneficiary, [REDACTED] and an additional individual who did not appear on either organizational chart submitted for the U.S. company. The petitioner also submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2006, indicating that the petitioner had three employees when the petition was filed with CIS. The petitioner reported five employees during the second quarter of 2006.

In addition, the petitioner submitted an exhibit labeled "recent employee paystubs" which included recent payroll records for the beneficiary, [REDACTED]. Based on the records provided for [REDACTED] she commenced employment with the company in April 2006, as this was the first month for which she received a salary.

The petitioner also provided a large number of photographs of the petitioner's retail store in response to the director's request for photographs of the interior and exterior of the premises secured for the United States entity. The photographs depict all employees of the company working in the petitioner's retail store and show the beneficiary responding to customer's questions and "overseeing" sales transactions conducted by other employees. The petitioner's response to the director's request also included a number of reference letters from retail and corporate customers of the U.S. company, and evidence of advertising activities undertaken by the U.S. company.

The director denied the petition on January 12, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director observed that the petitioner's job duties initially attributed to the beneficiary "do not describe those of a multinational executive or manager." The director acknowledged the voluminous response submitted in response to the request for evidence, and focused primarily on the submitted photographs of the petitioner's business. The director noted that, according to the petitioner's captions, the beneficiary's role includes the following:

[L]leading sales negotiations, educating the customers on qualities of ruby in a bracelet, guiding another employee with a negotiation, complimenting a sales woman on her sale, attending to clients, guiding Ami with diamond quality in a bracelet, overlooking jewelry sales, explaining the difference between studded and plain gold to a customer, leading [REDACTED] in accepting a custom order, etc.

The director concluded that "the beneficiary is a sales manager with direct contact with the sale personnel and customers. The beneficiary is a hands-on manager/supervisor of a jewelry store."

On appeal, counsel for the petitioner asserts that the decision was made without considering all the facts submitted, and claims that the beneficiary's proposed position is in a managerial capacity. With respect to the director's comments regarding the petitioner's photographs, counsel states:

It is true that [the petitioner] owns a jewelry store but selling jewelry is a small part of their business. The main business deals [with] manufacturing, diamond and jewelry import and export. With the assistance of their office in India, [the petitioner] wants to expand their business in the USA and surrounding areas. This business does not involve selling jewelry but involves importing the products manufactured by its parent company in India and to promote these products in the USA and other countries, promote the export of latest techniques and machines to India to constantly improve [the foreign entity's] diamond and

jewelry manufacturing processes and to export polished diamonds and diamond jewelry products from USA.

Counsel asserts that the beneficiary's position qualifies as managerial pursuant to section 101(a)(44) of the Act because he: (1) manages the sales and marketing division which includes the product design team, corporate sales team, marketing team, creation of marketing strategies and production team; (2) supervises and controls the work of other supervisors, professionals or managerial employees, including "five executive level employees in USA, seven executive level employees in India whom he works with on a daily basis," 10 additional supervisors, fifty workers and more than 3,500 workers in the foreign entity; (3) has the power to hire and fire employees under his supervision and manages and controls all the functions of marketing, sales and production; and (4) exercises discretion over the day-to-day operation of each activity under his control.

Counsel refers to unpublished AAO decisions in which the sole employee of a petitioning company was found to be employed in a managerial capacity as the manager of an essential function. Counsel asserts that the beneficiary manages the marketing function by supervising and leading the marketing team, corporate sales team, marketing strategy team, and production team. The petitioner submits additional reference letters from business associates in the United States and India as evidence that the beneficiary "has been a critical person in the growth of the company as the Marketing Head."

In support of the appeal, the petitioner submits a new letter dated February 8, 2007, in which it provides a position description similar to that provided in response to the director's request for evidence. The letter also includes position descriptions for the beneficiary's subordinates, and includes new position titles for some employees. Most significantly, the petitioner now states that [REDACTED] manages the petitioner's jewelry store "which is a small part of the entire business," serves as loose diamonds and diamond jewelry sales manager, and supervises a sales assistant and goldsmith/jewelry repairer. In addition, the petitioner attributes additional duties to [REDACTED] who is now designated "market analyst" and described as managing customer relations pre- and post-sales and taking care of "all marketing and administrative activities."

The petitioner states that it has "clearly demonstrated that [the beneficiary] is not managing a jewelry store but is managing the marketing department of a large international business."

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

Prior to addressing this issue, the AAO must emphasize that the critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If the petitioner or beneficiary become eligible under a new set of facts, the proper course of action is to file a new petition. Despite the previous denial, there is no bar to the petitioner's filing of a new petition supported by new evidence of eligibility.

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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In addition, the definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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's initial description of the beneficiary's duties offered little insight into what he does on a day-to-day basis. The petitioner indicated that the beneficiary is responsible for "providing and directing Sales and Marketing efforts," marketing, developing and delivering special orders, and performing at the highest level in designing and creating jewelry. Based on this brief description, the beneficiary's exact role in marketing, selling, designing and producing the petitioner's products could not be discerned. The petitioner did not indicate how the beneficiary would carry out his responsibilities or clearly indicate that subordinate employees would relieve him from performing non-qualifying duties associated with his assigned functions. 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 petitioner did submit a lengthy position description in response to the request for evidence, composed primarily of duties involving heading, leading, managing, directing, commanding or overseeing individuals and "teams" responsible for carrying out jewelry design, marketing, promotion, sales, and customer service tasks. Therefore, it is reasonable to assume that, based on this detailed description, the petitioner intended to represent the beneficiary as a personnel manager. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner has provided inconsistent and contradictory evidence with respect to the company's staffing structure as of the date the petition was filed, which undermines its claim that the beneficiary devotes essentially all of his time to supervisory duties and carries out his objectives through subordinate personnel. The AAO notes the following contradictions:

- First, on March 16, 2006, the petitioner stated on the Form I-140 immigrant visa petition that it employed a total of five persons.
- Second, the organizational chart dated March 1, 2006 indicated the petitioner employed nine individuals.
- Third, the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2006 shows that the company had only three payroll employees as of March 2006.
- Finally, in response to the director's request for evidence, the petitioner submitted an organizational chart dated September 25, 2006 that mixed the petitioner's staff with the purported staff of the foreign organization for a total of more than 3,452 employees.

While the petitioner has explained that [REDACTED] is a shareholder who has opted not to receive a salary, there still remains a significant discrepancy, at a minimum, between the number of employees identified on the initial March 2006 organizational chart and the number of employees reported on the petitioner's tax documentation for the first quarter of 2006. 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).

In attempting to deduce which three employees received wages from the petitioning company during the quarter in which the petition was filed, it is noted that the petitioner paid [REDACTED] \$576 in 2005, but there is no evidence of any payments to this individual in 2006. The petitioner has provided evidence that it employed [REDACTED] in 2004, but has not documented any payments to this employee in 2005 or 2006. The petitioner's payroll statements submitted in response to the petitioner's request for evidence indicate that [REDACTED] began receiving her monthly salary of \$1,050 in April 2006, subsequent to the filing of the petition, and the petitioner has not provided evidence that she was employed on a contract or commission basis prior to that date. The AAO therefore concludes that the petitioner's three employees, as of March 2006, included the company president, the beneficiary, and the goldsmith/jewelry repairer.

The AAO notes that as of October 2006, when responding to the director's request for evidence, the petitioner claimed that the beneficiary also supervised: the vice president of finance, who was initially identified as a direct subordinate of another employee; an external accountant, who did not appear on the initial organizational chart; a gold jewelry sales representative, [REDACTED] who was previously identified as an accounting employee, and whose employment is not corroborated by any supporting documentation; and a market research/customer satisfaction employee hired in August 2006, more than four months after the petition was filed. As noted above, the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of [REDACTED]* 14 I&N Dec. 45, 49 (Comm. 1971).

In addition, the petitioner did not provide any explanation for the changes made in its reporting structure and employee job titles, and the AAO questions whether the finance and accounting staff actually fall under the beneficiary's authority, as such authority is not indicated by his position description. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of* [REDACTED] 9 I&N Dec. at 591. For these reasons, the AAO will consider only the organizational chart submitted in support of the initial petition.

The petitioner also indicates that the beneficiary has seven direct employees in India and spends 35 percent of his time "monitoring, advising, guiding and directing the Indian team on daily business activities," and "training them on adapting new design concepts." The beneficiary's employment capacity with the foreign entity is not in question. However, the petitioner's claim that the beneficiary continues to oversee and monitor this function within the foreign entity is irrelevant to a determination regarding whether his role within the U.S. entity will be in a primarily managerial or executive capacity. The petitioner has not indicated that the foreign entity's employees assist in any way with the U.S. operations. The petitioner has also failed to submit evidence to establish the existence of the overseas employees. Regardless of the beneficiary's overseas duties, the petitioner must establish that the duties the beneficiary performs on a day-to-day basis for the U.S. entity are primarily managerial or executive in nature.

Therefore, the AAO will confine its analysis of this issue to the U.S. company's staffing levels as of the date of filing. As discussed above, the only employees whose employment can be verified based on the evidence submitted are the beneficiary, the company president, and the goldsmith. The evidence submitted appears to indicate that the beneficiary both reports to and supervises the company president, and the actual reporting structure has not been adequately explained. The petitioner's statements that the president merely handles "daily business chores," assists the beneficiary with "creating his briefs and presentations" and does not have the experience to manage the company are not entirely plausible, given that the **president**, [REDACTED] appears to have run the company for two years prior to the beneficiary's arrival in the United States at the end of 2004.

Regardless, the fact that the petitioner appears to have had only three employees at the time of filing raises questions as to how the beneficiary supervises the many "teams" who are identified in his job description, and who are claimed to relieve the beneficiary from performing non-qualifying duties associated with sales, market research, promotions, design of marketing materials, pre- and post-sales customer service, and other routine functions. The evidence in the record does not establish that the beneficiary primarily supervises subordinate managers, professionals or supervisors, and therefore the petitioner has not established that the beneficiary can be deemed a "personnel manager" based on his supervisory duties. *See* section 101(a)(44)(A)(ii) of the Act. If the beneficiary does not actually supervise the claimed "teams of professionals" then it is reasonable to conclude, and has not been shown to be otherwise, that many of these functions must be performed by, rather than managed by, the beneficiary himself. 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).

Such a conclusion is further supported by a review of the petitioner's staffing levels and its reasonable needs in light of its purpose and stage of development. 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). Instead, an executive's duties must be the critical factor. However, if CIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Despite its submission of photographs showing all of the petitioner's employees, including the beneficiary, engaged in customer service and retail sales activities in the petitioner's jewelry store, the petitioner claims that it is primarily an importer and exporter of polished diamonds and diamond jewelry and an exporter of "techniques" and jewelry manufacturing equipment. On appeal, counsel concedes that the petitioner operates a store but characterizes it as "only a small part of their business." Testing the limits of credulity, counsel even asserts that "this business does not involve selling jewelry but involves importing the products manufactured by its parent company." At the same time, the petitioner submits the company's 2005 profit and loss report which indicates that 67 percent of the petitioner's income in 2005 was derived from retail sales, while the remaining income was derived from repair services and wholesale activities. While the petitioner may be an importer and exporter, the evidence submitted suggests that the U.S. company's business does in fact "involve selling jewelry." The record shows that the petitioner's customers include individuals who purchase jewelry in the retail store, wholesale customers, and corporate customers who seek custom-designed jewelry lines. The record also contains the store's advertisements, which indicate that the petitioner's retail store is open for business for 51 hours per week.

As an importer, exporter, retailer, and wholesaler the petitioner reasonably requires employees to perform duties associated with purchasing, inventory, import/export and customs arrangements, domestic distribution, retail sales, market research, design of marketing and advertising materials, special custom design projects for corporate and retail customers, marketing of products to wholesalers, marketing the retail store, taking and fulfilling orders from wholesalers, repair services, customer service and routine administrative and financial operations associated with any business. The petitioner has not establish that the reasonable needs of the company would plausibly be met by a president, a vice president of sales and marketing, and a goldsmith, who were the only confirmed employees at the date of filing. While the AAO does not doubt that the beneficiary exercises discretion over sales and marketing functions, the petitioner has not established that he was relieved from performing non-qualifying duties associated with these functions as of March 2006. Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties, particularly as nearly every duty described indicates that the beneficiary manages "teams" of unidentified employees.

The actual duties themselves 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 absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. See *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003) (holding that the INS' finding that the beneficiary did not work in a primarily managerial or

executive capacity was "bolstered by the absence of evidence that a sufficient 'subordinate staff' will 'relieve her from performing non-qualifying duties'").

As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

Counsel asserts on appeal that the beneficiary will manage the petitioner's marketing function and therefore qualifies for the benefit sought on this basis. 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. However, 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. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d at 305. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages. Even if the beneficiary does not directly supervise employees, it is the petitioner's obligation to establish that someone other than the beneficiary performs the day-to-day non-managerial tasks of the function managed. As discussed above, the petitioner has not met this burden as it has not established the existence of any lower-level sales or marketing personnel as of the date of filing.

Counsel refers to unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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

The last issue in this matter regards a previous approval of an L-1A nonimmigrant intracompany transferee petition filed on behalf of the beneficiary. The AAO has consistently determined that prior nonimmigrant approvals do not preclude CIS from denying an extension or a separate immigrant petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity and on similar definitions of qualifying relationship/organization. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44) and 8 C.F.R. § 204.5(j)(2) and 8 C.F.R. § 214.2(l)(1)(ii). Although the statutory definitions for managerial and executive capacity are the same and the definitions of qualifying relationship/organization are similar, the question of overall eligibility requires a comprehensive review of all of the provisions, not just these definitions. 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 general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition does not guarantee that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approval by denying approval of the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church* [REDACTED] 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.