

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

APR 03 2006

SRC 04 220 51486

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of Texas in January 2003. It claims to be engaged in the retail and investment industry. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established: (1) that the beneficiary would be employed in a managerial or executive capacity for the United States petitioner; or (2) that it enjoyed a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner submits a brief in support of the appeal as well as documentation previously submitted.

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 and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a managerial or executive capacity for the U.S. petitioner.

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. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a July 20, 2004 letter appended to the petition, the petitioner indicated that the beneficiary as president and executive director:

[I]s responsible for the overall direction and operation of the company. He is involved in all facets of the business, including new hires of the management staff strategy. He establishes our financial relations and is responsible for all tax and other required reports. He reports directly to our parent company. He reviews business opportunities and is in charge of the company's expansion plans.

The petitioner submitted a proposed organizational chart for the beginning of the year 2004. The chart depicted the beneficiary as the president and listed two departments below him: (1) a retail/marketing manager over a retail establishment with a manager and one clerk in one department; and (2) a financial administrative manager and an assistant in the second department. The petitioner stated on the Form I-140, Immigrant Petition for Alien Worker, that it had six employees.

On May 11, 2005, the director requested, among other things, additional evidence detailing the beneficiary's proposed position with the petitioner including: the position title; a list of all duties; the percentage of time spent on each duty; the names of subordinate managers/supervisors or other employees reporting directly to the beneficiary; a brief description of their job duties, and educational levels, or if the beneficiary would not supervise other employees, the essential function the beneficiary would manage; an organizational chart specifying the beneficiary's position within the organizational hierarchy; and, who provides the product sales/services or produces the petitioner's products. The director further requested copies of the corporation's income tax return for the 2004 year; Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, of all employees from the date of filing the petition; and copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for all salaried employees including their names for the last three years.

In a June 15, 2005 letter in response to the director's request, the petitioner indicated that the beneficiary:

[I]s responsible for overseeing the management of the company. Responsibilities include defining the objectives of the company and directing the overall operations of the U.S. Company. Responsible for initiating and implementing expansion plans for the company as well as establishing and maintaining budgets, meeting profitability levels, and ensuring the overall growth of the company. In addition, he is in charge of negotiating contracts, recruiting managerial positions, hiring and firing of management staff. He is in [sic] of reviewing financials.

The petitioner added that the beneficiary supervises his managers who in turn supervise subordinate employees. The petitioner stated that the beneficiary did not engage in the daily activities of the store, but that the manager and sales people performed the daily work. The petitioner indicated that the beneficiary: spent 60 percent of his time on management, including overseeing the management; recruiting and terminating managerial and subordinate employees where the need arises; meeting with the general manager to oversee daily activities of the company and establishment of procedures and policies; spent 20 percent of

his time on contract negotiations including responsibility for final approval of contracts with vendors and large customer orders; and, 20 percent of his time in charge of marketing and advertising.

The petitioner also provided the job duties of its other employees. The petitioner indicated that: (1) the account manager reviewed financials and budgets, profit and loss statements, balanced books, handled payroll, met with the accountant, participated in formulating and administering company policies and developing long range goals and objectives, and reported directly to the president; (2) the account assistant reported directly to the account manager and posted payments, sorted and filed invoices and checks, reconciled banks statements, opened mail, and recorded daily sales; (3) the store manager supervised an assistant manager and store employees, planned and prepared work schedules, assigned employees their duties, formulated pricing policies, supervised employees, took inventories, reconciled cash with sales receipts, kept operating records, was in charge of promotion, marketing, and advertising activities, and reported directly to the president; (4) the assistant store manager supervised cashiers and salespersons, ensured employees' compliance with security, sales and record keeping procedures, trained new employees, opened and locked up store, handled customer complaints, and reported to the store manager; and (5) the salespersons sold cellular phones demonstrated phones, explained options, answered questions, and maintained sales records.

The petitioner also provided its 2004 IRS Form 1120, showing \$30,000 paid in officer's compensation and wages and \$48,956 paid in salaries and wages; the first page of its IRS Forms 941 for the four quarters of 2004; and the petitioner's IRS Forms W-2 issued to the beneficiary in the amount of \$30,000; to the individual in the proposed position of retail/marketing manager in the amount of \$9,571; to the individual in the proposed position of assistant account manager in the amount of \$10,100; to the individual in the proposed position of financial and administrative manager in the amount of \$9,280; to the individual in the proposed position of "manager" in the amount of \$9,380; and to the individual in the proposed position of store clerk in the amount of \$10,625.

On July 19, 2005, the director denied the petition noting that the beneficiary performed some of the day-to-day duties of the business. The director observed that the petitioner paid only \$48,956 in salaries and wages for five employees in the 2004-year, suggesting that these individuals were not employed full-time. The director determined that it was reasonable to assume that the petitioner's business did not need a full-time executive to manage four or five part-time employees. The director also determined that the record did not establish that the beneficiary's primary assignment would be directing or supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. The director dismissed a subsequently filed motion to reopen and reconsider on August 26, 2005.

On appeal, counsel for the petitioner argues that it is mathematically possible to conclude that the petitioner's five employees are working full-time. Counsel contends that the petitioner's organizational structure, including the beneficiary's oversight of a general manager who oversees an assistant store manager who in turn supervises subordinate employees, has been created so that the beneficiary would not have to engage in the day-to-day activities of the petitioner's cellular telephone outlet. Counsel asserts that the beneficiary supervises his general manager who oversees the subordinate employees. Counsel also restates portions of

the previously submitted description of the beneficiary's duties and asserts that the beneficiary acts in a managerial/executive capacity.

Counsel's assertions are not persuasive. 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. For example, the petitioner states that the beneficiary spends 60 percent of his time overseeing management, recruiting and terminating employees as well as establishing procedures and policies. These "duties" paraphrase elements found in the definition of managerial capacity and of executive capacity. See section 101(a)(44)(A)(iii) and section 101(a)(44)(B)(ii) of the Act. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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.

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 has provided only a vague outline of the beneficiary's duties. The petitioner's assertion that the beneficiary's role will involve responsibility for the overall direction and operation of the company, involvement in all facets of the business, establishing policies and procedures, and reporting to the claimed parent company do not provide a comprehensive understanding of what the beneficiary does on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

In addition, portions of the job description of the beneficiary's duties suggest that the beneficiary is involved in performing non-qualifying operational tasks. For example, the beneficiary is responsible for tax and other reports, reviews business opportunities, spends 20 percent of his time on contract negotiations, and 20 percent of his time on marketing and advertising. 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).

More importantly, however, is the petitioner's lack of substantiating documentation regarding its staffing levels and whether the beneficiary's subordinates work full-time or are in positions to relieve the beneficiary from performing the daily tasks of purchasing and selling the petitioner's product of cellular phones. The petitioner in this matter provides an organizational chart and descriptions of the beneficiary's subordinates' duties. The petitioner however: fails to provide all pages of its IRS Forms 941, even though requested by the director; fails to explain its salary structure and how the salaries of the beneficiary's subordinates could possibly include full-time employment; and fails to explain how the beneficiary's subordinates' part-time or intermittent employment could encompass the duties attributed to their positions. Failure to submit requested

evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Counsel's assertion that it is mathematically possible to consider that the beneficiary's subordinates work full-time, begs the question. In this matter, the petitioner claims to operate a retail cellular phone store. However, the record does not support a conclusion that the phone store could be fully staffed as shown on the petitioner's organizational chart with the number of the petitioner's paid employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel's contention that the petitioner's organizational structure has been created so that the beneficiary would not have to engage in the day-to-day activities of the petitioner's cellular telephone outlet is not persuasive. In this matter the AAO believes that the petitioner's proposed organizational chart, its number of part-time employees and the duties ascribed to them, and the beneficiary's position on the chart are not credible and were created to exaggerate the beneficiary's actual role in the organization. If Citizenship and Immigration Services (CIS) fails to believe 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).

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

Although the AAO recognizes that a beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Counsel's implied assertion that the beneficiary's primary duty entails oversight of a general manager is not supported in the record. First, as observed above, the record does not substantiate that the petitioner has employed an individual in a general manager position has been employed; rather the petitioner's organizational chart shows a store manager and an accounts manager in two separate departments. Second, the record does not support that either the claimed store manager or the accounts manager were employed full-time. Third, upon review of the totality of the record, the record suggests that the beneficiary is the only individual employed full-time and as such the only individual in the position to perform first-line supervisory duties the majority of the time. 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). The AAO questions the validity of an organization that has a single retail outlet but employs a president, three managers, a two-person accounts department, and only one or two salespeople.

The AAO notes 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. Section 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 petitioner in this matter has not established that the beneficiary will be employed in a primarily executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. As observed above, the petitioner has not established that it employs full-time managerial employees subordinate to the beneficiary's position.

The petitioner in this matter has not established that the beneficiary will be employed in a primarily managerial capacity. The petitioner has not established that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. Neither has the petitioner established that the beneficiary will manage an essential function for the petitioner.¹ The petitioner failed to provide sufficient evidence that the beneficiary would be relieved from performing primarily operational tasks or the tasks of a first-line supervisor. Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition will not be approved.

¹ The petitioner in this matter has not furnished 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). Neither does the petitioner's description of the beneficiary's daily duties demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As such, the petitioner has not established that the beneficiary will be employed primarily as a function manager.

The next issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

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

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In a July 20, 2004 letter appended to the petition, the petitioner indicated that the beneficiary had worked for [REDACTED] as a production director since 1998. The petitioner's 2003 IRS Form 1120 listed [REDACTED] as the petitioner's parent company. The record also contained the petitioner's stock certificate number 1 issued to [REDACTED] for 1,000 shares, dated January 10, 2003.

In a March 29, 2005 request for evidence, the director requested evidence that the foreign entity was still in business and a viable company. The director also requested evidence that the beneficiary's position with the foreign entity was in a managerial or executive capacity.

In a June 5, 2005 letter attached as an exhibit to the petitioner's response, the president [REDACTED] attested that the beneficiary had been employed by it from January 1, 1998 to March 2001 in charge of its production department. The petitioner also provided copies of invoices to demonstrate that the foreign entity was still conducting business. The invoices were not issued in the name of [REDACTED] but rather were for [REDACTED]

In a June 15, 2005 letter, also attached to its response, the petitioner explained that the partners of [REDACTED] dissolved their partnership in June 2003 and that the petitioner's stock had been transferred to [REDACTED]. The petitioner further indicated that [REDACTED] had formed a new company, [REDACTED] and that the petitioner "is now a subsidiary of [REDACTED] which [REDACTED]

operates as a sole proprietor." The petitioner provided a copy of a June 5, 2003 "Mutual Agreement" dividing the assets of [REDACTED] also stated that all the petitioner's stock would be transferred and held in the name of [REDACTED]. The petitioner's 2004 IRS Form 1120 continued to list [REDACTED] as the petitioner's foreign shareholder.

The record also contained a February 24, 2005 affidavit signed by [REDACTED] affirming that: (1) he and his brother had owned [REDACTED] since 1984; (2) in a June 2003 separation agreement he was awarded all the stock of the petitioner and [REDACTED] (3) he had conducted business as [REDACTED] until June 2004 when he began operating under the name [REDACTED] and (4) the companies had been consolidated and now all operations were under the name [REDACTED].

On July 19, 2005 the director denied the petition, noting that the beneficiary's foreign employer had been divided as of June 12, 2003, prior to filing the Form I-140 petition. The director observed that the record contained discrepancies that had not been sufficiently explained and that the petitioner had not provided evidence that the United States petitioner was the same employer, or a subsidiary, or affiliate of the firm, corporation, or other legal entity by which the alien had been employed overseas.

On appeal, counsel for the petitioner contends that the foreign entity's change in ownership interest and in business name does not negate the existence of the foreign entity. Counsel asserts that even though Azeem International has changed ownership and is operating under a new name, "it still qualifies to establish a relationship between the foreign entity and the U.S. employer of the beneficiary." Counsel further asserts that the foreign entity owns 100 percent of the United States petitioner.

Counsel's argument is not persuasive. The AAO declines to expand this immigration classification to include past qualifying relationships. The petitioner must establish a qualifying relationship with the beneficiary's foreign employer when the petition was filed. When the foreign entity was dissolved, the petitioner's connection to the beneficiary's foreign employer was severed and the beneficiary could no longer claim to enter the United States in order to render services to the same employer or to a subsidiary or affiliate thereof. The AAO also declines to include in the definition of "same employer" a partnership and all entities that were once owned by the partnership. The dissolution of a separate and distinct entity does not automatically cause all components of the dissolved entity to merge into a new shareholder. An employment-based immigration classification can be based on an *ongoing* qualifying relationship between a parent and branch office, a parent and subsidiary, or two affiliates possessing the required common ownership and control. The AAO again emphasizes that in the context of this immigrant visa classification, the qualifying relationship must exist when the petition was filed.

Of note, the AAO also observes that the record lacks supporting documentation relevant to the claimed qualifying relationship. The record does not contain documentation substantiating that the petitioner's stock was formally transferred to the new foreign entity. Although such a stock transfer would not have assisted in establishing an ongoing relationship between the petitioner and the beneficiary's foreign employer, the lack of a stock certificate serves to validate the director's observation that the record contains innate inconsistencies.

The petitioner has not established that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it was doing business for one year prior to filing the petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D). The petition was filed August 12, 2004; thus the petitioner is required to establish that it was doing business as of August 12, 2003. The petitioner in this matter submitted numerous invoices with dates beginning in September 2003. The AAO observes that all the invoices, save one, do not identify the petitioner by name. The record in this matter is insufficient to establish that the petitioner was doing business in a regular, continuous, and systematic manner for one year prior to filing the petition. For this additional reason, the petition will not be approved.

In addition, the director in this matter when determining that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer inferred that the beneficiary was not employed in a managerial or executive capacity for the foreign entity. The director, however, did not discuss the deficiencies in the record regarding the beneficiary's foreign employment.

The AAO determines that the record does not contain sufficient evidence establishing that the beneficiary worked in a managerial or executive capacity for the foreign entity prior to entering the United States as a nonimmigrant. The record contains a general description of the beneficiary's duties for the foreign entity that suggests that the beneficiary performed operational tasks associated with production schedules, specifications, purchase orders, and budget reports as well as providing first-line supervisory duties of non-professionals. The description of the beneficiary's subordinates' duties is insufficient to establish that the positions they occupy are professional positions or are primarily supervisory or managerial positions. Further, the record does not contain documentary evidence that the individuals subordinate to the beneficiary were employed; thus the foreign entity's claimed organizational structure has not been substantiated. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The AAO acknowledges that CIS approved L-1A nonimmigrant transferee petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, 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 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. at 1103. Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

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

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

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

Finally, the AAO observes that as the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

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.