



U.S. Citizenship
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Services

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FILE:

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Office: TEXAS SERVICE CENTER

Date:

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IN RE:

Petitioner:

Beneficiary:

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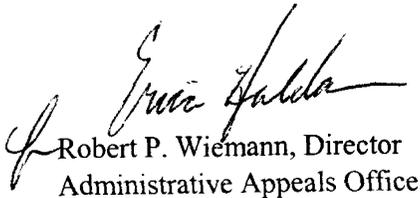
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 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 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 Texas that is operating a gas and convenience store and a laundromat. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not established that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; or (2) at the time the priority date was established the petitioner had the ability to pay the beneficiary's proffered salary of \$32,000.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services' (CIS) denial of the immigrant petition is based on the petitioner's staffing levels, irrespective of its financial growth or the beneficiary's management of the "presidency function." Counsel claims that as a result of its "early stage of development," the petitioner does not require large staffing levels. Counsel also contends that the petitioner demonstrated its ability to pay, in that the petitioner's gross receipts and taxable income in 2004 were greater than the proffered wage. Counsel claims that with regard to those immigrant petitions requesting classification as a multinational manager or executive, CIS should not institute a "hyper analytical" analysis of the petitioner's ability to pay. Counsel states that, rather, the petitioner need only demonstrate its status as a bona fide company in the United States. Counsel submits a brief 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 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 immigrant petition on February 22, 2005 noting that the beneficiary would be employed as the president of its five-person organization. Appended to the petition was a February 18, 2005 letter from the petitioner in which it outlined the following proposed "executive functions" of the beneficiary:

- Directs and coordinates activities of the organization and formulates and administers company policies.
- Responsible for creation, implementation, monitoring, and planning of all operations and any growth and expansion of businesses.
- In consultation with the management, develops long-range goals and objectives of the company.
- Directs and coordinates activities of employees in the sales, purchasing, advertising and marketing for which responsibility is delegated to further attainment of goals and objectives.
- Responsible for hiring and dismissing employees, negotiate contracts, and oversee any domestic distribution system.
- Reviews and analyzes activities, costs, operations, financial administration, and forecast data to determine progress toward stated goals and objectives.
- Discusses with management and employees to review achievements and discusses required changes in goals or objectives of the company.

The petitioner included an organizational chart which reflected the beneficiary's position as president and the following subordinate positions: store manager, assistant, and two cashiers. The petitioner noted two proposed positions for its "laundramat" and "gift and novelty" stores.

The director issued a request for evidence on April 29, 2005 asking that the petitioner submit an additional organizational chart of its staffing levels, as well as an outline of the dates each employee was hired and whether the workers are employed on a full-time or part-time basis. The director also requested copies of the petitioner's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for all workers employed in the years 2003 and 2004.

Counsel for the petitioner responded in a letter dated July 22, 2005, stressing the executive nature of the beneficiary's employment, which counsel claimed "is corroborated not only by the staffing that allows him to focus on executive directing but more importantly by the nature of the duties he has performed." Counsel attached the following outline of the beneficiary's job duties, which, although similar to the above-named responsibilities, include an allocation of the amount of time to be spent on each:

- In consultation with the management and the Indian company develops long-range goals and objectives of the company. (20%)
- Directs and coordinates activities of the organization and formulates and administers subsidiary's investment policies (20%)
- Directs and coordinates activities relating to corporate planning, general administration, marketing-sales, and purchasing, activities for the subsidiary; (20%)
- Directs and coordinates activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives; (20%)

- Reviews and analyzes activities, costs, operations, and forecast data to determine progress toward stated goals and objectives (10%)
- Reviews with management and employees company's achievements and discusses required changes in goals or objectives of the company (10%);

Counsel again attached an organizational chart of the petitioner's staffing levels, noting seven employees, which included the beneficiary, as president, a store manager, two assistants, and three cashiers. In an appended outline of personnel, the petitioner identified each employee's hiring date as prior to the filing of the instant immigrant petition. In his July 22, 2005 letter, counsel stressed that the beneficiary's subordinate workers would "carry out the day-to-day ministerial tasks of the organization," thereby relieving the beneficiary from the performance of the non-qualifying functions of the business.

Counsel further explained that the beneficiary would be responsible for managing "the essential function of Presidency." Counsel stated that the beneficiary's employment as a functional manager would satisfy the regulation at 8 C.F.R. § 204.5(j)(2), which requires that the beneficiary "manage an essential activity or function of the organization," function at a senior level with respect to the function, and exercise authority over the daily activity of the function managed.

In a decision dated August 8, 2005, 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. Addressing the petitioner's staffing levels, the director noted both the low amount of compensation paid by the petitioner to employees in 2004 and ambiguity in whether the named workers were employed on a full-time or part-time basis. The director stated that the limited staff raises the question of whether the daily functions associated with the petitioner's business would be performed by someone other than the beneficiary. The director stated that there was no evidence rebutting the finding that the beneficiary would spend the majority of his time performing the petitioner's day-to-day operations. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on September 8, 2005. In a subsequently filed appellate brief, counsel contends that CIS erroneously focused on the number of workers employed by the petitioner without also considering its reasonable needs. Counsel claims that CIS should take into account the petitioner's financial growth since its inception, which counsel states is a "critical demarcation of impending success," as well as its expansion goals and staffing. Counsel contends that CIS cannot determine the beneficiary's employment capacity "on the basis of the number of subordinate employees or their part-time status," and notes that the petitioner's "early stages of operations" do not require a large staff. Counsel states that the current trend in the operation of retail convenience stores dictates using automated gas pumps instead of cashiers and delivery personnel to stock inventory, thereby minimizing the need for a large staff.

Counsel further states that the director disregarded the beneficiary's role as a function manager. Counsel notes that the concept of "function manager" does not require the supervision of subordinate employees. Counsel contends that the beneficiary, as the manager of the presidency function, functions at a senior level of the organization and exercises discretion over the petitioner's daily operations, thereby satisfying the elements of the definition of "function manager."

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). Here, both job descriptions offered by the petitioner and counsel are vague and fail to identify the specific managerial or executive job duties to be performed by the beneficiary on a daily basis. The above-cited regulation requires the petitioner to present a clear description of the beneficiary's proposed managerial or executive job duties beyond that of "coordinat[ing] activities," "formulat[ing] and administer[ing] company policies," monitoring the company's growth, developing corporate goals, and analyzing the organization's activities, costs, and operations. The limited job description does not identify what "activities," "policies," or "operations" the beneficiary would direct, administer, or implement, nor does it specifically explain the managerial or executive role the beneficiary would exert over the company's purported "management." 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).

Additionally, based on the record, several of the beneficiary's proposed job duties do not seem plausible within the context of the petitioner's business. Specifically, the petitioner's claim that the beneficiary would "coordinate activities of managers and employees in the production, operations, purchasing and marketing departments" is unsupported by the record, as the petitioner has not identified the existence of these corporate departments nor the employment of any workers who would be responsible for performing these functions. This same analysis applies to the beneficiary's purported responsibility of coordinating activities related to the petitioner's general administration and marketing-sales, as the petitioner has not identified employees to whom these functions would be assigned. 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).

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

At the time of filing, the petitioner was a four-year old company. The petitioner claimed on Form I-140 to employ a staff of five workers, however, its quarterly report ending the period of December 31, 2004 reflects that two individuals were employed during the month of December 2004. A comparison of the petitioner's December 31, 2004 quarterly report and its organizational chart, which identified five employees, would suggest that at least two of the workers named on the chart were not employed at the time of filing. The organizational chart submitted by counsel in response to the director's request for evidence fails to clarify the petitioner's correct staff at the time of filing. Furthermore, the dates of employment claimed by the petitioner on its statement submitted with counsel's July 2005 response do not coincide with the information contained

on the petitioner's December 31, 2004 quarterly report. In sum, the record as presently constituted, prevents an accurate finding of the beneficiary's subordinate employees at the time of filing. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As a result, the AAO cannot ascertain whether the reasonable needs of the petitioning entity could possibly be met through its staffing levels at the time of filing.

Regardless of the dates of employment, it would appear that the beneficiary would be personally responsible for performing many of the petitioner's non-qualifying functions. A review of the beneficiary's proposed job duties and those of his subordinate employees demonstrates that the beneficiary would likely perform the petitioner's sales, marketing, and general administration, as well as maintaining personnel records, payroll, accounts payable and receivable, and inventory. Additionally, based on a Texas Sales and Use Tax Permit, the petitioner began operating a second business, a gift and novelty store, on January 1, 2005, one month prior to the instant filing. However, the petitioner, noting on its organizational chart that it *anticipates* hiring one worker, has not established that any workers are employed at this operation. Absent a support staff working in the gift and novelty shop, it is reasonable to conclude that the beneficiary is also responsible for personally maintaining its operations. Accordingly, the record does not support a finding that the beneficiary would be primarily performing the managerial or executive tasks outlined in the Act at sections 101(a)(44)(A) and (B). 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Furthermore, the above analysis confirms that the petitioner's reasonable needs would not be met through the employment of the beneficiary as its president and an unconfirmed number of employees.

Counsel's additional claim on appeal that the beneficiary would be employed as a function manager is not supported by the record. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to **managing the essential function**. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. In this matter, the petitioner has not provided sufficient evidence specifically defining the managerial or executive job duties associated with the "presidency function." Counsel's blanket statement incorporating the beneficiary's title into the function purportedly managed by the beneficiary is simply not sufficient to demonstrate that the beneficiary would be employed as a function manager. Counsel cannot expect the AAO to infer the essential function to be managed by the beneficiary, particularly when several of the beneficiary's purported job duties consist of managing employees, a task not commonly held by a "function manager." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As a result, the AAO cannot conclude that the beneficiary would be employed as a function manager.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether at the time the priority date was established the petitioner demonstrated its ability to pay the beneficiary his proffered salary of \$32,000.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the beneficiary's 2004 IRS Form W-2 reflects compensation paid in the amount of \$3000. As a result, the petitioner did not establish that it had previously employed the beneficiary at the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on February 22, 2005, the AAO must examine the petitioner's tax return for 2005. However, because the instant appeal was filed in September 2005, the petitioner's 2005 corporate tax return would not yet have been prepared. As a result, the AAO will review the remaining financial documentation included in the record.

Based on the petitioner's 2004 income tax return, the sole piece of documentary evidence reflecting the petitioner's financial status, the petitioner had a net taxable income of approximately \$9,000. The petitioner would not be able to pay an additional \$29,000 out of this amount.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. As addressed by the

director in her decision, the petitioner does not maintain sufficient assets from which to pay the beneficiary's proffered salary.

The AAO addresses counsel's reference to a "totality" approach in which the petitioner's "entire financial resources" are analyzed for evidence of its ability to pay. Counsel's reliance on *O'Connor v. Attorney General*, 1987 WL 18243 (D.Mass) in support of this proposition is misplaced. In *O'Connor v. Attorney General*, the court noted that as an "unincorporated sole proprietorship," the personal assets of the employer should be considered in the analysis of its ability to pay. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). The instant case is distinguishable, as the petitioner is an incorporated organization. As a corporation, the petitioner is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Accordingly, CIS properly applied a narrow analysis of the petitioner's financial status.

Furthermore, the 2004 CIS memorandum referenced by counsel supports a more limited review of the petitioner's net income and net current assets. Memorandum from William R. Yates, Associate Director for Operations, *Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)*, HQOPRD 90/16.45 (May 4, 2004). CIS' Associate Director of Operations further clarifies the regulation at 8 C.F.R. § 204.5(g)(2), stating that CIS has *discretionary authority* to accept and consider financial statements or evidence other than the petitioner's annual reports, federal tax returns, or audited financial statements in its analysis of the "ability to pay" requirement. In other words, CIS is not required to consider the average monthly balance of the petitioner's checking account.

The AAO further notes that the regulations clearly impose the "ability to pay" standard on all petitioners filing an employment-based immigrant petition. See 8 C.F.R. § 20435(g)(2). Despite counsel's claims otherwise, the regulations, which are considered CIS policy, should not be construed as applying a lesser standard of scrutiny on those petitions involving classification as a multinational manager or executive. The regulations do not provide for the application of varying "ability to pay" analyses according to the immigrant classification sought.

Based on the foregoing discussion, the petitioner has failed to demonstrate its ability to pay the beneficiary's proffered salary at the time the priority date was established. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. In its February 18, 2005 letter, the petitioner provided an equally vague outline of job responsibilities held by the beneficiary in his position as "partner" of the foreign organization as that provided for the beneficiary's employment in the United States. In fact, the beneficiary's job duties as "partner" mirror those held by him as "president," and again, fail to define the associated managerial or executive tasks. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Additionally, several of the beneficiary's job duties abroad are dependent on the company's "management" and "employees," yet the petitioner does not specifically identify the subordinate workers, except to address a staff of "over 18 to 20 employees and senior level management team." The AAO notes that the May 20, 2001 letter from the foreign entity, in which it

broadly addressed the beneficiary's job duties overseas and outlined a personnel staff consisting of a manager, sales supervisor, accountant, cashier, and clerk, is not sufficient to document the beneficiary's prior employment capacity. The record does not contain documentary evidence, such as an organizational chart identifying job titles and descriptions, substantiating the existence of a subordinate staff to perform the foreign entity's non-qualifying operations. 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 has failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this reason, the petition will be denied.

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 notes that CIS has previously approved at least two L-1A petitions for the benefit 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 at 29-30 (recognizing that CIS approves some petitions in error).

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 approval by denying the present immigrant petition.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.