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U.S. Citizenship
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Services

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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **OCT 10 2007**
LIN 06 213 51495

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based visa petition. The petitioner subsequently filed a motion to reopen or reconsider, which the director granted and ultimately affirmed the original denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is engaged in the production of computer software. The petitioner represents itself as a subsidiary of the beneficiary's foreign employer, and seeks to employ the beneficiary as its chief executive officer/chief technical officer.

The director denied the petition concluding that the petitioner had not established that the beneficiary had been or would be employed by the foreign or United States entities in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner challenges the director's finding, stating that the beneficiary's job duties represent employment in a primarily managerial or executive capacity. Counsel further contends that the petitioner's organizational structure would be sufficient to support a primarily managerial or executive position. Counsel submits a brief and additional 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 first issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

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

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-140 on July 3, 2006 noting the beneficiary's proposed employment as the chief executive officer/chief technical officer of its eighteen-person corporation, during which he would manage the company's development team, approve all "key" decisions, and monitor the performance of the operations in the United States and United Kingdom companies. In an appended June 20, 2006 letter, the petitioner noted the beneficiary's role in expanding the company's presence in the United States by increasing its staff and

developing an East coast office, which would assume the company's sales and support functions from the already-established California office.

In a separate statement, the beneficiary's role and "key responsibilities" were identified as the following:

To direct the global operation of [the foreign and United States entities], ensuring effective communication and co-ordination of the operating companies in the US and UK, to allow smooth operation and profitability. Identify and progress strategic partnerships. Lead the development of both existing and new software products to promote increased sales and customer retention.

- Agree budgets, sales and other performance targets with the Managing Director (UK) and Regional Manager (US). (2%)
- Monitor performance of the UK and US organizations. (25%)
- Approve all key decisions. (3%)
- Manage the development team to ensure effective maintenance and development of current software products. (20%)
- Identify areas in which new software modules and products can be developed to exploit market opportunities. (5%)
- Co-ordinate and manage the design and implementation of new software. (20%)
- Identify and recruit software partners to allow quicker and more effective exploitation of market opportunities where possible. (5%)

In an appended organizational chart, the beneficiary was depicted as overseeing the foreign and United States organizations, which collectively employed sixteen workers, two of which were identified as United States employees. The two employees were identified as occupying the positions of regional manager and support analyst. In a second organizational chart, depicted on a separate page and dated December 2005, the petitioner was represented as employing three workers subordinate to the beneficiary who occupied the positions of president, support analyst/testing coordinator, and regional manager south-east. Based on a comparison of the two organizational charts, it appears that the employment of the petitioner's regional manager was terminated prior to the instant filing and that its president assumed the title and position of regional manager.

On August 15, 2006, the director issued a request for evidence instructing that the job description offered by the petitioner in its original filing contained "broad" and "general" statements that were not sufficient to establish the beneficiary's proposed employment in a primarily managerial or executive capacity. The director requested that the petitioner submit a "detailed, comprehensive description" of the beneficiary's employment in the United States entity addressing his specific job duties and the amount of time the beneficiary would devote to performing each. Noting that the organizational chart depicted both the foreign and United States entities, the director asked that the petitioner clarify how the beneficiary's time would be divided between the two companies, and explain how the beneficiary would manage the United States organization. The director also requested a description of the job titles, job duties, and position requirements for each of the beneficiary's subordinate employees.

The petitioner's former counsel responded in a letter dated November 1, 2006 contending that the beneficiary's employment in the United States would be primarily executive in nature. Counsel stated that in

his proposed position, the beneficiary is required to: interview and train new employees; expand the petitioner's position in "the global field" through research of the United States market; set budgets and monitor the performance of both the United States and foreign entities; identify new market opportunities; make final decisions with respect to the petitioner's expenditures and operations; identify software partnerships; and supervise the organization's employees.

In a separate letter, dated October 31, 2006, the petitioner distinguished the beneficiary's job duties in the United States and United Kingdom, noting that the beneficiary would devote 60 percent of his time to job duties specific to the United States organization, while 15 percent of his time would be occupied by tasks related to the organization in the United Kingdom. The petitioner noted that the beneficiary would spend the remaining 25 percent of his time performing as the chief technical officer of both organizations.

The petitioner delineated the beneficiary's job duties as chief executive officer from chief technical officer, noting that as the company's chief executive officer, the beneficiary would dedicate 15 percent of his time to such job duties as:

- Recruitment, promotion and changes to organizational structure (5%)
- Requests for unbudgeted expenditure and budgeted expenditure over agreed amounts (3%)
- Review any new legal agreements and variations to existing agreements (5%)
- Evaluate proposed alliances and third party products for resale (2%)

With respect to the beneficiary's responsibility of identifying United States software partners in order to effectively exploit market opportunities, the petitioner noted that the beneficiary would devote 35 percent of his time to the following associated job duties:

- Research the U.S. market for products complementary to [the petitioner's] own, via the web and by talking to customers and prospective customers. (5%)
- Approach key strategic partners directly at a high level to open discussions about mutual opportunities. (15%)

* * *

- Delegate approaches to other prospective partners to the President of [the petitioning entity]. (5%)

* * *

- Evaluate proposed alliances and third party products for resale coming from either direct approaches from third parties or from suggestions by employees with [the petitioning entity] (5%)
- Guide pre-sale evaluation and oversee initial implementation of [the petitioner's] software sold by partners, or partner software sold by [the petitioner], to ensure that [the petitioner's] new customer will be a good reference site. Resources used from [the petitioning entity] will be the Regional Sales Manager for New York, the

Professional Services Manager and consultancy/support resources from [the petitioner] in the U.S. and U.K. (5%)

The petitioner further noted the following responsibilities related to the beneficiary's role as chief executive officer: interviewing candidates, 2%; product training, 3%; advising on customer relations issues, 5%; setting budget, sales and performance targets, 5%; and monitoring the performance of the United States and foreign organizations, 10%.

The petitioner explained that the beneficiary's additional role as chief technical officer included "reading, web-based research and attending conferences and seminars," and that his specific job duties would include:

- Manage the development team to ensure effective maintenance and development of current software products – this work is performed using remote communications, email, telephone and web conferencing for software walkthroughs and team meetings. (10%)
- Coordinate and manage the design and implementation of new software and communications. (10%)
- Identify areas in which new software modules and products can be developed to exploit market opportunities. (5%)

As the founder of [the foreign and petitioning entities] and driving force behind [the foreign entity's] product development over the last 15 years, it is essential that [the beneficiary] is now able to drive product development from a U.S. perspective, as the company has much larger growth opportunities in the U.S. Even without his full time presence, they have established the company successfully in the U.S., running profitably with a full time workforce of four U.S. citizens (with one vacancy) in California. By [the beneficiary's] moving to the New York area, gaining this U.S. perspective and being readily available to key partners and customers on the East Coast, as well as much more accessible to [the petitioner's] office in California, he expects to greatly accelerate growth and profitability.

The petitioner noted that while employed in the United States, the beneficiary would supervise the company's president, as well as workers employed in the following positions: the managing director of the company in the United Kingdom; a professional services manager; a yet unfilled position of software development team leader; a senior software developer; and a software developer/consultant. The petitioner submitted an organizational chart that depicted the referenced professional services manager as an employee of the United States organization. The AAO notes, however, that the professional services manager was identified on the original organizational chart as an employee in the United Kingdom. The organizational chart submitted in response to the director's request for evidence also depicted the subordinate positions of sales/support administrator and marketing manager as being occupied in the United States company, while the positions of east and west account manager were noted as not yet being filled. Again, none of these positions were identified on the petitioner's original organizational chart.

On November 15, 2006, the director issued a decision in which he concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director outlined the list of submitted job duties, finding that while the job

description "contain[s] some managerial level duties, [] other duties are insufficiently defined (such as how [the beneficiary] will 'manage' the development team, or his specific duties in relation to design and implementation of software) to demonstrate that they are actually managerial or executive in nature." The director also concluded that some of the beneficiary's job duties are "functional in nature," such as his research of new markets, communications with "partners to achieve sales agreements," identification of areas for product development, and training of employees on products and customer relations issues. The director also found that based on a comparison of the amount of time the beneficiary would devote to the foreign and United States entities, it is not clear whether the petitioner's reasonable needs support a managerial or executive position. Consequently, the director denied the petition.

The petitioner's former counsel filed a motion to reopen the director's decision on December 18, 2006, challenging the director's finding and claiming that the beneficiary would be performing primarily executive and managerial job duties. In her December 15, 2006 brief, counsel provided a "thorough job description" of the beneficiary's proposed employment in the United States entity, submitted claims that the beneficiary would be employed as both a manager and an executive. As counsel's brief is already part of the record, it will not be entirely repeated herein. In a decision dated February 26, 2007 the director granted the motion, yet ultimately determined that the petitioner had failed to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity.

The petitioner's current counsel filed the instant appeal on March 30, 2007 contending that "the structure and nature" of the petitioning entity would support the beneficiary in a primarily managerial or executive capacity. In an attached appellate brief, dated March 29, 2007, counsel contends that the beneficiary would be employed in both an executive and managerial capacity. In support of the beneficiary's eligibility for classification as both a manager and an executive, counsel references portions of the job duties from the already submitted job descriptions as evidence of satisfying the statutory definitions of "managerial capacity" and "executive capacity." Counsel states that the beneficiary's purported employment as an executive is further supported by the petitioner's organizational structure, "which shows his position at the pinnacle of the multinational corporate hierarchy, managing and delegating functional duties to at least fifteen positions under his supervision." As additional evidence of the beneficiary's managerial and executive authority, counsel notes the beneficiary's role in the company's business dealings, specifically referencing a "major agreement" between the petitioner and a Massachusetts-based company, QAS, to sell the petitioner's software. Counsel also references and submits copies of the beneficiary's electronic mail log of correspondence from January through March 2007, claiming that it "illustrates his daily activities in subjects relating to purely managerial duties, such as staff hiring and pay, client interaction, direction/management of the development team, advice to support staff, and budget and expenses."

Counsel contends that the petitioner's organizational structure demands the employment of a manager or executive "because of the significant degree of overall coordination and management required between the U.S. subsidiary petitioner in California and New York and its British parent company." Counsel instructs that the management of "remote employees" is a common practice particularly in the technology industry, and explains that the beneficiary's placement in the New York office facilitates easier communications between the California and United Kingdom offices, which have a time difference of 8 hours. Counsel submits a copy of the petitioner's 2007 business plan update, which addresses its decision to assign the beneficiary to the development of a New York office and to recruit sales, support and administrative staff.

On appeal, counsel submits additional documentary evidence, including a 2007 organizational chart depicting revisions in the company's staffing levels since the filing date and letters confirming the petitioner's business relationship with QAS, as well as with a separate Florida-based company.

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The AAO emphasizes that the beneficiary's eligibility for classification as a manager or executive is based on an analysis of the beneficiary's employment at the time of filing the immigrant visa petition. Case law requires that a petitioner 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 Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

When examining the managerial or executive capacity of a beneficiary, United States Citizenship and Immigration Services (USCIS) 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.

When analyzing 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 AAO concurs with the director's observation that the job description initially offered with the Form I-140 is not sufficiently detailed so as to establish the beneficiary's purported employment in a primarily managerial or executive capacity. Similarly, the job description submitted in response to the director's request for evidence does not clarify the beneficiary's role as a manager or executive.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. Again, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

While the petitioner's response to the director's request for evidence includes references to job duties noted in the original job description, the time allocated to the specific tasks varies, thus raising questions as to the employment capacity originally proposed to the beneficiary at the time of filing. Specifically, the beneficiary is first represented on the job description as devoting the majority of his time to the following three areas: monitoring the United States and foreign organizations, 25%; managing the development team, 20%; and coordinating and managing the design and implementation of new software, 20%. In contrast, in its October 31, 2006 letter submitted in response to the director's request for evidence, the petitioner indicated that a cumulative amount of 20 percent of the beneficiary's time would be devoted to managing the company's development team and coordinating the design of new software, two tasks that were originally represented as

consuming 40 percent of the beneficiary's time. Similarly, the beneficiary was identified as spending only 10 percent of his time monitoring the performances of the foreign and United States entities. 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).

Because of the varying and limited statements submitted with respect to some of the beneficiary's job responsibilities, the specific managerial or executive job duties of the beneficiary are unclear. For example, it is not clear what specific managerial or executive tasks the beneficiary would assume in monitoring the performance of the United States and foreign organizations. The AAO notes that in response to the director's request for evidence, the petitioner simply stated the same job responsibility without providing additional clarification. Also, the beneficiary's role as chief technical officer and his purported management of the company's development team has not been explained or confirmed. This is particularly relevant considering he was initially represented as spending a cumulative 40 percent of his time managing the development team and coordinating and managing "the design and implementation of new software." Moreover, there is no indication in the record that the petitioner, itself, maintains a "development team." Rather, it appears that the development team employed by the foreign entity would perform these functions for the United States entity. As a result, it is not clear who the beneficiary is actually managing with respect to this particular responsibility. Case law dictates that a petitioner's blanket claim of employing the beneficiary as a manager or executive without a description of how, when, where and with whom the beneficiary's job duties occurred is insufficient for establishing employment in a primarily managerial or executive capacity. *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 actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

Based on the petitioner's October 31, 2006 letter, the beneficiary would devote the most time, 35 percent, to the specific task of identifying software partners in the United States and determining marketing opportunities. This task was initially identified as consuming 5 percent of the beneficiary's time as the chief executive officer of the United States corporation. The petitioner further indicated that the individual tasks comprising this responsibility were: researching the United States market for complimentary products; communicating and negotiating with "strategic partners"; delegating "approaches" to prospective partners; evaluating "proposed alliances and third party products for resale"; and overseeing "pre-sale evaluation" and the initial implementation of the petitioner's software products, which the petitioner represented as having been sold by partners. For various reasons addressed in detail below, the AAO questions the beneficiary's purported managerial or executive role with respect to this responsibility.

First, the petitioner repeatedly refers to "partners" that would be responsible for selling the petitioner's software. The AAO acknowledges that the additional evidence submitted on appeal confirms the existence of the petitioner's business relationship with QAS for the purpose of marketing and selling its products; however, the relationship was not established until November 2006, or approximately four months after the original filing. It is not clear who performed the east coast negotiations or sales for the petitioning entity until that date, as the petitioner's regional manager¹, who is based in California, is identified as merely managing the

¹ The AAO again notes that depending on the referenced organizational chart, Robert Heidenreich was employed at the time of filing as occupying the position of president or regional manager. For purposes of this proceeding, the AAO will refer to Robert Heidenreich as the company's regional manager, as the

sales and marketing functions. The AAO notes that the petitioner conceded in its October 31, 2006 letter its efforts to recruit a regional sales manager for its New York location, as well as to procure "consultancy and support resources in the region." Moreover, the petitioner's prior counsel admitted in her December 15, 2006 brief submitted in support of the motion to reopen that the beneficiary "performs some functional sales duties for prospective clients in the New York/Philadelphia/Boston area, pending recruitment of a Regional Sales Manager for New York."² Based on these representations, it is not clear whether the beneficiary's communications with outside organizations for the purpose to obtaining corporate representation on the east coast can be considered "high[-]level" or managerial or executive in nature, as suggested by the petitioner. The beneficiary's additional and related responsibilities of personally researching the United States market via the worldwide web and through communications with prospective customers for complementary products, overseeing the implementation of the company's software in new customer sites, product demonstrations, and guiding "pre-sale evaluation[s]" further challenge his claimed employment in a primarily managerial or executive capacity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591.

Additionally, as the sole employee in the petitioner's east coast office, and one of three employees working for the petitioner in the United States, it is questionable whether the beneficiary would be supported in a primarily managerial or executive capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The AAO notes the existence of many unresolved discrepancies in the petitioner's staffing levels at the time of filing the immigrant visa petition. On the Form I-140, the petitioner represented a staff of sixteen employees, yet in an appended organizational chart identified the employment of a regional manager and support analyst in the United States. In a second organizational chart also submitted with the initial filing, the petitioner identified the occupied positions of president, support analyst and regional manager as being subordinate to the beneficiary in the United States corporation. In response to the director's request for evidence, the petitioner submitted yet a third organizational chart depicting its staffing levels as of September 2006 and noting the employment of five employees in the United States, one of which was originally represented as an employee the foreign entity. Despite the differing representations made by the petitioner, for purposes of determining the beneficiary's employment capacity, the AAO will deem the regional manager and support analyst, both of who were employed in the California office, as employees of the petitioning organization at the time of filing³ and will not consider the revisions made to the petitioner's staffing levels since the time of filing the Form I-140. *See Matter of Katigbak*, 14 I&N Dec. at 49.

petitioner initially indicated in the original job description that the beneficiary would discuss the company's performance targets with the company's regional manager.

² Counsel indicated that the functional sales tasks would consume only 10 percent of the beneficiary's time, and that the beneficiary would be performing the "higher level functional duties" of developing business relationships for sales and marketing with outside organizations.

³ Despite the petitioner's reference to the employment of a south-east regional manager on a December 2005 organizational chart submitted with the original filing, the petitioner later conceded that the position of

Counsel contends on appeal that the structure of the United States organization demands the employment of the beneficiary as the chief executive officer in order to coordinate and manage the California and New York offices, as well as the foreign entity. Counsel states that the employment of the beneficiary in an executive position is "evident in the structural organization of the company . . . which shows [the beneficiary's] position at the pinnacle of the multinational corporate hierarchy, managing and delegating functional duties to at least fifteen positions under his supervision." Similarly, the petitioner's former counsel states on motion that "[t]he nature of the [petitioner's] business underpins [the petitioner's] contention that [the beneficiary's] role is that of an executive manager . . . [as] it is developing and selling original, specialist, data cleansing software, employing a skilled staff in the U.S. (four of whom are U.S. citizens)."

In each claim, both the petitioner's current and former counsel is relying on the expanded staffing levels of the petitioner. A critical analysis of the petitioning organization and the staffing levels maintained at the time of filing creates doubt as to whether the petitioning entity would support the beneficiary in a primarily managerial or executive capacity. In support of this observation, the AAO notes, in particular, counsel's reference on appeal to portions of the petitioner's business plan, which addresses its need to have the beneficiary "develop channels in [the New York] region and to recruit sales, support and administrative staff," as well as its methods of contacting and selling directly to customers by electronic mail or telephone. Again, other than the beneficiary, the petitioner has not claimed to employ any workers in its New York office on the date of filing. Also, the AAO again notes that at the time of filing, the petitioner had not yet developed any business relationships with outside "partners" for the marketing and sale of its products. *See Matter of Katigbak*, 14 I&N Dec. at 49 (requiring the petitioner to 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). As a result, it is not clear whether the petitioner's reasonable needs, particularly those concerning the New York office, would be met through the services of its three-person staff, of which two are employed on the West coast.

On appeal, counsel also focuses on the role of "remote employees" in the analysis of the beneficiary's employment capacity. Counsel states that "remote management" is an accepted practice in the technology industry and challenges that the beneficiary's presence in New York should not undermine his executive and managerial employment. The AAO recognizes the concept of "remote management" and acknowledges that the beneficiary may manage employees who are not within geographical proximity to the New York office. However, while the record contains several organizational charts and an October 31, 2006 statement of the beneficiary's subordinates, there is little clarification as to how the beneficiary is managing the various offices and who the beneficiary was managing on the filing date, particularly since the staffing levels of each organization have been revised with each new response by the petitioner. Again, although the beneficiary was initially represented as monitoring the performance of the foreign and United States organizations, the petitioner did not expound on the specific tasks associated with this responsibility. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

regional sales manager for New York had not been filled. It is not clear whether these are the same positions, however, the record is devoid of documentary evidence confirming the employees of the petitioner at the time of filing. Moreover, the petitioner's prior counsel concedes on motion that the beneficiary is the "first employee on the East coast." 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)).

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)).

In light of the above-noted inadequacies and discrepancies, the petitioner has not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity at the time of filing of the immigrant visa petition. The AAO notes that the petitioner is not restricted from filing a new I-140 immigrant visa petition seeking classification of the beneficiary as a manager or executive. Based on the above discussion, the appeal will be dismissed.

The second issue in this proceeding is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In the June 20, 2006 letter submitted at the time of filing, the petitioner identified the beneficiary as having occupied an executive position in the foreign entity, which required "knowledge of company specific client base, markets, and fields of research." The petitioner did not provide additional evidence in support of the beneficiary's overseas employment as a manager or executive of the foreign entity. In an attached organizational chart, the beneficiary was depicted as supervising the following twelve subordinate positions in the foreign company: managing director, senior architect, technical lead, developer, administration controller, accountant, sales manager, sales administrator, sales consultant, marketing manager, customer support manager, and support analyst.

In his August 15, 2006 request for evidence, the director instructed the petitioner of the inadequate account of the beneficiary's job duties in the foreign entity, and requested a "detailed, comprehensive description of the beneficiary's position abroad." The director directed the petitioner to define the specific job duties related to the beneficiary's former position in the foreign company.

In her November 1, 2006 letter, the petitioner's former counsel outlined the statutory requirements of "executive capacity," and claimed that as the chief executive officer/chief technical officer of the foreign entity, the beneficiary satisfied the relevant statute in that he: interviewed and trained employees; identified and established new market opportunities; approved "key decisions"; set budgets, sales and performance targets; monitored the company's performance; and, as a founding member of the foreign entity, received only general supervision.

In the appended October 31, 2006 letter, the petitioner outlined the following job duties performed by the beneficiary while employed in the foreign entity, which are the same as those initially provided for his proposed employment in the United States entity:

- Agree budgets, sales and other performance targets with the Managing Director (UK) and Regional Manager (US).
- Monitor performance of the UK and US organizations.
- Approve all key decisions.
- Manage the development team to ensure effective maintenance and development of current software products.
- Identify areas in which new software modules and products can be developed to exploit market opportunities.
- Co-ordinate and manage the design and implementation of new software.

- Identify and recruit software partners to allow quicker and more effective exploitation of market opportunities where possible.

In his November 15, 2006 decision, the director concluded that the petitioner had not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director noted that other than providing the same job description for the beneficiary's foreign employment as that originally submitted for the beneficiary's proposed position in the United States, the petitioner had failed to submit "information regarding the beneficiary's position abroad prior to his entry, despite being advised that the prior description was insufficient." The director stated that absent additional documentation, the beneficiary could not be deemed to have been employed as a manager or executive of the foreign entity. Consequently, the director denied the petition.

In the subsequent motion to reopen, the petitioner's former counsel provided the following additional outline of the job duties associated with each of the beneficiary's above-listed job responsibilities:

- Directs and monitors performance of the U.K. and U.S. organizations. (25%)
Monitor performance by reviewing reports provided on a weekly and monthly basis showing:
 1. [C]urrent management accounts, including profit and loss for the month, quarter and year to date
 2. [S]ales for the month and quarter and pipeline (forecast) sales
 3. Service Request summaries for the Help Desk System
 4. [R]elease schedule for new releases, plus reviewing customer experience with the current release.The review led to discussions with relevant managers and sometimes subordinate employees, where it is necessary to go into detail, to suggest ways to improve, or to commend.
- Make or Approve all key decisions. (3%)
Recommendations for key decisions are submitted by the relevant manager/executive by email for consideration and approved, modified, or rejected by email (Email folders are stored locally and backed up centrally each day). Decisions that are referred to the CEO include:
 1. Recruitment, promotion, and any changes to organizational structure
 2. Requests for unbudgeted expenditure and budgeted expenditure over agreed amounts
 3. Review any new legal agreements and variations of existing agreements
 4. Evaluate proposed alliances and third party products for resale.
- Manage the development team to ensure effective maintenance and development of current software products. (20%)
Managing the development team includes:
 1. Reviewing reports provided on a daily and weekly basis showing Software Issues outstanding by type and priority and Software Issues allocated by staff member

2. Reviewing project plan for project work (as opposed to maintenance) to gauge reasonableness of estimates and progress against plan.
 3. Delegating new work
 4. Walkthroughs of design documents.
 5. Specification of urgent maintenance tasks.
 6. Spot checks of handover for completed tasks (which can include reviewing program code for adherence to standards and maintainability).
 7. Reviewing summary reports from automated test suites.
 8. Evaluating recommendations for software productivity tool purchase and deployment.
- Co-ordinate and manage policies for the design and implementation of new software. (20%)
Coordinating and managing the design and implementation of new software communications include:
 1. Leading discussions about requirements with sales and marketing staff
 2. Delegation of work to appropriate development staff
 3. Walkthroughs of and requests for revisions to functional design documents.
 - Agree budgets, sales and other performance targets with the Managing Director (U.K.) and Regional Manager (U.S.). (2%)
This involves an iterative process carried out in the last quarter of each financial year, relating to the next financial year. First, performance in the current year to date is reviewed and compared with the budget for the current year. Next, the rolling three year strategic plan is reviewed. In the [sic] light of these reviews, a budget for the coming year for each organization is formulated. At organization and group level, these are then reviewed with the relevant managers and with the company accountant. Amendments are then made to the new budgets to ensure projected profitability at a satisfactory level and acceptable cash flow.
 - Identify areas in which new software modules and products can be developed to exploit market opportunities. (5%)
Identifying areas in which software modules and products can be developed includes reading, web-based research and attending conferences and seminars.
 - Identify and recruit software partners to allow quicker and more effective exploitation of market opportunities. (5%)
This involves identification of complementary products selling well into the same market and discussion with the authors of those packages about bundling [the foreign entity's] software in with their products, or actually programming in calls to [the foreign entity's] component software.

Counsel accounted for the remaining 20 percent of the beneficiary's time, explaining that it was comprised of "miscellaneous" interruptions and telephones calls.

Counsel claimed that the beneficiary satisfied the statutory criteria for "executive capacity" in that he directed the foreign company's management in the establishment of policies related to the business' marketing and finance functions, supervised such professional employees as the company's managing director, accountant, technical leader, senior software architect, and the United States company's regional manager, and established new market opportunities and performance targets.

In his February 26, 2007 decision, the director again determined that the petitioner had failed to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. While the director noted that counsel's statement on motion provided additional information regarding the beneficiary's job duties in the foreign entity, he did not specifically explain why the petitioner failed to demonstrate the beneficiary's former employment as a manager or executive of the foreign entity. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

On appeal, the petitioner's present counsel contends that the job duties performed by the beneficiary while employed by the foreign entity were primarily managerial or executive in nature. Counsel broadly discusses the beneficiary's former overseas employment in conjunction with his proposed employment in the United States, stating that the previously provided job duties satisfy the statutory criteria of both "managerial capacity" and "executive capacity." Counsel specifically notes the beneficiary's supervision over the foreign company's managing director and accountant and his authority to direct the day-to-day operations of the foreign organization.

Upon review, the petitioner has established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). As instructed above, when analyzing the employment capacity of the beneficiary, CIS will also review the totality of the record, including descriptions of the job titles and job duties of the beneficiary's subordinate employees, the nature of the foreign company's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in the organization.

An analysis of the additional job description submitted by the petitioner's former counsel on motion, in conjunction with the foreign entity's staffing levels, demonstrates that the beneficiary was employed as a manager or executive of the foreign entity. Counsel's supplemental job description provided detail of the specific job duties performed by the beneficiary in his role as chief executive officer/chief technical officer in the foreign entity, which was sufficient to establish his employment in a primarily managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Also, in contrast to the petitioning entity, the record suggests that the foreign organization maintained a subordinate staff sufficient to perform the day-to-day tasks of the foreign business and to support the beneficiary in a primarily managerial or executive capacity. *See Q Data Consulting, Inc. v. INS*, 293 F.Supp.2d. 25, 29 (D.D.C. 2003) (instructing that when analyzing the beneficiary's claimed employment as a manager or executive, INS may consider evidence of a subordinate staff to determine whether the beneficiary would be relieved from performing non-qualifying job duties). Accordingly, the director's decision with respect to this issue will be withdrawn.

The AAO recognizes that CIS previously approved an L-1A immigrant petition filed by the petitioner on behalf of the beneficiary. It should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

In addition, 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 prior nonimmigrant approval does 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.

Moreover, if the previous nonimmigrant petition was 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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.