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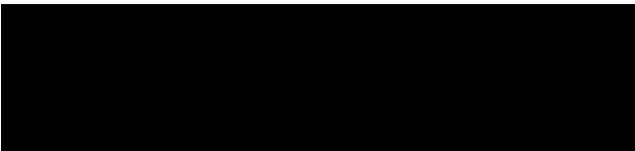
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS2090  
Washington, DC 20529-2090



U.S. Citizenship  
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER  
LIN 07 068 50736

Date: **MAR 27 2009**

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:



**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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John J. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a California corporation, alleges to be a software consulting and development business and to have a qualifying relationship with the beneficiary's claimed former employer in the United Arab Emirates. 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 denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel disputes the director's findings and asserts that the beneficiary will perform primarily qualifying duties.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) must be accompanied by a statement from an authorized official of the "petitioning United States employer" which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The primary issue in this proceeding is whether the petitioner provided sufficient evidence to establish that the beneficiary will be employed 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) 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.

The petitioner does not specify whether the beneficiary will be employed primarily in a managerial capacity or an executive capacity. Due to the lack of clarity, the AAO will assume the petitioner is claiming the beneficiary will be employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner claims to employ four "management personnel," including the beneficiary, in a letter dated December 15, 2006. The petitioner further claims that the "upper management team of four has thereafter further hired three Software Engineers, and one Quality Assurance Engineer to provide services as well as develop the business of the company." The petitioner describes the duties of the beneficiary as follows:

| JOB DUTIES  | % TIME |
|---|--------|
| <p><b>Personnel Management:</b></p> <ul style="list-style-type: none"> <li>● Manage the hiring, terminations, promotions and salary increases for all staff</li> <li>● Supervise and appraise the activities of subordinate staff against measurable objectives, and draft and administer all policies and procedures;</li> <li>● Establish policies to train all employees hired;</li> <li>● Retain ultimate authority to hire and fire employees, promote or provide raises;</li> <li>● Plan, develop and establish corporate policies and objectives for the organization;</li> <li>● Continue to hire qualified managerial personnel;</li> <li>● Continue to hire/consult with professional legal and tax consultants;</li> </ul>             | 25%    |
| <p><b>Overseeing Management Operations:</b></p> <ul style="list-style-type: none"> <li>● Consult with managerial professionals and review their recommendations and reports;</li> <li>● Oversee and direct a market survey to analyze local market conditions, make decisions on where to expand the client base, what services to augment and which client sector to focus on</li> <li>● Continue to develop and update a training program through the Vice-President for management employees and defining the expectations for running the new business; Setting policies and procedures to be followed by management staff;</li> <li>● Continue to set up policies to hire qualified software engineers to provide services in the</li> </ul> | 25%    |

|   |     |
|---|-----|
| ERP, network security and software quality assurance solutions areas; to ensure that they are trained in assigned tasks and are efficiently performing their job;   |     |
| <b>Financial Management:</b> <ul style="list-style-type: none"> <li>● Take ultimate decisions on the budget, invoicing policies and other financial activities of the company;</li> <li>● Continue to set up policies upon monitoring the performance and profitability of the company, to further its financial well-being.</li> </ul>   | 25% |
| <b>Management of Business Development and IT Service Activities:</b> <ul style="list-style-type: none"> <li>● Continue to oversee and supervise a qualified Business Development Manager and IT Services Manager;</li> <li>● Continue to oversee the training of the Business Development Manager to Research technologies, services, and competition and make recommendations to the executive team; Identification and execution of new business opportunities; Prospecting of partners; Crafting creative business relationships.</li> </ul> | 25% |

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary at the top of the organization supervising the "vice president," who, in turn, is portrayed as supervising the managers of IT services and business development. These two claimed subordinate managers are shown to supervise additional subordinates.

Finally, the petitioner submitted profiles of the subordinate workers. All of the workers are described as having earned university degrees.

On August 22, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's job duties, descriptions of the job duties of the beneficiary's proposed subordinates, and copies of Forms W-2 and 1099 for the United States operation.

In response, counsel submitted a letter dated October 1, 2007 in which he claims that the petitioner employs four workers, including the beneficiary. The petitioner submitted a quarterly wage report for the month in which the instant petition was filed, i.e., January 2007. The report indicates that the petitioner employed four people, including the beneficiary, during this time period. These four workers appear to be the beneficiary, the vice president, the manager of business development, and a sales worker. The remaining workers identified on the organizational chart appear to be employees of third party professional service providers.

It is further noted that the wage report for the first quarter of 2007, as well as the report from the second quarter of 2007, indicates that the petitioner employed only one person in March, April, May, and June 2007.

Moreover, the petitioner submitted a more detailed description of the beneficiary's proposed job duties. As this description is in the record, it will not be repeated here verbatim. Generally, the petitioner further describes the beneficiary as reviewing policies, procuring professional services, and overseeing the subordinate "managers."

The petitioner also described the duties of the three claimed subordinate employees: the vice president, the manager of business development, and the subordinate sales worker. As these job descriptions are in the

record, they will not be repeated here. The "vice president" is described as supervising the manager of business development and the provision of services through contracted service providers. The manager of business development is described as performing sales tasks and as supervising a single sales worker.

On March 29, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel argues that the beneficiary will primarily perform qualifying duties in the United States.

Upon review, counsel's assertions are not persuasive.

In examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will be employed in a primarily "managerial" or "executive" capacity. To the contrary, it appears that the beneficiary will devote a majority of her time to performing non-qualifying administrative, operational, and first-line supervisory tasks. The record indicates that the beneficiary will devote most of her time to either performing tasks related to business development, financial matters, client services, and contracting with third parties or to acting as a supervisor of subordinates. As these subordinate workers have not been established to be bona fide employees or, even if actually employed, to be supervisory, managerial, or professional in nature (*see infra*), the petitioner has not established that the beneficiary's supervision of these workers will be a qualifying duty. Furthermore, the petitioner has not established that any of the duties ascribed to her pertaining to business development, financial matters, client services, and contracting with third parties are qualifying managerial or executive duties, especially given that the record is not persuasive in establishing that the beneficiary will be relieved of the need to perform these tasks by subordinates. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; **otherwise meeting the definitions would simply be a matter of reiterating the regulations.** *Id.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). An employee who will "primarily" perform 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 International*, 19 I&N Dec. 593 (Comm. 1988).

As noted above, the petitioner has failed to establish that the subordinate workers are supervisory, managerial, or professional employees. First, the record is not persuasive in establishing that any of these workers is a bona fide employee of the petitioner. As noted above, the petitioner's wage reports indicate that, less than two months after the filing of the instant petition, the petitioner ceased employing all subordinate workers with the exception of the beneficiary. Accordingly, it appears that the beneficiary will need to perform all the non-qualifying tasks inherent to her ascribed duties, and to the operation of the business in general, since the petitioner will not employ any subordinate workers. Absent any explanation for this substantial change in

circumstances, this also calls into question the credibility of the petition. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Second, even if the petition were persuasive in establishing that these subordinate workers are bona fide employees, the record does not establish that these workers will be supervisory or managerial in nature. An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. 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. In this matter, the petitioner has not established that the needs of the United States operation could reasonably compel the employment of a managerial or executive employee to oversee one or more subordinate supervisors. To the contrary, it is more likely than not that the workers are all primarily performing non-qualifying tasks. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9<sup>th</sup> Cir. 2006). Accordingly, it appears that the beneficiary will be, at most, the first-line supervisor of the subordinate employees. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner also failed to establish that the beneficiary will supervise "professionals." In evaluating whether the beneficiary will supervise professional employees, the AAO must evaluate whether the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. In this matter, although the petitioner asserts that several of her claimed subordinates have earned university degrees, the petitioner failed to establish that degrees are necessary to perform the duties of any of these positions. The petitioner also failed to submit evidence that these workers had actually earned these degrees or, if they were earned abroad, that they are equivalent to United States university degrees. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.<sup>1</sup>

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<sup>1</sup> It has also not been established that the beneficiary's claimed "supervision" of various third party service providers constitutes the supervision and control of managerial, supervisory, or professional "employees." The supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. *See* section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. §

Accordingly, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial capacity.<sup>2</sup>

Similarly, the petitioner has failed to establish that the beneficiary will act in an "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. 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 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-day operations of the enterprise. 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. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. As explained above, it appears that the beneficiary will primarily perform the tasks necessary to the function and will, at most, serve as a first-line supervisor of non-professional workers. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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214.2(l)(1)(ii)(B)(2). Although the engagement of contractors could be relevant in some situations in ascertaining whether beneficiaries will likely be relieved of the need to perform certain non-qualifying tasks, the Act is quite clear that only the management of *employees* may be considered a qualifying managerial duty for purposes of this visa classification. Therefore, even if the petitioner could establish that the independent contractors are performing professional duties, the beneficiary's supervision of such contractors would not constitute a qualifying managerial duty.

<sup>2</sup>While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, 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. *See* 8 C.F.R. §§ 8 C.F.R. § 204.5(j)(2) and (5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. To the contrary, it appears that the beneficiary will primarily perform the tasks necessary to the function and will, at most, serve as a first-line supervisor of non-professional workers. Absent a clear and credible breakdown of the time to be spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will be managerial, if any, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

In this matter, the petitioner describes the beneficiary's duties abroad as director of business operations and sales in a letter dated December 15, 2006 as follows:

At the [foreign] enterprise [the beneficiary] supervised a team of 11 professional employees including a Senior Manager, a Manager, Business Development and Sales Executives who in turn oversaw programmers and Network Support Engineers. Her responsibilities included:

- Managing the business development and marketing portfolios of the company;
- Directing, coordinating the work of and training all managers and staff in these departments;
- Setting policies and procedures for operations management as well as the management of/contracting with clientele;
- Training managers to hire competent technical professionals to provide Biometric Solutions, Network Security Services and ERP solutions to clients; [e]nsure that they maintained high performance reviews;
- Retaining the authority to hire and fire all employees supervised.

The petitioner also submitted an organizational chart for the foreign employer. The chart shows the beneficiary directly supervising three sales executives, a senior manager of networks, and a manager of business development. The senior manager of networks is portrayed as supervising, directly or indirectly, ten additional workers.

On August 22, 2007, the director requested additional evidence. The director requested, *inter alia*, more detailed job descriptions for the beneficiary's position abroad and her claimed subordinates.

In response, the petitioner described the beneficiary's duties abroad in a document attached to its response to the Request for Evidence as follows:

| JOB DUTIES  | % TIME            |
|---|-------------------|
| <p><b>Business Development</b></p> <ul style="list-style-type: none"> <li>- <u>Managed the business development and marketing portfolios of the company</u></li> <li>- In consultation with the CEO developed the strategic business plan and directed the management team to develop new businesses and increase existing businesses</li> <li>- Directed the management team to develop new businesses and increase existing businesses</li> <li>- Supervised the Sales team to design integrated solutions that offered the full spectrum of services to customers</li> </ul> | <p><b>35%</b></p> |

|  |                   |
|--|-------------------|
| <p><i>The following day to day tasks were involved in the completion of these duties:</i></p> <ul style="list-style-type: none"> <li>- In consultation with the CEO, created the strategic business plan by forecasting from previous year's budget while factoring in the estimated growth in sales and changes in market conditions such as price movements, salary increases, market growth, targeted market share, planned promotional activities etc. Used excel formulae and regression analysis to arrive at budget figures.</li> <li>- Conducted meetings with immediate subordinates to share annual budget figures as well as annual and quarterly Business Plan.</li> <li>- Directed the Manager of Business Development and Sales Executives to translate quarterly business plan into sales plans and targets to develop new businesses.</li> <li>- Evaluated sales plans submitted by Manager of Business Development and Sales Executives to ensure that integrated solutions of products and services were being offered to customers.</li> <li>- Conducted regular meetings with Senior Manager of Networks, Manager of Business Development and Sales Executives to ensure compliance with quarterly objectives.</li> </ul>  |                   |
| <p><b>Operations Management</b></p> <ul style="list-style-type: none"> <li>- <u>Set policies and procedures for operations management as well as the management of/contracting with clientele</u> <ul style="list-style-type: none"> <li>▶ Formulated operational policies and made recommendations to the CEO</li> </ul> </li> <li>- <u>Directed, coordinated the work of and training all managers and staff in these departments</u> <ul style="list-style-type: none"> <li>▶ Oversaw the marketing, production and delivery of products and services through subordinates.</li> <li>▶ Ensured effective matrix integration of Sales with Finance &amp; Administration and Commercial departments to achieve combined business goals.</li> <li>▶ Trained managers in TQM (Total Quality Management) to ensure they delivered on the company's strategic plan in the most effective and efficient manner.</li> </ul> </li> </ul> <p><i>The following day to day tasks were involved in the completion of these duties:</i></p> <ul style="list-style-type: none"> <li>- <b>Provided top management team with cost effective recommendations to improve overall operations</b></li> <li>- Created key performance indicators to support business objectives (sales force performance, product performance, profitability, etc[.])</li> <li>- Supervised the Manager of Business Development in the creation of contract templates that governed company's contracts with clients.</li> <li>- Conducted monthly reviews with Manager of Finance &amp; Administration, Director Commercial, Senior Manager of Networks and Manager of Business Development to regularly discuss business issues and find solutions through pooled efforts.</li> <li>- Conducted Total Quality Management workshop for managers and ensured</li> </ul> | <p><b>35%</b></p> |

|  |     |
|--|-----|
| managers followed up on Quality Management objectives.   |     |
| <p><b>Personnel Management</b></p> <ul style="list-style-type: none"> <li>- <u>Trained managers to hire competent technical professionals to provide Biometric Solutions, Network Security Services and ERP solutions to clients; [e]nsure that they maintained high performance reviews</u> <ul style="list-style-type: none"> <li>▶ Trained managers in Competency Based Hiring Techniques to ensure the hiring of competent professionals.</li> <li>▶ Conducted annual performance review of all immediate subordinates.</li> </ul> </li> <li>- <u>Retained the authority to hire and fire all employees supervised</u></li> <li>- Supervised and directed the Senior Manager of Network, Manager of Business Development and 3 Sales Executives.</li> </ul> <p>The following day to day tasks were involved in the completion of these duties:</p> <ul style="list-style-type: none"> <li>- Conducted Competency Based Hiring workshop for Senior Manager Network, Manager of Business Development and Manager of Finance and Administration.</li> <li>- Met individually with each direct subordinate to evaluate their performance based on achievement of predefined objectives. Set new objectives for the quarter and year ahead.</li> <li>- Made 'employee training' part of each manager's performance review to ensure that immediate managers provided their subordinates with training required for their job functions.</li> <li>- Approved annual merit increases for immediate subordinates based on individual performance[.]</li> <li>- Chaired staff meetings to discuss achievements and future targets[.]</li> </ul> | 30% |

The petitioner also described the duties of the beneficiary's direct subordinates. The "senior manager of network" is described as having a bachelor's degree, as supervising four software development and programming workers, and as managing the development and production activities of the network department. The "sales executives" are described as performing sales tasks. The "manager of business development" is described as having a bachelor's degree and as performing business development tasks.

Once again, in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary acted primarily in a "managerial" or "executive" capacity. To the contrary, it appears that the beneficiary devoted a majority of her time to performing non-qualifying administrative, operational, and first-line supervisory tasks. For example, the petitioner claims that the beneficiary devoted most of her time to either

performing tasks related to sales, marketing, and business development or acting as a first-line supervisor of the three "sales executives" and the "manager" of business development. As these subordinate workers have not been established to be supervisory, managerial, or professional employees (*see infra*), the petitioner has not established that the beneficiary's supervision of these workers is a qualifying duty. Furthermore, the petitioner has not established that any of the duties ascribed to her pertaining to sales, marketing, and business development are qualifying managerial or executive duties. Once again, specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Although the beneficiary is described as having supervised a network manager who allegedly supervised subordinate workers, the record indicates that this duty consumed a minority of her time and that she principally served as first-line supervisor of the sales and business development workers and performed tasks related to this non-qualifying duty. As noted above, an employee who "primarily" performed the tasks necessary to produce a product or to provide services is not considered to have been "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 International*, 19 I&N Dec. 593.

The petitioner has also failed to establish that the sales executives and the "manager" of business development were supervisory, managerial, or professional employees. As the record does not establish that these workers supervised any subordinates, it does not appear as if these workers were supervisory or managerial in nature. The petitioner also failed to establish that the beneficiary supervised "professionals." Although the petitioner claims that several of her subordinates have earned university degrees, including the network manager, the petitioner failed to establish that degrees were necessary to perform the duties of any of these positions. The petitioner also failed to submit evidence that these workers had actually earned these degrees or, if they were earned abroad, that they are equivalent to United States university degrees. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Accordingly, it appears that the beneficiary was "primarily" a first-line supervisor of non-professional workers and one who performed the tasks necessary to provide a service. Once again, a managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Accordingly, the petitioner has not established that the beneficiary was employed abroad primarily in a managerial capacity.<sup>3</sup>

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<sup>3</sup>While the petitioner has not clearly argued that the beneficiary managed an essential function of the organization, the record nevertheless would not support this position even if taken. Similar to the United States position, it appears that the beneficiary primarily performed the tasks necessary to the function and served as a first-line supervisor of non-professional sales and business development workers. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties were managerial, nor can it deduce whether the beneficiary was primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. As explained above, it appears that the beneficiary primarily performed the tasks necessary to the function and served as a first-line supervisor of non-professional sales and business development workers. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary primarily performed managerial or executive duties, and the petition may not be approved for that reason.

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). Therefore, based on the additional ground of ineligibility as discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

As a final note, USCIS records indicate that the beneficiary has previously been approved for L-1 employment with the instant petitioner. However, with regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS 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 USCIS 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 USCIS spends less time reviewing Form I-129 nonimmigrant 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 USCIS 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 USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant 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 USCIS 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).

In addition, 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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.