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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
SRC 04 148 50323

Office: TEXAS SERVICE CENTER

Date:

DEC 01 2005

IN RE:

Petitioner
Beneficiary

[REDACTED]

PETITION:

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Florida corporation operating as a financial consulting firm. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the beneficiary would not be employed in the United States in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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.

The primary issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or executive.

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

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

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

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

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

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

In support of the petition, the petitioner submitted a letter dated April 26, 2004, which provided the following description of the duties to be performed by the beneficiary under an approved petition:

Among [sic] [the beneficiary]'s responsibilities as [g]eneral [m]anager include managing and supervising the employees for the U.S. [c]ompany. [He] supervises their overall employment activities, and has the authority to hire and fire or recommend those as well as other personnel actions [The beneficiary] supervises by instructing his lower level management of the goals and objectives that should be achieved. Furthermore, [he] functions at a senior level within the organizational hierarchy or with respect to the function managed. [The beneficiary] exercises discretion over the day-to-day operations of the activity or function for which he has authority.

The petitioner also submitted its organizational chart listing the beneficiary as the second from the top of the organization, subordinate only to the company's president. The chart indicates that the beneficiary has a total of five subordinates consisting of an accountant advisor, a legal advisor, a financial advisor, an operations and sales manager, and an accountant. Although quarterly wage statements were submitted, the latest statement accounted for the fourth quarter of 2003 and named only the beneficiary, the financial advisor, and the accountant.

On February 16, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a description of the job duties and educational levels of the beneficiary's subordinates and to explain how their individual educational levels relate to their job duties. The petitioner was also instructed to describe the beneficiary's role as goal setter, policy maker, and decision maker and to justify the beneficiary's position of "purchasing manager" in light of the small staff.

The petitioner responded with a letter dated March 16, 2005 in which counsel provided the following list of the beneficiary's duties/responsibilities:

- Directing the management of the corporation[.]
- Implement[ing] administrative and operational policies and strategies[.]
- Reviewing corporate objectives[.]
- Evaluating and reviewing the services ultimately provided by the company to ensure its [sic] meets proper specifications as per client and the service to ensure conformity with [the] company's standards.
- Directly supervise[ing] department's directors[.]
- Negotiating contracts with banks, others [sic] financial institutions and dealers.
- Manage the overall activities of the company; handle and/or supervise the administration and finances of the company[.]
- Maintaining regular communication with the foreign parent company[.]
- Hiring and firing personnel[.]
- Assign to the financial director how [to] proceed in each case. . . .
- Review[ing] and evaluat[ing] monthly and weekly reports presented by the accountant.
- Do the final approval to grant a [sic] financing[.]
- Present three annual established reports and the extraordinary ones that the president or the foreign parent company requests.

The letter further explained that the beneficiary receives only general supervision from the president of the company and the board of directors of the foreign company. The petitioner reiterated that the beneficiary has discretion over the company policies, business objectives, personnel issues, and all decision-making in general. In regard to the director's reference of the purchasing manager position, the petitioner properly stated that such a position was not named in the chart. Additionally, though not pointed out in the petitioner's response, the petitioner has maintained that the beneficiary currently assumes and would continue to assume the position of general manager.

The petitioner also submitted another organizational chart, which contained an additional position for a data entry employee as another of the beneficiary's direct subordinates. There is no indication as to the hiring date of this employee, or evidence that this individual was employed when the petition was filed in April of 2004. The petitioner also did not name any employees in the sales department even though the prior organizational chart indicated that [REDACTED] worked in that department. Although the petitioner added an entry for independent contractors at the bottom of the chart, this entry did not appear in the chart initially submitted with the petition.

On April 12, 2005, the director denied the petition concluding that the record lacked evidence that the beneficiary would be employed in a primarily managerial or executive position. Although the director referred to the petitioner's 2003 wage statements, which are irrelevant in light of the 2004 filing date of the petition, it is noted that the petitioner failed to submit any of its more recent quarterly wage statements to determine who was part of its staff at or near the time the petition was filed.

On appeal, counsel asserts that the director erred in placing an undue burden on the petitioner to establish that the beneficiary would be employed in a managerial *and* an executive capacity. However, a thorough review of the director's decision suggests that counsel's assertion is without merit, as the director used the conjunction "or" indicating that the petitioner has the option of establishing that the beneficiary meets the statutory definition of either managerial capacity or executive capacity. Counsel's argument is further undermined by his own statement submitted in response to the RFE. On the second page of the response, prior to the list of the beneficiary's duties, counsel stated, "The beneficiary acts in a managerial and executive capacity due to his duties as [g]eneral [m]anager" It was not the director that placed the undue burden of establishing that the beneficiary meets the criteria of both statutory definitions; rather, it was counsel himself making the unnecessary suggestion. Although counsel initially stated in the support letter that the petitioner seeks to employ the beneficiary as a multinational manager, he contradicted that prior statement with the latter one made in response to the RFE, thereby causing the AAO to question whether the petitioner desires to employ the beneficiary in a managerial or executive capacity.

Counsel perpetuates the confusion by restating that the beneficiary's duties fit the definitions of managerial and executive capacity. More specifically, counsel states that the beneficiary manages an essential function and supervises the work of professional employees.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and

establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner's description of the beneficiary's position is replete with general statements regarding overall job responsibilities without sufficient detail as to the beneficiary's specific daily job duties. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Stating that the beneficiary directs the management of the company, reviews corporate objectives, implements policies, and hires and fires staff does not adequately describe the duties actually performed in carrying out these general responsibilities.

Furthermore, while counsel claims that the beneficiary supervises professional employees, the petitioner has submitted little evidence to support this claim. While the petitioner submitted its 2003 quarterly wage reports, it provided no evidence as to the salaries it paid and the employees who received those salaries near the time the petition was filed. 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)). While the director may have erred in determining that two out of three of the petitioner's employees during the fourth quarter of 2003 were employed on a part-time basis, the fact remains that the petitioner submitted no evidence to establish whom it employed during the relevant time period. Without this information, the AAO cannot make an affirmative determination as to the beneficiary's subordinates at or near the time the petition was filed. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). While the petitioner submitted its first quarterly wage report for 2005, this report does not reveal the employees working for the petitioner during the relevant time period. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the evidence furnished, it cannot be found that the beneficiary would have been employed primarily in a qualifying managerial or executive capacity at the time the petition was filed. For this reason, the petition may not be approved.

As a final note, counsel makes a brief reference to the petitioner's current approved L-1 employment of the beneficiary. 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 CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences

between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing 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 CIS approves some petitions in error).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 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 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).

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

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

ORDER: The appeal is dismissed.