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FILE: [REDACTED]  
WAC 02 245 54960

OFFICE: CALIFORNIA SERVICE CENTER Date: JUN 07 2005

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a California corporation claiming to operate as a freight forwarding business. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity.

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 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 his letter dated July 23, 2002, counsel for the petitioner submitted the following description of the proposed duties to be performed by the beneficiary:

[The beneficiary] is charged with continuing to lead and further establishing the company to increase services in the United States, including expanding to a future Dallas office in conjunction with the parent companies [sic] efforts to expand . . . . [The beneficiary] has unfettered discretion in setting goals and policies for the U.S. company. He reports to the Board of Directors of the parent company in Taiwan. He has final authority on all matters of business management, financial affairs, daily business, human resources and strategic decisions. He coordinates between the parent company in Taiwan and the U.S. company. He meets with clients, negotiates contracts and oversees financial transactions. It is the goal of the company to grow its business and hire additional U.S. workers. The company currently

provides work and benefits the U.S. economy by paying outside contractors for forwarding services.

After assessing the information provided, the director issued requests for additional evidence on three separate occasions in an attempt to illicit further information about the beneficiary's proposed job duties and the petitioner's organizational structure. The first request was issued on October 22, 2002, the second request was issued on March 7, 2003, and the third request was issued on August 9, 2003.

The petitioner responded to all three requests, submitting a copy of its organizational charts and various job descriptions for the beneficiary. As the job descriptions were incorporated, verbatim, in the director's denial, they need not be duplicated in the instant decision.

On February 26, 2004, the director denied the petition concluding that the beneficiary's job descriptions do not adequately establish that the beneficiary would primarily perform qualifying managerial or executive duties.

On appeal, counsel states that the director's use of several different standards resulted in the petitioner's inability to understand what portion of beneficiary's duties must be qualifying. While the AAO acknowledges the director's use of the terms "substantially," "primarily," and "majority" to quantify the portion of time the beneficiary must devote to qualifying tasks, counsel's assertion that any meaningful confusion resulted from the director's use of different words to refer to the standard of proof is without merit. Even if a valid question was to have arisen as to the actual standard of proof, it could have easily been answered by relying on the statutory definition, which explicitly requires that a beneficiary must "primarily" perform duties of a qualifying nature. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). Although this term is not specifically defined by statute, the *Webster's II New Collegiate Dictionary*, 877 (Houghton Mifflin 2001), defines "primarily" as "principally" or "chiefly." The most contextually relevant definition for the word "majority" is "[a] number more than half of the total number of a given group." *Id.* at 660. No matter how similar the two terms may appear, a thorough review of their actual dictionary definitions indicates that even if a majority of one's duties are of a qualifying nature, that does not necessarily imply that the person primarily performs qualifying duties. A significantly larger amount of the overall duties must be of a qualifying nature in order to establish that one's duties are *primarily* qualifying. Thus, counsel is incorrect in asserting that the "majority" standard applies in the case of an I-140 petition.

Counsel also asserts that the Attorney General has no powers to "revoke visa petitions once individuals have reached the United States." Whether counsel's assertion is correct is entirely irrelevant in the instant case, as a revocation has not taken place. Rather, the instant matter is one where a petition was simply denied. In order to have a revocation, a petition must at some point have been granted. That is not the case in this matter where the only approvals granted were in regard to the petitioner's L-1A petitions. While the petitioner's latest L-1A petition to extend the beneficiary's period of employment had been denied, this is not the same as a revocation. Therefore, any statutes or regulations that apply to revocations are irrelevant in this proceeding; and any of counsel's arguments that assume that a revocation has taken place will not be addressed.

Counsel goes on to state that denial of the petition is equivalent to "readjudicating the issue previously decided under an L-1A application and extension." Counsel's point, however, is without merit. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. 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).

Furthermore, 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).

Next, counsel goes through the four-prong definition of "executive capacity" and provides examples of the beneficiary's discretionary authority over all aspects of the company. While the definition clearly stresses the importance for an I-140 beneficiary to have decision-making powers within his employment capacity, this is not the sole factor used to determine whether a beneficiary is employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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).

In the instant case, the beneficiary's job descriptions do not adequately establish that the beneficiary primarily performs qualifying duties on a day-to-day basis. Specifically, while the petitioner claimed that 20-25% of the beneficiary's time is spent preparing reports and business documentation, no explanation was provided as to the types of business reports and documents the beneficiary prepares and how he obtains the information upon which the reports are based. The petitioner also indicated that 20% of the beneficiary's time is spent communicating with and reviewing the work of the vice president "to ensure the financial status and the efficiency of the parent company." However, the petitioner did not provide any details as to the contents of the alleged communications, nor did the petitioner explain why it takes personnel in the United States to resolve the foreign company's issues. The petitioner further stated that 20-25% of the beneficiary's time is spent meeting with personnel in the United States to make sure shipping arrangements are properly carried out and work is assigned to employees. However, the record lacks sufficient evidence that any of the personnel can be deemed supervisory, managerial, or professional. As the beneficiary spends at least another 20% of his time meeting with prospective clients, a task that cannot be deemed qualifying, it can be concluded that the beneficiary spends at least 40-45% of his time on non-qualifying tasks. The petitioner further specified that the beneficiary meets with vendors and assists the operations manager in resolving any problems that may arise. Based on this breakdown of duties, the AAO cannot affirmatively conclude that the beneficiary primarily performs duties of a qualifying nature.

The AAO's determination is further validated when the breakdown of duties is reviewed in light of the petitioner's personnel structure, which indicates that the petitioner's work force consists of three subordinate employees, one of whom is located in New York and another who, based on the claimed quarterly salary of \$180, is apparently a part-time employee. Therefore, based on the information provided, the beneficiary is

left with only one full-time employee who works in the same general locale as the beneficiary himself. Counsel strongly asserts that the director placed undue emphasis on the size of the petitioner's personnel and used this factor to discriminate against the petitioner. This allegation, however, is unfounded. While the director may not use the petitioner's personnel size as the sole basis for determining when a beneficiary can be deemed a managerial or executive, this factor can and should be considered in an effort to ascertain who carries out the petitioner's essential operational tasks. In the instant case, the petitioner appears to have contracted the services of outside companies to carry out the actual shipping-related duties. However, the petitioner has not provided sufficient evidence to show who carries out the business-related tasks, including the solicitation of clients, the marketing of the petitioner's services, and the handling of the customer service relations. Based on the petitioner's lack of a sufficient support staff, the AAO can conclude by inference that the beneficiary's services are needed to assist in carrying out these non-qualifying, though essential tasks. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant matter, the petitioner has not established that the beneficiary would primarily perform duties within a managerial or executive capacity. Accordingly, this petition cannot be approved.

Beyond the decision of the director, the various discrepancies found in the petitioner's tax documents for the year 2000 bring into question the credibility of the petitioner's overall claims. Namely, the petitioner's 2000 tax return, Form 1120, shows that the beneficiary was paid \$42,000 that year. However, the beneficiary's individual return, Form 1040, and his W-2 wage and tax statement for 2000 show that he was paid \$36,000 that year. Further, while the petitioner's Form 1120 for the year 2000 tax return shows that other employees were paid \$52,688 that year, the remaining W-2's issued by the petitioner in the year 2000 show that a total of \$30,778.75 was paid in employee salaries. Finally, the 2000 tax return shows that the total of wages, salaries, and officer compensation was \$94,688. However, this does not match the petitioner's 2000 W-3 and all the issued W-2's for 2000, which show a total of \$66,778.75. 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). Furthermore, 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. *Id.*

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 petitioner's questionable credibility, as discussed in the above paragraph, this petition cannot be approved.

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.