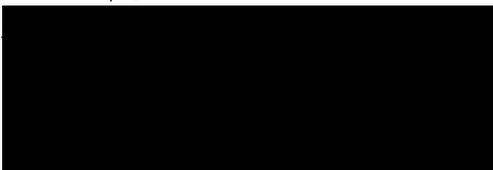


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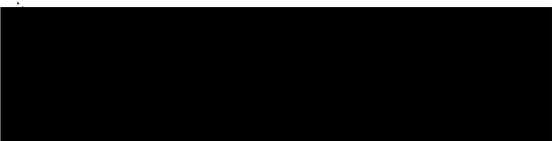
OFFICE: VERMONT SERVICE CENTER

Date: **AUG 02 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

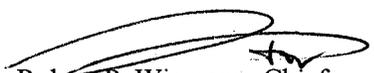
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief
Administrative Appeals Office

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

The petitioner is a Delaware corporation engaged in the provision of business process outsourcing services. It seeks to employ the beneficiary as its director of business development. 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 establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits additional documentation addressing the director's decision.

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 employed in a 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.

In support of the Form I-140, the petitioner provided a letter dated September 28, 2005, which contained the following description of the beneficiary's proposed job responsibilities:

- Developing business plans to achieve financial goals for the [b]anking and [f]inancial [s]ervice segment for [the petitioner][.]
- Leading and managing a team of responsible for designing, recommending and implementing the business solutions The specific job functions of this team includes [sic] providing market research used in solution design, research [the petitioner]'s proprietary knowledge bank to support [the] most optimal business solution, liaison with international teams in the U[.]K[.] and India to seek appropriate answers to respond to client's specific queries on time.

- Review and evaluate the solutions designed by subordinates to ensure solutions meet clients' requirements[.]
- Exercise hiring and firing authority over subordinates including personnel evaluation, training & development and career planning.
- Exercise discretion over day-to-day decisions regarding expenditures to implement sales initiatives including [the] development of [a] budget plan for sales operations (responsible for budget expense of \$100,000)[.]
- Confers directly with the CFOs and [c]hief [s]trategy [o]fficers of clients to better understand their organization's corporate business policies and procedures and to explain who [the petitioner]'s service delivery platform will make their current business operations more efficient[.]
- Oversee client communications and training on implementation of [the petitioner]'s [p]roprietary tools and unique methodologies . . . [.]
- Report and confer with the [c]hief [m]arketing [o]fficer, (CMO), [c]hief [e]xecutive [o]fficer (CEO) and [the] [p]resident of the company on developing business priorities and make policy recommendations on client solutions, career planning, promotions and staffing level requirements for the team under this position.
- Lead the Service Level Agreement (SLA) negotiations with clients using service delivery expertise gained while employed at the Indian subsidiary of [the petitioner]—a must for this position.
- Supervise the responses by the team for the [r]equests for [p]roposals (RFPs) from prospective clients to ensure a deep understanding of [the] company's proprietary tools . . . in order to make appropriate recommendations to clients[.]

The petitioner stated that the beneficiary's subordinates in the U.S. include a business analyst and a manager of sales and business development. The petitioner further stated that the beneficiary continues to supervise assistant managers at the overseas subsidiary.

On June 24, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the petitioner's staffing levels and management structure identifying the employees by name and position title. The petitioner was also instructed to provide a description of the duties performed by each member of its staff.

In response, the petitioner provided its organizational chart, which listed the beneficiary's position as directly subordinate to the chief marketing officer. The chart reiterates the prior claim that the beneficiary's subordinates in the United States include a sales manager and an assistant manager/business analyst and that his immediate subordinate in India is a sales manager who supervises two assistant sales managers. The

petitioner provided the following supplemental list of the beneficiary's job responsibilities in the United States:

- Responsible for developing and revising sales and business development strategies and objectives based on changing market conditions to achieve financial targets for revenue growth and profitability[.]
- Present revenue status on a quarter[ly] basis at meetings with [the] leadership team[.]
- Develop and implement company sales growth strategies[.]
- Oversee the organization and implementation of branding events[.]
- Responsible for development of training programs to educate prospects with company proprietary tools[.]
- Represent [the petitioner] at industry seminars and relevant trade shows[.]
- Manage team communications [sic] to ensure team goals and objectives are understood and met by direct report support teams comprising 2 team members in the U.S. and 3 team members in India[.]
- Conduct yearly personnel evaluation sessions for subordinates and provide timely feedback for progressive career growth for subordinates[.]
- Manage client relationship, ensuring successful attainment and delivery of goals and business objectives communicated to clients[.]
- Manage client communications of all emergency situations and oversee internal procedures to raise issues with appropriate authorities with [the petitioning organization.]
- Responsible for account management, overseeing the timely submission, tracking and receipt of invoices/payments[.]

On September 18, 2005, the director denied the petition based on the conclusion that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. More specifically, the director noted that the beneficiary's federal tax documentation suggests that the beneficiary has been employed by someone other than the U.S. petitioner contrary to the claims made in support of the Form I-140.

On appeal, counsel explains that the petitioner has outsourced the payroll tasks to another company and that the beneficiary's tax documentation contains the tax identification number of the company that provides the petitioner with those services. In support of this claim, the petitioner has provided the service agreement it signed with the company responsible for the provision of various administrative services including payroll. Thus, the petitioner has submitted independent objective evidence to resolve the perceived inconsistency. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director further noted that the documentation submitted suggests that the beneficiary has been employed as a salesman rather than in the capacity of a manager or executive. However, the director's conclusion places undue emphasis on the beneficiary's salary and his itemized tax deductions for various sales related expenses. Contrary to the director's reasoning, an employee's salary cannot be used to determine whether the beneficiary's position entails the performance of qualifying or non-qualifying tasks. There is neither regulation nor case law to support the director's conclusion on such a basis. Furthermore, there is little information in any of the tax documentation submitted to contradict the petitioner's claim that the beneficiary has been or would be employed in an executive position.¹ As properly pointed out by counsel on appeal, the mere indication that the beneficiary is employed in a sales-related occupation does not lend itself to the conclusion that the beneficiary would perform non-qualifying tasks. Such a conclusion can only be reached by analyzing the beneficiary's proposed job duties, a key element in determining whether the beneficiary would be primarily employed in a qualifying managerial or executive capacity. See 8 C.F.R. § 204.5(j)(5). Thus, while the AAO concurs with the director's ultimate conclusion, it cannot support the director's reasoning, which appears to lack the crucial analysis of the proposed job duties.

After conducting such an analysis, the AAO finds that the description provided by the petitioner is insufficient to draw an accurate conclusion as to what the beneficiary would actually do on a daily basis. While the petitioner illustrates the beneficiary's position as one involving a high degree of discretionary authority and management of professional and managerial employees, the description is limited to a broad range of the beneficiary's general job responsibilities with little indication as to the beneficiary's actual daily tasks. 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. Savà*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Stating that the beneficiary would develop and implement sales strategies, maintain responsibility over developing training tools, and manage team communications is insufficient; these responsibilities can only be defined if they are accompanied by the actual job duties that are required for their execution. In the instant matter, the petitioner did not provide the necessary information. Therefore, while the AAO cannot affirmatively conclude that the beneficiary would primarily perform non-qualifying tasks, the record lacks sufficient information to enable an affirmative conclusion in favor of the petitioner. As such, this petition cannot be approved.

Furthermore, though not previously addressed in the director's decision, the record shows several additional factors that render the petitioner ineligible for the immigration benefit sought in this matter.

First, the petitioner has not established that the beneficiary was employed abroad in a qualifying capacity. In order to meet the requirements discussed in 8 C.F.R. § 204.5(j)(3)(i)(B), the petitioner must establish that the beneficiary was employed abroad for at least one out of three years prior to entering the United States. In the instant matter, the AAO is unable to determine whether the beneficiary was primarily performing qualifying tasks in light of the broad terminology the petitioner used in describing the beneficiary's foreign position.

¹ On the third page of the denial, the director suggests that the petitioner claims that the beneficiary would be employed in the position of vice president. This statement is incorrect and does not reflect the documentation provided by the petitioner. The record shows that the petitioner has referred to the beneficiary's position title as assistant vice president of sales and business development and as director of business development. There is no documentation referring to the beneficiary's position as vice president.

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. Moreover, the record lacks documentary evidence to establish the beneficiary's employment with the claimed foreign subsidiary. 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)).

Second, the record lacks sufficient evidence of a qualifying relationship between the U.S. petitioner and its claimed foreign subsidiary. See 8 C.F.R. § 204.5(j)(3)(i)(C). Although the petitioner has submitted stock certificate nos. 4, 5, and 9, which indicate that the U.S. petitioner holds a majority of the foreign entity's shares, the record does not indicate what happened to stock certificate nos. 1-3 and 6-8. Without sufficient information regarding the missing stock certificates, the AAO cannot rule out the possibility that the foreign entity issued additional shares and that the U.S. petitioner is not the majority owner as claimed.

Moreover, the record lacks any evidence that the petitioner actually paid for its ownership of the foreign entity's stock. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

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 grounds of ineligibility discussed above, this petition cannot be approved.

As a final note, service records show the petitioner's previously 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, 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 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).

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.

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.