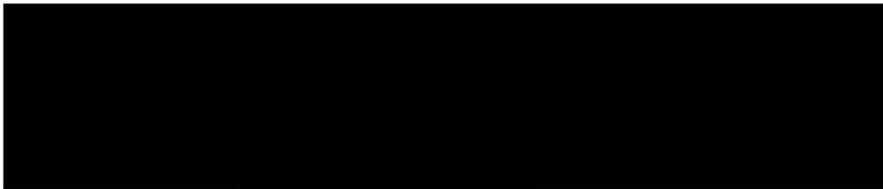


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U.S. Citizenship
and Immigration
Services

BA



FILE: [Redacted]
WAC 05 135 51267

Office: CALIFORNIA SERVICE CENTER

Date: DEC 06 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, Chief
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 Delaware corporation engaged in the business of distributing batteries. According to Part 6, item 1 of the petitioner's Form I-140, the petitioner seeks to employ the beneficiary as its operations 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 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 primarily perform duties of a qualifying managerial or executive nature as an employee of the petitioning organization.

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 submitted an undated letter signed by its vice president/general counsel. The letter contained the following description of the beneficiary's proposed position with the petitioning entity in the United States:

The official title for [the beneficiary's] position in the United States is [o]perations [g]eneral [m]anager. In this position, he will perform the same essential functions he performed for [the foreign entity] as [r]egional [m]anager (the positions are functional equivalents), although the distributorships and region for which he is responsible will now be located in the western United States, rather than western Canada. [The beneficiary] will continue to have significant management responsibilities, including overseeing management of four to six of the [c]ompany's distributorships, which entails supervising employees (including lower level managers, i.e., distributorship managers and supervisors) and warehouses, training managers and supervisors, overseeing and managing operational details of the

distributorships, and implementing company policies and goals, including company goals with respect to profitability and sales. In this managerial capacity[,] [the beneficiary] will be generally responsible for the management and performance of the [c]ompany's distributorships in the western United States. [The beneficiary] as [o]perations [g]eneral [m]anager will operate at a high level within the organizational hierarchy of [the petitioner] with respect to the functions he manages. [He] will apply his managerial experience and knowledge in the United States and will be working in a managerial capacity.

In a separate submission, titled "Job Description," the petitioner indicated that the beneficiary's direct subordinate would be the vice president of operations. The petitioner also stated that the beneficiary would oversee four to six of the company-owned distributorships, which would entail overseeing the work of four to six managers who would actually manage those distributorships. The petitioner indicated that 90% of the beneficiary's time would be devoted to overseeing the four to six managers and their management of the distributorships.

On August 10, 2005, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the beneficiary's employment capacity in the proposed position in the United States: 1) the petitioner's organizational chart illustrating its managerial hierarchy and staffing levels and clearly identifying the beneficiary's subordinates by name and position title; and 2) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty in order to indicate how much of the beneficiary's time would be devoted to each of the listed duties.

In response, the petitioner provided the requested information and a cover letter from counsel dated October 31, 2005, which introduced and explained the information that followed. Counsel stated that the beneficiary would occupy the senior managerial position within his region, which includes two areas in Canada and one in the San Francisco area. Two organizational charts were submitted. The first chart (exhibit A) illustrates the general overview of the U.S. entity, its affiliate, and the parent organization. The chart shows the president and CEO as head of the overall organization and the vice president as the second in command. The vice president oversees one regional manager, one director, two regional supervisors, a director of human resources and marketing, and a director of sales. Each of those six positions has the responsibility of overseeing either a region or at least one subordinate employee. Accordingly, the director, whose superior is the vice president, oversees both a region and an employee. The beneficiary, who is identified as a regional manager, is the director's subordinate.

In the second organizational chart, the petitioner provided a more detailed illustration of the beneficiary's position. The chart identified the beneficiary's position as that of regional manager. His three subordinates include three managers, two representing regions in British Columbia, and one in San Francisco. The beneficiary is identified as the manager heading the business in San Francisco. Thus, based on the second organizational chart, the beneficiary occupies two distinct positions, a regional managerial position and a local managerial position. While the beneficiary apparently oversees the work of two managerial employees, he himself also performs the work of a managerial employee, which includes directly overseeing the work performed by the employees in the United States. The staff within the petitioning entity includes three warehouse workers, four route sales managers, an office associate, a sales associate, and a hot shot driver. The chart does not indicate that any of those subordinate employees are supervised by someone other than the beneficiary in his capacity as head of the San Francisco business.

In a separate submission, the petitioner provided the following percentage breakdown of the beneficiary's duties and responsibilities:

1. Working with British Columbia and Costal [sic] British Columbia 15%
 - a. Work with managers and supervise overall operations
 - b. Monitor sales, expenses, inventory, etc.
 - c. Work to implement company policies

2. Home office report 15%
 - a. Timesheets, [w]eekly [t]allies, [p]etty [c]ash [r]eimbursements, etc.
 - b. Special [p]rojects
 - c. General reporting and coordination with home office concerning performance of [the] [r]egion

3. Directing and [t]raining [e]mployees 15%
 - a. Team meetings
 - b. Individual training
 - c. Personnel issues and management

4. A/R [c]ollection 10%
 - a. Reviewing A/R
 - b. Making A/R calls
 - c. **Monitor A/R aging and collections**
 - d. Work with managers and employees on A/R issues

5. Inventory [c]ontrol 15%
 - a. Monitor and work with managers to control inventory
 - b. Monitor the inventory in the warehouse
 - c. Monitor truck loads and unloads
 - d. Processing the by-product

6. Dealer [r]elations 20%
 - a. Visiting dealers
 - b. Answering dealer calls
 - c. **Fielding dealer questions and complaints**

7. Reviewing [r]eports 10%
 - a. Ticket register reviews
 - b. Non-serviced dealers reports
 - c. Unit enclosures

On December 8, 2005, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director referred to portions of the beneficiary's job description provided in response to the RFE and

concluded that the beneficiary would primarily perform non-qualifying tasks. The director further determined that the position description suggests 85% of the beneficiary's duties entails the supervision of the non-supervisory, non-managerial, and non-professional employees in the San Francisco region.

On appeal, counsel disputes the director's conclusion and underlying analysis, particularly the above determination regarding the allotment of 85% of the beneficiary's time to the supervision of non-supervisory, non-managerial, and non-professional employees. Counsel deems the director's observation erroneous and asserts that the duty listed in No. 1 of the above description refers only to the amount of time the beneficiary would spend actually communicating with the British Columbia managers, not the amount of time that would be spent managing those regions.

Counsel's assertion regarding the breakdown of the beneficiary's proposed duties, however, is confusing and is a direct contradiction to the structure illustrated in the second organizational chart discussed above. Namely, the chart clearly suggests that the two regions in British Columbia would actually be managed by two individuals other than the beneficiary. With respect to either business location, the beneficiary's task, as indicated by the chart, would be to oversee the work of the managers who are situated at the given locations and who directly oversee their respective list of subordinates, all of whom are employees of the foreign entity. According to the percentage breakdown recreated above, the physical communication with the British Columbia managers is the way in which the beneficiary oversees the work of the two managerial employees. Thus, the director's interpretation of the evidence submitted is logical and corresponds with the information provided by the petitioner.

Furthermore, the AAO notes that the second organizational chart clearly shows that the beneficiary would occupy two separate positions. While the director did not expressly make this observation, he properly noted that the beneficiary's position as manager of the San Francisco business operation would require the direct supervision of employees who, regardless of their position titles, do not appear to be performing in a supervisory, managerial, or professional capacity. *See* section 101(a)(44)(A)(ii) of the Act. The AAO acknowledges that the beneficiary's duties need not be *entirely* within a managerial or executive capacity, so long as they are *primarily* managerial or executive. Where, as in the instant matter, the record strongly suggests that the beneficiary has two separate positions within the petitioning entity and one of those positions requires the performance of non-qualifying tasks, the petitioner must delineate a list of the beneficiary's specific duties and clearly indicate which duties the beneficiary would perform in his position as regional manager and which duties he would perform as manager of the San Francisco operation. In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

In the instant matter, the petitioner provided a general list of duties, a number of which are non-qualifying, and failed to clearly identify which duties the beneficiary would perform in his capacity as regional manager and which he would perform as manager of the San Francisco operation. The only duties that clearly pertain to the beneficiary's position as regional manager are those enumerated in No. 1 of the petitioner's list. Thus, based on the information provided, the director could not determine that any other duties, aside from those mentioned in No. 1 above, directly pertain to the beneficiary's position as regional manager. Moreover, in the petitioner's initial submissions and in the Form I-140 itself, the petitioner clearly stated that the beneficiary would occupy the position of operations general manager. Neither the position title nor the preliminary job description submitted in support of the Form I-140 even remotely suggested that the beneficiary would occupy more than one position with the petitioner's organizational hierarchy. Rather, the additional

information suggesting that the beneficiary would occupy two positions was provided in the petitioner's response to the RFE.

However, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the RFE did not clarify or provide more specificity to the original duties of the position. Rather, the petitioner added new generic duties to describe the beneficiary's role and provided an organizational chart which suggests that the beneficiary has two positions within the petitioner's organization, each located at a different managerial level within the organizational hierarchy. The petitioner's new job description does not clarify which job duties apply to the beneficiary's position as regional manager and which apply to his position as manager of the San Francisco area office. For example, the petitioner stated that 15% of the beneficiary's duties would involve directing and training employees, 10% would involve monitoring accounts receivable, and 15% would involve inventory control. However, the petitioner did not account for the beneficiary's two distinct positions within the petitioner's organizational hierarchy. While the petitioner's generalized description of job duties may fit either position, the AAO finds it unlikely that the beneficiary's position as regional manager involves the same set of duties as those performed in his position as manager, particularly since the latter clearly involves supervision over the very same managerial position the beneficiary occupies within the scheme of the San Francisco office.

Despite the likelihood that some of the beneficiary's proposed duties would be within a qualifying managerial capacity, the petitioner has failed to provide sufficient evidence and information to establish that the beneficiary would primarily perform duties of a qualifying nature. Additionally, the beneficiary's duties that would involve inventory control and dealer relations cannot be deemed qualifying. Overall, the petitioner's failure to distinguish between the beneficiary's two positions precludes the AAO from determining which specific duties correspond with each of the beneficiary's two positions and, consequently, prevents an ultimate conclusion as to the percentage of time spent performing qualifying duties.

Additionally, though not expressly addressed by the director, the record indicates that an additional ground for ineligibility may be present in this matter. Namely, the petitioner has indicated that the beneficiary's duties within the U.S. organization are similar to those previously performed during his employment abroad. Accordingly, the same reasoning can be used to determine that the beneficiary was not employed abroad in a qualifying managerial or executive capacity as required by 8 C.F.R. § 204.5(j)(3)(i)(B).

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 discussed above, this petition cannot be approved.

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, counsel refers to the petitioner's current 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, 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. 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).

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.