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FILE: [REDACTED]
WAC 05 047 50950

Office: CALIFORNIA SERVICE CENTER Date: JAN 24 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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Arizona in July 2002. It claims to operate a motel in Payson, Arizona. It seeks to employ the beneficiary as its president and chief executive officer. 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 had not established: (1) that it had a qualifying relationship with the beneficiary's foreign employer; or (2) that the beneficiary would be employed in a managerial or executive capacity with the petitioner.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) committed serious error in both law and fact in its denial of the petition. Counsel submits a brief and documents in support of the appeal.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner in this matter claims that: Rangoli Tex-Style Private Limited, the beneficiary's foreign employer, owns 5,100 shares of the 10,000 shares issued in the U.S. company; the beneficiary owns 2,450 shares of the 10,000 shares issued, and a third individual owns 2,450 shares of the 10,000 shares issued. The petitioner submitted stock certificates and evidence of payment for the stock to substantiate the foreign entity's 51 percent ownership. The record also contains the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for 2003 and 2004. Both IRS Forms 1120 show on Schedule E that the beneficiary owns 100 percent of the petitioner.

On July 7, 2005, the director determined that the inconsistent evidence regarding the petitioner's ownership cast doubt on the petitioner's qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel submits a statement from the petitioner's accountant acknowledging a mistake in listing the beneficiary as the petitioner's 100 percent owner on the petitioner's IRS Forms 1120. Counsel also submits copies of amended IRS Forms 1120 for 2003 and 2004 correcting the error.

Although the petitioner has not provided evidence that it filed the amended IRS Forms 1120X, the AAO considers the correction of this inconsistency sufficient to confirm the petitioner's qualifying relationship with the foreign entity. The director's decision will be withdrawn as it relates to the issue of the petitioner's qualifying relationship with the beneficiary's foreign employer.

The second issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary "Direct[s] managers to oversee managerial duties of motel chain. Plan and oversee the managerial direction of the franchise company and report to Directors in India." The Form I-140 also indicated that the petitioner employed five people. In a November 2, 2004 letter appended to the petition, the petitioner stated that the beneficiary "will continue to be responsible for the continued success of the USA company, which includes the supervision of other managers and staff within the business."

The petitioner also provided a sales agreement dated February 9, 2003 wherein the petitioner agreed to purchase a 51 percent interest in a separate corporation allegedly 100 percent owned [REDACTED] and [REDACTED]. The separate corporation purportedly owned and operated the Rim Country Inn, a Motel 6 licensee. The petitioner submitted an undated document identified as a "Revised Business & Feasibility Plan" and signed by the beneficiary on behalf of the petitioner. The business plan listed the beneficiary as the company's president and chief executive officer and stated that the beneficiary "supervises two professionals, [REDACTED] both of whom are executive managers of this Company and both of whom hold University Master's Degrees. They supervise the day[-]to[-]day operations, sales, and staffing needs, as well as the lower level department staff."

The petitioner's organizational chart depicted the beneficiary in the position of president, [REDACTED] as the office manager, and [REDACTED] the operations manager. The organizational chart showed that both the officer manager and the operations manager reported to the beneficiary and that one employee for the front desk and one housekeeper reported to the operations manager.

On February 3, 2005, the director requested a more detailed description of the beneficiary's duties including what the beneficiary would do in the day-to-day execution of his position, the percentage of time the beneficiary would spend in each of the listed duties, a list of goals and policies established by the beneficiary in the previous six months, and a list of discretionary decisions the beneficiary had exercised over the previous six months. The director also requested the petitioner's organizational chart including the names of all executives, managers, supervisors, and number of employees within each department or subdivision and brief descriptions of the job duties, educational levels, dates of employment, and annual salaries for each employee under the beneficiary's supervision. The director further requested copies of the state quarterly wage report for the last four quarters.

In an April 4, 2005 response, counsel for the petitioner submitted a one page document titled "duties in the U.S." The director recited the one-page description in his decision; thus it will not be repeated in its entirety here. Briefly, the petitioner indicated that the "Detained [sic] descriptions of his [the beneficiary's] duties with the USA Company are: the day[-]to[-]day general management of the organization. He establishes the company policies and goals of the organization; he exercises wide discretionary decision[-]making over the short and long term business matters of the organization for which he receives very little general supervision

from the company Board of Directors and stockholders." The petitioner also refers to the beneficiary's responsibilities associated with keeping the petitioner's business operations open during difficult economic times, attracting business visitors and tourists, and overseeing the sales and marketing managers. The petitioner stated that the beneficiary devoted his time as follows:

- (1) 50% of his time establishing goals and policies for the advancement of revenue growth and expansion of the physical assets of the company businesses;
- (2) 25% of his time is spent communicating with the other directors, its shareholders, company CPA and legal counsel of the petitioner company about company business and revenues;
- (3) 25% of his time is devoted to discretionary[-]decision making in response to questions from subordinate managers and out side [sic] business inquiries.

The petitioner also indicated that the beneficiary had established goals: to produce more revenue, upgrade the company computer reservation and telephone systems, for more training and incentives for company reservation clerks, and to provide meeting rooms, refreshments, and Internet access for business customers. The petitioner also indicated that the beneficiary's specific day-to-day duties included reviewing company revenue receipts and employment, operational costs, customer count and percentage of return business, reservations lists and room availability counts, meetings with the sales, marketing, and office/departmental manager, planning for future conventions, meetings with the directors regarding financial obligations, reviewing weekly plans, meeting with department managers as needed, and with the company accountant and legal counsel once a month to discuss various matters.

The petitioner provided its Arizona Quarterly Unemployment Tax and Wage Report, for the quarter in which the petition was filed. The report listed five employees whose names corresponded to the individuals listed on the petitioner's organizational chart holding the positions of: president, the beneficiary's position, earning \$3,230.78 for the quarter; operations manager earning \$7,000 for the quarter; office manager earning \$4,846.17 for the quarter; front desk earning \$2,294.15 for the quarter; and housekeeper earning \$3,346 for the quarter.

The director denied the petition on July 7, 2005, determining that it was reasonable to believe, based on the petitioner's organizational structure showing only four subordinate employees, that the beneficiary would be assisting with day-to-day non-supervisory duties and that the performance of menial tasks precluded the beneficiary from being considered an executive. The director also determined, based on the record in its entirety, that the beneficiary at most, was a first-line supervisor of non-professional employees. The director further determined that the record did not establish that the beneficiary would be employed as a functional manager.

On appeal, counsel for the petitioner asserts that CIS is placing a burden on the petitioner that is not required by law. Counsel claims that the petitioner has supplied adequate proof that the beneficiary is the petitioner's chief executive and the only person exercising control over lower management and long-term corporate planning. Counsel contends that CIS is substituting its own unsupported opinion as to how a chief executive should perform his duties while determining that an "executive" who supervises only four or five employees

cannot qualify. Counsel notes that the petitioner indicated that the beneficiary spent 25 percent of his time dealing with professionals in accounting and legal matters, and that this information was not considered by CIS. Counsel concludes by again asserting that CIS is imposing requirements not supported by law and that CIS is attempting to establish new ad hoc rules for determining whether an executive is performing the required executive duties.

Counsel's assertions are not persuasive. 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). First, neither the petitioner nor counsel clarifies whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Initially, the petitioner indicated that the beneficiary "Direct[s] managers to oversee managerial duties of motel chain. Plan and oversee the managerial direction of the franchise company and report to Directors in India," as well as "supervise[ing] two professionals, Pradeep K. Patel and Asha Patel, both of whom are executive managers of this Company." In the petitioner's April 4, 2005, the petitioner recites the definition of executive capacity as the description of the beneficiary's duties. These statements suggest that the petitioner is claiming that the beneficiary will be performing both managerial and executive tasks. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Moreover, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Contrary to counsel's claim, the petitioner has not submitted adequate evidence that the beneficiary will be employed in a managerial or executive capacity. The petitioner's initial description of the beneficiary's duties was general necessitating a request for a more detailed description of the beneficiary's duties and those of his subordinates. In the April 4, 2005 response, the petitioner provided a general description repeating in part the definition of executive capacity while also noting that the beneficiary oversaw sales and marketing managers. As noted above, 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. at 1103. The petitioner's indication that the beneficiary oversaw sales and marketing managers is not substantiated in the record. The petitioner's organizational chart does not include a sales or marketing department. 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).

In addition, a portion of the petitioner's description of the beneficiary's job duties included tasks such as, reviewing company revenue receipts and employment, operational costs, customer count and percentage of return business, reservations lists and room availability counts, planning for future conventions, and reviewing weekly plans. The petitioner has not explained how these day-to-day operational tasks comprise primarily executive or managerial duties. The actual duties themselves reveal the true nature of the

employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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).

Further, the petitioner indicates that the beneficiary attends meetings with the sales, marketing, and office/departmental manager, attends meetings with the directors regarding financial obligations, and with the company accountant and legal counsel once a month to discuss various matters. Again, the petitioner has not identified individuals holding sales and marketing positions. Furthermore, the petitioner indicated that the beneficiary spent 25 percent of his time communicating with other directors, shareholders, the company accountant, and legal counsel. However, the petitioner has not submitted evidence substantiating that these meetings require 25 percent of the beneficiary's time and in fact indicates that meetings with the company accountant and legal counsel occur only once a month. Moreover reciting broadly-cast business objectives such as upgrading motel services and training staff are not sufficient; the regulations require a detailed description of the beneficiary's duties. 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)). The general oversight exercised by an owner or shareholder of a business is not evidence that the beneficiary will perform primarily managerial or executive duties for the petitioner.

Although the petitioner assigns a percentage of time to the beneficiary's general duties of establishing goals and policies and communicating with others, and discretionary decision-making, the duties described are general and paraphrase the definition of executive capacity. The record does not contain a description of the beneficiary's duties that allows a conclusion that the beneficiary will primarily perform managerial or executive duties.

In addition to the inadequacies of the petitioner's description of the beneficiary's duties, the petitioner fails to provide a description of the beneficiary's subordinates' duties. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner's organizational chart and quarterly employment records are not sufficient in this instance to provide an understanding of the beneficiary's role in the organization. The record does not provide detail regarding the operational manager and the office manager's duties. The record reveals that these two individuals own a significant minority interest in the motel operation, however, ownership of a business is not sufficient to establish that the owners are performing in a primarily managerial, supervisory, or professional capacity. Neither, is a conclusory statement that "[t]hey supervise the day[-]to[-]day operations, sales, and staffing needs, as well as the lower level department staff." The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; 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. The record in this matter suggests that the beneficiary's subordinates are the individuals who perform the actual day-to-day tasks of operating the motel. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Counsel's observation that a company's size alone, without taking into account the reasonable needs of the organization may not be the determining factor in denying a visa to a multinational manager or executive is noted. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the AAO questions the legitimacy of the petitioner's purchase of a 51 percent interest in a separate corporation that holds an established business. The AAO observes that the record does not include evidence that the petitioner's purchase of an interest in the business was completed. The record suggests that the petitioner's purchase of a 51 percent interest in a separate corporation may have been begun only to enable the beneficiary to transfer to the United States.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition will not be approved.

The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, 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 general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 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).

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 approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought,

the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, 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).

Further, 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 petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that as the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

The petition will be denied for the above stated reason. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.