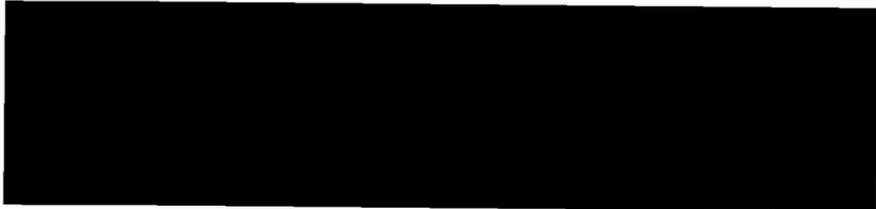


identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



FILE: LIN 05 109 51448 Office: NEBRASKA SERVICE CENTER Date: MAR 21 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

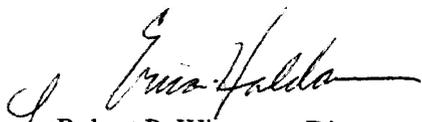
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Nebraska Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a company headquartered in Chicago, Illinois that is engaged in the design and manufacture of aerospace vehicles. The petitioner seeks to employ the beneficiary as its procurement quality specialist.

The director denied the petition concluding that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner claims that CIS' decision denying the immigrant petition disregards evidence that the beneficiary would manage and direct an essential function of the United States company. In a subsequently submitted appellate brief, counsel claims that in the position of "manager, business operations and policy," the beneficiary would manage the essential function of procurement quality assurance, as well as direct professional employees.¹ Counsel challenges the director's finding that the beneficiary would perform routine functions of the company, stating that the beneficiary would direct others in the performance of these activities. Counsel submits a brief and additional evidence 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 or 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.

¹ On appeal, counsel references a position to which the beneficiary was promoted following his transfer to the United States organization as an L-1A nonimmigrant manager or executive. The AAO notes that in his appellate brief, counsel, referencing a "declaration" made by the petitioner's Director of Procurement Quality Assurance, excluded language by the company's director that the beneficiary had been promoted to this position after his transfer to the United States, and stated only that the beneficiary's "formal title" is that of "manager, business operations and policy."

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 employed in the United States in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

As noted previously, counsel stresses on appeal the beneficiary's position of "manager, business operations and policy" in the United States organization and the associated "executive" and "managerial" job duties. The AAO notes, however, that the record demonstrates that the beneficiary was not employed in this position at the time of filing. The Form I-140, as well as the accompanying Form ETA 750, Application for Alien Employment Certification, and the petitioner's February 16, 2005 support letter indicate that the beneficiary would occupy the position of "procurement quality specialist." The September 8, 2005 "declaration" by the petitioner's director of procurement quality assurance confirms that the beneficiary was promoted to the position of "manager" following his transfer to the United States organization as its procurement quality specialist. As a result, counsel's reliance on the beneficiary's new position of "manager, business operations and policy" is misplaced. Counsel does not specifically address on appeal the director's finding that the beneficiary, as the petitioner's "procurement quality specialist," would not be employed in a primarily managerial or executive capacity. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The AAO again notes counsel's misquote of the declaration made by the petitioner's director in his appellate brief. It appears that counsel excluded the director's reference to the beneficiary's promotion in an attempt to revise the record and conform to the statutory requirements for a multinational manager or executive. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Under this same analysis, the expert opinion submitted by counsel in response to the request for evidence, which addresses the beneficiary's employment capacity in his new position as "manager," will not be considered herein. As counsel did not address on appeal the beneficiary's qualification for the requested classification in the position of "procurement quality specialist," the director's decision will be affirmed. Accordingly, the appeal will be dismissed.

For purposes of completeness, the AAO will address the merits of this issue based on the job description offered with the initial immigrant petition. The petitioner has failed to demonstrate that as the petitioner's "procurement quality specialist," the beneficiary would be primarily 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). In support of the beneficiary's managerial or executive employment in the United States, the petitioner submitted a copy of its January 7, 2005 letter provided in connection with the beneficiary's L-1A nonimmigrant petition, in which the beneficiary's proposed position was described as:

[M]anaging and directing the preparation, maintenance, and review of procurement quality procedures to ensure compliance with customer and government requirements; planning, organizing, and conducting audits, surveys, and inspections; monitoring and reporting on supplier quality-related activities to verify quality system, product, and contract or purchase order compliance; directs the conducting of training programs and coordinating company initiatives to develop and improve supplier performance and productivity; the providing of technical expertise to company employees, suppliers, customers, and regulatory education with respect to the quality system; ensuring that suppliers manufacturing and quality systems, special processes, and products meet purchase contract requirements and applicable regulatory agencies and government regulations.

The petitioner's vague job description failed to address the specific job duties associated with the beneficiary's role of procurement quality specialist. The petitioner has not defined the managerial or executive tasks related to the beneficiary's responsibilities of ensuring regulatory and customer compliance with regard to systems, products, processes, contracts or purchase orders, "coordinating company initiatives," or imparting "technical expertise" on the petitioner's quality system. Additionally, the petitioner has not explained what "company initiatives" would be "coordinate[d]" by the beneficiary in order to the performance and productivity of suppliers, nor documented how this responsibility would be managerial or executive. The regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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). Absent an additional explanation from the petitioner, the AAO cannot conclude that the beneficiary's position in the United States organization would be primarily managerial or executive in nature.

Based on the limited job description offered by the petitioner, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). It appears that the beneficiary would perform non-managerial and non-executive job duties related to the petitioner's procurement of supplies. Specifically, the beneficiary would personally monitor and perform audits, surveys and inspections of the suppliers' "quality-related activities" and "report" on the results, as well as ensure that the manufacturing and quality systems, processes and products meet regulatory and contract requirements. The beneficiary is in effect performing the non-qualifying activities necessary to assure the quality of the products obtained by outside suppliers, rather than managing or directing subordinate workers who would perform these operational job duties. In addition, it is unclear how the beneficiary's responsibilities of directing training programs and "providing technical expertise to company employees, suppliers, [and] customers" are managerial or executive in nature. Instead, it again seems that the beneficiary is personally performing operational functions of the quality assurance department in his representation of the petitioning entity to outside suppliers and customers. The petitioner has not submitted sufficient evidence to demonstrate that the beneficiary, in the position of "procurement quality specialist," would primarily perform managerial or executive job duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO again notes that in a June 22, 2005 request for evidence, the director referenced the petitioner's "generalized terminology" with regard to the beneficiary's proposed position, and asked that the petitioner submit a "detailed description" of the job duties to be performed by the beneficiary in the United States company. The director further asked that the petitioner delineate the amount of time the beneficiary would devote to each task. The petitioner failed to comply with the director's request, instead reiterating the beneficiary's same job description and focusing on the beneficiary's new position as "manager, operations and policy." 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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.

In support of the beneficiary's proposed managerial or executive employment, the petitioner stresses that in the position of procurement quality assurance specialist, the beneficiary would manage and direct "supervisory personnel" and would possess the authority to hire, fire and implement personnel actions. The petitioner has failed to specifically identify the referenced "supervisory personnel." The AAO notes that the organizational charts submitted by the petitioner depict the position to which the beneficiary was promoted subsequent to the filing of the immigrant petition. There is no evidence to establish that the beneficiary would supervise a staff of supervisory, professional or managerial personnel at the time the petition was filed. *See* section 101(a)(44)(A)(ii) of the Act. 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)). Additionally, the authority to hire and fire, by itself, is not sufficient to demonstrate employment that is primarily managerial or executive in nature. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that the beneficiary satisfy all four criteria of "managerial capacity" and "executive capacity"). As addressed above, the petitioner has not demonstrated that the beneficiary would primarily manage or direct the management of the petitioning organization, but rather, would personally perform non-managerial and non-executive functions of its quality assurance department, including devising systems and procedures for quality compliance.

The petitioner also contended that the beneficiary would manage an essential function "within the petitioner's corporate organization as [p]rocurement [q]uality [a]ssurance [s]pecialist managing and directing the procurement of high quality raw materials and aircraft components to assure that requirements of the petitioner's customer's are satisfied, and that there is full compliance with all applicable regulations." The petitioner described the essential nature of confirming that the products obtained by the petitioner meet manufacturer and government standards.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As addressed previously, the petitioner has not established that the beneficiary would primarily manage the petitioner's quality assurance function. There is no evidence in the record that the beneficiary functions at a senior level with respect to the "procurement quality assurance" function, or evidence that the non-qualifying operational tasks of this department would be performed by employees other than the beneficiary. As noted above, the petitioner disregarded the director's June 22, 2005 request for an allocation of the proportion of

time the beneficiary would devote to his proposed job duties.² Again, the petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Based on the foregoing discussion, the petitioner has not demonstrated that at the time of filing the petition the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner indicated in various documentation in the record that the beneficiary was employed overseas as the company's procurement quality assurance specialist, the same position offered to the beneficiary upon his transfer to the United States company. Counsel indicated in his January 7, 2005 letter submitted with the petition that the beneficiary's position in both companies required the performance of the same job duties. Therefore, based on the above discussion of the tasks associated with the position of procurement quality assurance specialist, there is insufficient evidence to demonstrate that the beneficiary was employed in a primarily managerial or executive capacity. As addressed previously, the job duties performed by the beneficiary were primarily operational tasks of the foreign company's quality assurance department. The petitioner has not demonstrated that the beneficiary devoted his time to performing primarily managerial or executive job duties. Again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The AAO again notes the petitioner's failure to respond to the director's request for a comprehensive description of the job duties performed by the beneficiary overseas, an organizational chart of the foreign entity, and a description of the job titles and duties of the beneficiary's subordinates. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO cannot conclude that the beneficiary was primarily employed overseas as a manager or executive. As a result, the petition will be denied for this additional reason.

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).

The AAO acknowledges the beneficiary's prior L-1A nonimmigrant visa petition approval. 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

² The petitioner acknowledges the director's request on appeal and submits a brief description of how the beneficiary would spend 20 percent of his time in his new position as "manager, business operations and policy." As noted above, this evidence, which is not related to the position offered to the beneficiary at the time of filing the petition, will not be considered herein.

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.

Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

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 in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.