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[Redacted]

FILE: [Redacted] SRC 02 220 51577

Office: TEXAS SERVICE CENTER Date: MAR 22 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:

[Redacted]

**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, Texas Service Center, denied the employment-based petition. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO), which the AAO remanded to the director for further consideration and the issuance of a new decision. The matter is again before the AAO on certification from the director. The AAO will affirm the director's September 15, 2005 decision.

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 corporation organized under the laws of the State of Florida that is engaged in the purchase, sale, distribution and export of fabrics and raw materials for use in the confection and manufacturing of clothing. The petitioner seeks to employ the beneficiary as its administrative manager.

In a decision dated August 23, 2004, the director denied the petition concluding that the petitioner had failed to establish that "the beneficiary continues to render services to a subsidiary in a capacity that is managerial or executive." The director noted that the information contained on the beneficiary's Form I-485, Application to Register Permanent Residence, indicated that the beneficiary was unemployed, and further noted the petitioner's inability to provide the beneficiary's 2003 Internal Revenue Service (IRS) Form W-2. On review of the appeal, the AAO determined that the petitioner had overcome the director's ground for denying the petition by submitting additional documentary evidence. The AAO further found that the director had applied an incorrect standard to her analysis, and noted, beyond the decision of the director, that the petitioner had not demonstrated that: (1) the beneficiary had been employed abroad or would be employed in the United States in a primarily managerial or executive capacity; (2) the petitioner had been doing business in the United States for at least one year prior to the filing of the immigrant petition; or (3) a qualifying relationship existed between the foreign and United States entities. The AAO remanded the matter to the director instructing the issuance of a request for additional evidence and the entry of a new decision.

In a September 5, 2005 decision, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director certified the decision to the AAO for review, properly notifying the petitioner of its opportunity to submit evidence in rebuttal of the denial within thirty days of its receipt of the decision. *See* 8 C.F.R. § 103.4(a)(2). The record as presently constituted does not contain a response from the petitioner.<sup>1</sup>

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):

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<sup>1</sup> The AAO notes that its May 31, 2005 decision instructed the director to request, among other evidence, documentation of the beneficiary's proposed position in the United States entity. In her June 16, 2005 request for evidence, the director failed to specifically request evidence related to the beneficiary's proposed employment. As the petitioner had an opportunity to submit additional evidence of the beneficiary's employment capacity in response to the instant certification, and consequently neglected to do so, the AAO will adjudicate the issue based on the present record.

(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.

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 the instant matter is whether the beneficiary would be employed by the United States entity 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.

The petitioner filed the instant immigrant petition on July 11, 2002, requesting the beneficiary's employment as its administrative manager. While the petitioner noted on Form I-140 a staffing level of 25 workers, counsel for the petitioner subsequently acknowledged an error in the preparation of the petition and noted that the petitioner employed five workers at the time of filing. In a February 20, 2002 letter submitted with the petition, the petitioner explained that in the proposed position, the beneficiary would be responsible for the management of the company's human resources, including holding "the authority to hire, fire, train, delegate authority, promote, discipline, and remunerate."

In a notice of intent to deny issued on July 12, 2004, the director asked that the petitioner provide "additional details" of the beneficiary's proposed position, including her daily job duties and the amount of time to be spent on each. The director also asked that the petitioner provide its organizational chart reflecting all employees, as well as a brief description of the job duties performed by each worker, and evidence of each employee's wages. Counsel responded in a letter dated August 11, 2004, and included an August 11, 2004 letter from the petitioner, in which the petitioner outlined its current staff of eleven workers. The AAO again notes counsel's clarification of the petitioner's five-person staff at the time of filing, rather than a staff of twenty-five as was previously noted on Form I-140. In its letter, the petitioner provided the following job description of the beneficiary's position as administrative manager:

[The beneficiary] organize[s], directs, and supervises all of our departments within our organizational policies and procedures (50% of the time). She hires and supervises the independent contractors (10% of the time), handles and deals with suppliers (10% of the time), and plans, coordinates and develops new projects (10% of the time), controls the financials for the company (10% of the time), and finally supervises, hires, and manages the sales employees (10% of the time).

While the petitioner also provided an organizational chart and description of the job duties performed by its lower-level employees, the workers named are those employed in August 2004, or approximately two years after the filing of the petition. 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). As a result, the submitted organizational chart is not probative of the petitioner's staffing levels at the time the petition was filed.

In her September 15, 2005 decision, the director focused on the eleven workers employed by the petitioner in August 2004, and noted inconsistencies in their compensation and the amount of time each worked for the petitioner. The director also noted doubt in the compensation paid to the beneficiary for her employment as the administrative manager. The director stated that the petitioner had failed to prove that "the beneficiary fulfills an executive assignment, that the managers perform a managerial assignment, or that there are employees to perform the labor." Consequently, the director denied the petition.

Upon review, the petitioner has not demonstrated that it would employ the beneficiary in a primarily managerial or executive capacity.

Despite affirming the director's denial of the petition, the AAO notes that she used an improper standard in reviewing the beneficiary's employment capacity. As the petition was filed on July 11, 2002, the proper analysis of the beneficiary's employment capacity includes a review of the beneficiary's job duties and the petitioner's staffing levels at that time. The director incorrectly considered evidence relevant to the beneficiary's job duties and the petitioner's staffing levels as of August 2004, two years after the filing of the petition. Again, 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. at 49.

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). The limited job description provided by the petitioner, in which it stated merely that the beneficiary would be responsible for the management of the petitioner's human resources, fails to define the specific managerial or executive job duties to be performed by the beneficiary as the company's administrative manager. The associated responsibilities of hiring and firing employees and delegating authority are merely restatements of the definitions of "managerial capacity" and "executive capacity." *See* §§ 101(a)(15)(A) and (B) of the Act. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). It is unclear whether the AAO should also consider the job description offered in response to the director's request for evidence, as the petitioner has not clarified whether, although employed in the same position, the beneficiary's job duties have changed since the filing. **Regardless, the additional description is equally vague. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; 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.** *Id.* at 1108.

Additionally, the petitioner has not identified the employment of a support staff at the time of filing that would relieve the beneficiary from performing non-qualifying tasks of the business. The record is devoid of documentation such as employee records or the petitioner's state or federal quarterly reports, which would indicate whether any workers were employed when the immigrant petition was filed. Based on the petitioner's 2002 corporate tax return, which reflects compensation paid for salaries in the amount of \$21,260, the petitioner may have employed someone other than the beneficiary, or two part-time employees at most. Additionally, the petitioner has not documented who received compensation in the amount of \$89,403 paid by the petitioner in 2002 for outside labor. In any event, as none of the employees, outside contractors, or their positions has been identified, the AAO cannot conclude that the beneficiary would be relieved of performing

the business' operational or administrative tasks as of the date the petition was filed. The conclusion that the beneficiary would be personally responsible for the petitioner's sales and inventory is further supported by sales invoices in the record sent directly to the beneficiary from suppliers and purchase orders prepared by the beneficiary. 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). Furthermore, 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)).

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the petition will be denied.

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 stated in a September 7, 2005 letter that, in the position of administrative manager, the beneficiary performed such non-managerial and non-executive job duties as negotiating purchase and sales contracts and service agreements, meeting with customers, assisting in the preparation of reports, contracts, and training materials, editing, preparing correspondence, data entry, maintaining office and staffing files and project lists, mailing records, and providing technical assistance with databases. Based on the petitioner's representations, the beneficiary personally performed many of the company's administrative and operational tasks. It appears that the beneficiary was employed as the company's administrative assistant, rather than in a primarily managerial or executive capacity. 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). For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities. The petitioner claimed in its July 2002 letter submitted with the petition that the United States entity is a subsidiary of the foreign organization. As evidence of the claimed parent-subsidiary relationship, the petitioner submitted two stock certificates, dated November 1, 1999, identifying the foreign entity and the beneficiary as owners of 520 and 480 shares of stock, respectively. However, the petitioner's year 2000 corporate tax return identifies the beneficiary as the sole owner of the petitioner's stock. The beneficiary is subsequently identified as the owner of 52 percent of the petitioning entity on the petitioner's 2001 corporate tax return. The petitioner has not clarified these relevant discrepancies, which prevent a finding of a parent-subsidiary relationship between the two entities. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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 notes the prior approval of an L-1A nonimmigrant petition for the benefit of the beneficiary. 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, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 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). 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 at 29-30 (recognizing that CIS approves some petitions in error).

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 prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The director's September 15, 2005 decision is affirmed. The petition is denied.