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FILE:

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Office: TEXAS SERVICE CENTER

Date:

MAR 31 2006

IN RE:

Petitioner:  
Beneficiary:

[Redacted]

PETITION:

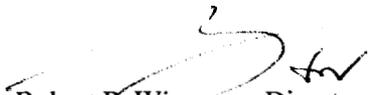
Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

The petitioner is a Texas entity operating as a computer and software sales enterprise. It seeks to employ the beneficiary as its vice president/director of operations. 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 the United States 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 be employed by the U.S. petitioner in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted a letter dated February 15, 2005, which provided the following description of the beneficiary's foreign and proposed U.S. job responsibilities:

Foreign job responsibilities:

- Directs and coordinates activities of the organization and formulates and administers company policies.
- In consultation with the management, develops long-range goals and objectives of the company.

- Directs and coordinates activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility was delegated to further attainment of goals and objectives.
- Reviews and analyzes activities, costs, operations, and forecasts data to determine progress toward stated goals and objectives.
- Discusses with management and employees to review achievements and discusses required changes in goals or objectives of the company.

Proposed U.S. job responsibilities:

- Confer with [the foreign entity] and develop long-range goals and objectives of [the petitioner].
- Direct and coordinate activities of the organization and formulate and administer company policies.
- Oversee the delivery of software and consulting services in the areas of accounting, management, information technology, organizational management, budgeting, market research, inventory control, allocation of human resources, employee training and investment management.
- Oversee the interactions with customers and clients to define [the] need or problem, conduct studies & surveys to obtain data to advise on or recommend solution[s], utilizing knowledge of theory, principles or technology in the management area.
- Direct and coordinate activities relating to purchasing, production, operations and sales for which responsibility is delegated and targeted to further attainment of goals and objectives.
- Dialogue with clients and customers to ascertain and define [the] need or problem area and determine scope of requirements.

Determine solutions, such as installation of alternate methods and procedures, changes in processing methods and practices, modification of machines or equipment, or redesign of products or services.

- Advise clients and employees on alternate methods of solving [the] need or problem, or recommend [a] specific solution.
- Negotiate contracts for services, inventories, and other business assets.
- Oversee the consulting services to management, customers and employees.

Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives.

- Discuss with employees to review achievements and discuss required changes in goals or objectives of the company.

The petitioner also provided its organizational chart depicting the beneficiary's position of vice president as the second from the top of the hierarchy. The chart indicates that the beneficiary's subordinates include an administrator, who has one subordinate, and a sales manager, who has two subordinates.

On May 2, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a detailed description of the beneficiary's daily job duties for his proposed employment in the United States. The director also asked the petitioner to provide a percentage breakdown of time to be spent on each of the listed duties.

The petitioner responded with a letter from counsel dated July 28, 2005. Counsel referred to the petitioner's organizational chart, stating that lower-level personnel would relieve the beneficiary from having to carry out nonqualifying tasks. Counsel further stated that the beneficiary would manage the essential function "[p]residency" and, therefore, would also fill the role of function manager. Although counsel also referred to a prior AAO decision discussed in the *Immigration Reporter*, this case is unpublished and, therefore does not serve as binding precedent in the present matter. See 8 C.F.R. § 103.3(c). As part of the supporting evidence, the petitioner provided a second organizational chart. However, the more recent organizational chart depicts the beneficiary at the top of the petitioner's hierarchy as the company president and suggests that the individual who was previously depicted as the beneficiary's superior is actually the beneficiary's immediate subordinate, occupying the position of vice president. It is noted further that Part 6, Item 1 of the Form I-140 indicates that the beneficiary's proposed job title is vice president/director of operations.

Prior to the petitioner's response to the RFE there was no indication that the beneficiary would be employed as the petitioner's president. The petitioner explained this change by providing an affidavit dated June 28, 2005, signed by the beneficiary and [REDACTED] the individual who co-owns the petitioner with the beneficiary. The affidavit indicates that the as of the date of the affidavit [REDACTED] would relinquish the role of president and that the beneficiary would assume that position in his place. 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. *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. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The petitioner also provided a copy of its quarterly wage report for the first quarter of 2005, which includes the month during which the petitioner filed the Form I-140. The wage report shows that at the time the Form I-140 was filed the petitioner was operating with a limited staff of three full-time and two part-time

employees. The report also shows that the administrator's subordinate as well as the subordinate of the sales manager were employed by the petitioner on a limited part-time basis.

Although the petitioner provided a percentage breakdown for the beneficiary's proposed duties in the U.S., the list provided in response to the RFE is the identical list of responsibilities initially provided in the petitioner's support letter dated February 15, 2005. Despite the director's specific request in the RFE, the petitioner failed to expand on the beneficiary's broad list of responsibilities by providing a list of the beneficiary's projected daily tasks. It is noted that merely assigning a percentage of time to a list of general job responsibilities does not satisfy the director's uncertainty as to the nature of duties the beneficiary would perform on a daily basis. Furthermore, the petitioner failed to explain the sudden change in the beneficiary's position within the company's hierarchy, particularly given the fact that he would apparently perform the identical duties he would have performed under the original position title provided in the Form I-140.

On August 15, 2005, the director denied the petition, noting that the petitioner's limited staffing leads to the conclusion that the beneficiary would be primarily involved in performing daily operational tasks and managing a staff of nonsupervisory, nonmanagerial, and nonprofessional personnel.

On appeal, counsel asserts that the director made a "key legal error" in his assessment of the beneficiary's duties within the definition of executive capacity.

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 description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis and how much of his time would be spent performing qualifying tasks versus the non-qualifying ones. For instance, the description of duties indicates that a great deal of the beneficiary's time would be spent developing policies and strategies. However, the petitioner does not clarify with sufficient detail what the beneficiary would actually be doing in her effort to develop policies and strategies. There is also no explanation for the petitioner's need to have the beneficiary involved in micromanagement by performing human resource-related duties when the petitioner employs two general managers in its organization. Furthermore, the petitioner indicated that the beneficiary would review all major service and supplier contracts and develop marketing and advertising strategies, none of which can be deemed as qualifying duties. Since the petitioner must establish that the beneficiary would *primarily* perform qualifying duties, it must also determine that the beneficiary would not spend a majority of her time performing these non-qualifying duties. It is noted that 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). In the instant case, the record lacks sufficient information to indicate what specific duties the beneficiary would primarily be performing. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be

directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, though not discussed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner is required to submit evidence to establish that the beneficiary was employed abroad in a qualifying capacity for at least one out of three years prior to the date the Form I-140 was filed.

In response to the director's RFE, the petitioner provided the foreign entity's organizational chart, which suggests that the beneficiary occupied a top-level position, subordinate only to the company chairman. However, as previously stated, 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's description of the beneficiary's position abroad is comprised of broad statements describing the beneficiary's general job responsibilities. Thus, the petitioner has failed to answer a critical question in this case: What did the beneficiary primarily do on a daily basis during his employment abroad? 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. While the beneficiary's position within the foreign entity's organizational hierarchy suggests that the beneficiary has significant decision-making powers and discretionary authority over the foreign entity's policies, there is no clear description of his daily activity.

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.

As a final note, CIS record shows that the petitioner was previously approved for 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, 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 Form I-129 nonimmigrant 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 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 petition was 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).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he/she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.