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FILE: [Redacted]
SRC 05 256 52643

Office: TEXAS SERVICE CENTER Date: **SEP 08 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, Chief
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 Florida corporation operating as a marketing and advertising enterprise. It seeks to employ the beneficiary as its president/general director. 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 denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary would employ the beneficiary in the United States in a managerial or executive capacity.

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 two issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established at the time it filed the Form I-140 that the beneficiary would be primarily employed in a 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 Form I-140, the petitioner provided a letter dated September 16, 2005, which contained the following statements describing the beneficiary's proposed position in the United States:

Since her transfer to [the petitioning entity], [the beneficiary] has performed and continues to perform the following duties: plan and control all the functions of relations in [the] administrative area of the business; perform necessary legal obligations, including with [sic] banking, [sic] institutions, and individual contracts; supervise existing managers for several marketing, media, art [and] accounting departments; supervise and control the executive activities for the managers of the different areas of: [sic] [a]rt department; media department;

accounting department, workshops for exterior publicity and reproduction; [and the] administrative department. Additionally, she continues to market the company to attract clients, define marketing strategy in conjunction with, [sic] and in light of the client's desires and stated marketing goals, make executive decisions regarding capital improvements to company equipment, and execute necessary licensing and financing agreements on behalf of the company in that regard.

The petitioner also provided a copy of its organizational chart and what appears to be list of the duties performed by the petitioner's employees. However, with the exception of the position titles and employee names, the remainder of the statement addressing the job duties was in Spanish and was not accompanied by a certified English language translation. *See* 8 C.F.R. § 103.2(b)(3). In the organizational chart, the petitioner identified a total of eight employees: the beneficiary at the top of the organization's hierarchy with the position title of general manager; three direct subordinates including an administrative assistant, a sales and market strategist, and one sales manager with four sales representatives as his direct subordinates.

Although the petitioner provided a general discussion of the business activities of the beneficiary's foreign employer, that discussion did not include any information as to the beneficiary's duties abroad.

On October 20, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the beneficiary's employment capacity during her employment abroad and in the proposed position in the United States: 1) a list of the job duties the beneficiary performed abroad as well as a percentage of time assigned to each job duty explaining how the beneficiary's job duties abroad were primarily within a qualifying managerial or executive capacity, noting that if the petitioner asserts that the beneficiary was employed as a manager and executive, it has the burden of meeting the criteria of both statutory definitions; 2) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty in order to indicate how much of the beneficiary's time would be devoted to each of the listed duties; 3) the job titles and description of duties of the beneficiary's subordinates; and 4) a number of the petitioner's tax documents.

In response, counsel submitted a letter dated January 12, 2006 addressing the director's concerns. With regard to the beneficiary's position abroad, counsel stated the beneficiary occupied the position of chief executive, which was at the top of the foreign entity's hierarchy. Counsel provided the following information concerning the beneficiary's past and continued responsibilities with regard to the foreign entity:

[The beneficiary] was (and continues to be) ultimately responsible for the operational success of the company, for planning and initiating corporate changes and long range planning (including having made the decision to open a U.S. office), and for supervising area managers and other employees so the company remains a successful enterprise.

Counsel further stated that the beneficiary continues to carry out her responsibilities to the foreign entity via telecommunication with her foreign subordinates.

With regard to the beneficiary's prospective employment with the petitioning entity, counsel stated that the beneficiary would continue to supervise professional employees and claimed that the beneficiary's duties would continue to be primarily within an executive and managerial capacity. Counsel stated the following:

She will continue having overall operational control and responsibility for the enterprise(s), including hiring, firing, and direction of personnel, defining corporate policies in relation to business expansion and methods, meeting with clients and vendors and negotiating and entering into agreements on behalf of the company, servicing as the company(ies) [sic] legal representative before governmental authorities, and other executive and managerial level responsibilities. As a result, she presently devotes nearly 100% of her time to executive or managerial level duties and she will continue to do so in the future.

In further support of the petitioner's claims of eligibility, counsel provided copies of the regulatory definitions for managerial and executive capacity as those terms are defined in 8 C.F.R. § 204.5(j)(2), which pertains to the Form I-140 immigrant petitions, and 8 C.F.R. § 214.2(l)(1)(ii), which pertains to Form I-129 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). However, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by Citizenship and Immigration Services (CIS) than nonimmigrant petitions. 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.

Furthermore, 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 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. 1103 (E.D.N.Y. 1989). As such, counsel's submission of an interoffice memorandum regarding extension of petition validity for petitioners with previously approved nonimmigrant petitions does not apply in the instant matter, where CIS seeks to determine the petitioner's eligibility for an immigrant petition, which, if approved, would enable the beneficiary to reside permanently in the United States and perhaps obtain U.S. citizenship.

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

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service

center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Additionally, the petitioner provided the following list of the beneficiary's responsibilities:

- Management, [p]lanning, and [s]upervision of the organization's plans and projects;
- Definition and determination of strategies to follow to reach corporate objectives [and] goals;
- Market [a]nalysis to determine which media and tools to use to further consolidate the company and for the successful implantation of our goods and services to commercialize;
- Negotiate and enter into business agreements with providers;
- Hiring and management of sales personnel;
- Supervision of administrative and accounting management.

The AAO notes that despite the director's specific request, the petitioner failed to provide a list of duties accompanied with percentage breakdowns for the beneficiary's position with the foreign entity and did not attribute a percentage breakdown to any of the above listed responsibilities regarding the beneficiary's prospective employment in the United States.

With regard to the director's request for various tax documentation, the petitioner provided its quarterly wage report for the third quarter of 2005, which includes the time period of the petitioner's Form I-140 filing. The quarterly report indicates that at the time the petition was filed, the petitioner employed the beneficiary on a full-time basis, while the remainder of its staff, including a sales manager, an administrative assistant and a marketing/sales strategist, was employed on a part-time basis.

On January 24, 2006, the director denied the petition concluding that the petitioner failed to provide the requested information specifically identifying the beneficiary's duties with regard to her prior position abroad and her prospective position in the United States. The director also noted that the quarterly pay records the petitioner submitted indicate that the beneficiary is the petitioning organization's only employee earning full-time wages.¹ The director questioned the petitioner's ability to relieve the beneficiary from having to perform primarily non-qualifying tasks given the fact that the beneficiary's entire support staff is comprised of individuals that are employed on a part-time basis.

On appeal, counsel provides a more detailed list of the beneficiary's responsibilities with the foreign entity and a percentage breakdown of the beneficiary's proposed duties in the United States. The AAO notes that despite the director's specific request in the RFE to provide this crucial information, the petitioner failed to do so and instead offers the information on appeal. It is noted, however, that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R.

¹ The AAO notes that the minimum wage in the state of Florida in 2005 was \$6.40 per hour, which requires that a full-time employee receive at least \$3,072 per quarter, assuming that each quarter consists of at least 12 weeks.

§ 103.2(b)(14). Furthermore, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the additional information regarding the beneficiary's duties abroad or the percentage breakdown of the U.S. duties, all of which the petitioner failed to provide in response to the director's specific request for such information.

Accordingly, the AAO concludes that the petitioner's failure to provide sufficient information regarding the beneficiary's specific job duties abroad precludes the AAO from affirmatively concluding that the beneficiary primarily performed duties of a qualifying nature during her employment abroad.

Aside from the percentage breakdown and foreign job description, which will not be considered in this proceeding, the petitioner provided the following supplemental list of responsibilities to be carried out by the beneficiary during the course of her employment in the United States:

1. Acts in behalf of the [c]orporation in [g]overnmental acts and obligations[.]
2. Settles formal agreements with people, public and private corporations, and/or financial services in order to assure the company operation.
3. Establishes policies about the best use of [f]inancial [r]esources and [m]aterial of the [c]orporation.
4. Recruits, hires and approves personnel[.]
5. Supervises and manages all operations within the [c]orporation[.]
6. Establishes [o]bjectives and defines goals in each operational area[.]
7. Organizes tasks, activities and employees' roles[.]
8. Motivates and communicates to all employees[.]
9. Has full supervisory control over employees. Supervises, evaluates and develops employees.
10. Handles and keeps [c]onfidential [i]nformation[.]
11. Reports performance results to the [b]oard of [d]irectors. Processes and maintains all records regarding revenues and provides reports to [the] [b]oard of [d]irectors.

Despite the petitioner's submission of additional evidence with regard to the beneficiary's proposed employment in the United States, the petitioner has failed to provide sufficient evidence to establish that the beneficiary's duties would be primarily managerial or executive.

First, the petitioner does not clarify 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. Rather, throughout the record, the AAO has established numerous instances where either counsel or the petitioner refer to the beneficiary's employment capacity as either a combination of managerial and executive or managerial *or* executive. Neither counsel nor the petitioner appears to have made a distinction between the two terms; nor is there any clarification as to how the beneficiary's duties meet each of the prongs of the statutory definitions.

Next, counsel fails to address the director's valid concern regarding the petitioner's primarily part-time support staff at the time the Form I-140 was filed. While the AAO acknowledges that the question of the petitioner's eligibility cannot rest entirely on the size of its support staff, the fact remains that the beneficiary's responsibilities clearly suggest that a support staff is needed in order to assist the beneficiary in successfully executing her job duties, whatever they may be. The petitioner has not fully explained how a part-time support staff can relieve the beneficiary from having to engage in performing primarily non-qualifying tasks. 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 "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 International*, 19 I&N Dec. at 604.

While the petitioner has not adequately addressed the director's request for a specific list of duties, the broad statements that were used to describe the beneficiary's proposed employment in the United States suggest that the beneficiary would perform a number of non-qualifying duties including performing market analysis, meeting with clients and vendors, and negotiating contracts. In light of the petitioner's failure to specifically list the beneficiary's duties and indicate the percentage of time the beneficiary would devote to each duty, the AAO cannot determine which duties would consume the primary portion of the beneficiary's time and whether such duties fit the definition of managerial or executive capacity. *See* section 101(a)(44)(A) of the Act.

Additionally, the petitioner has named four sales representatives in its organizational chart and claims that all four individuals work on a commission basis as contracted employees. However, 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)).

Furthermore, 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). As properly pointed out in the director's decision, 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, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant matter, while the petitioner provides broad descriptions of job responsibilities, which generally indicate that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties. Where, as in the instant case, the petitioner fails to provide CIS with a specific list of duties, a determination cannot be affirmatively made that the beneficiary primarily performs qualifying tasks.

Accordingly, based on the evidence furnished, it cannot be found that the beneficiary has been employed abroad or will be employed in the United States in a primarily qualifying managerial or executive capacity. For these reasons, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.