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FILE:

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Office: CALIFORNIA SERVICE CENTER

Date:

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IN RE:

Petitioner:

[Redacted]

Beneficiary:

PETITION:

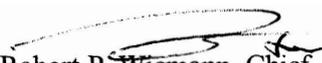
Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in the business of marketing and selling TFT LCD display products. It seeks to employ the beneficiary as its chief executive officer (CEO). 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 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 petitioner would employ the beneficiary in a capacity that is managerial or executive.

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 submitted a letter dated August 11, 2005, which contained a general description of the beneficiary's proposed job responsibilities. As the director has incorporated this description into his decision denying the petition, the AAO need not restate the description. The petitioner also provided an organizational chart showing its organizational hierarchy as of August 5, 2005. The chart identifies the beneficiary as CEO and head of the organization. His immediate subordinates include a secretary, an assistant manager in the accounting and operation department, and a sales assistant and RMA support in the sales department. The chart further indicates that the petitioner intended to hire two additional sales assistants, but had not completed the hiring process at the time the petition was filed. As such, the petitioner specifically identified the five employees that were part of its organization at the time of filing.

On January 18, 2006, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the beneficiary's employment capacity in the proposed position in the United States: 1) the petitioner's

organizational chart including the job duties and educational levels for all employees under the beneficiary's supervision; 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; and 3) the petitioner's 2005 quarterly wage reports, its payroll summary, and the W-2 wage and tax statements issued by the petitioner.

The petitioner's response included an additional breakdown of the beneficiary's proposed job responsibilities, as well as brief descriptions of the job responsibilities of the remaining members of the petitioner's staff. As the director included this breakdown in the decision denying the petition, the AAO need not restate it. The petitioner also complied with the request for various financial documents and provided an updated organizational chart, which included the names, job titles, and salaries of the petitioner's entire staff as of January 31, 2006.

On May 12, 2006, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. The director acknowledged the petitioner's submission of two organizational charts throughout this proceeding, but deemed only the first chart relevant, as it is a more accurate reflection of the petitioner's organizational hierarchy at the time the Form I-140 was filed.

On appeal, counsel disputes the director's comments disregarding the organizational chart submitted in response to the RFE. Counsel denies that the petitioner submitted an earlier organizational chart and indicates that the prior submission was meant to illustrate the petitioner's qualifying relationship with the beneficiary's foreign employer. Counsel's statement however, is without merit, as the record clearly contains a dated organizational chart as described in this decision, *supra*. While the RFE request for another organizational chart may have been unnecessary in light of the petitioner's prior submission, counsel's contention that the director mischaracterized the petitioner's submissions is unfounded. Furthermore, the intent of the RFE instructions with regard to the organizational chart appears to have been to seek additional details regarding the petitioner's staff at the time the Form I-140 was filed rather than an up-to-date organizational chart for the company, which is irrelevant to the petitioner's eligibility. 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). Therefore, regardless of the intent of the RFE request, eligibility cannot be based in any part on an organizational structure that did not exist at the time the petitioner filed its Form I-140.

Counsel also disputes the director's references to executive and managerial capacity, asserting that the director placed an undue burden on the petitioner to establish that the beneficiary fits under both statutory definitions. However, the plain language of the director's decision establishes that counsel's argument is unfounded. It is customary for service decisions to cite the statutory definitions of managerial and executive capacity for the benefit of the petitioner in the event that a petitioner claims to fit one definition but provides a set of facts that suggest the beneficiary fits the other statutory definition. There is absolutely no indication that the director subjected the petitioner to additional scrutiny or placed an additional burden of having to establish that the beneficiary fits both statutory definitions. Rather, the director specifically stated that only a petitioner that chooses to assert eligibility based on both statutory definitions has the burden of establishing that its beneficiary's duties are both managerial and executive. Nowhere in the director's decision is there a suggestion that the petitioner in the instant matter has been subjected to this additional burden.

Next, counsel contends that the director failed to analyze the petitioner's reasonable needs in light of its function and overall stage of development. Counsel discusses the petitioner's success and its increased level of business, indicating the need for the beneficiary's services during the petitioner's rapid development. However, 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). Thus, in instances where the beneficiary's job description lacks sufficient information to affirmatively establish qualifying employment, the reasonable needs and stage of development are irrelevant, as neither supersedes the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates a majority of his time to non-qualifying tasks, but those needs will not override the statutory requirement. In the instant matter, the petitioner failed to submit a detailed job description that elaborates on the beneficiary's general job requirements with a percentage breakdown of the specific day-to-day duties. While the director clearly acknowledged the petitioner's submission, he properly commented on the lack of necessary detail. The actual duties themselves 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).

Furthermore, the AAO questions whether the petitioner's organizational hierarchy at the time of filing was sufficient to support a primarily executive position. The record shows that at the time the Form I-140 was filed, the petitioner had five employees including the beneficiary. The beneficiary's four subordinates included a secretary, a sales assistant, tech support, and an assistant manager. Thus, the organization essentially consisted of two tiers—one tier containing the beneficiary and the lower tier containing the remaining four employees. Although the more recent organizational chart shows that a general manager was eventually hired to separate the beneficiary from the lower tier employees, the general manager was not part of the petitioner's organization at the time the Form I-140 was filed. The updated chart also shows a sales manager overseeing the work of an assistant manager and tech support in the sales department. However, the sales manager was also hired after the Form I-140 was filed. Additionally, while the more recent organizational chart identifies \_\_\_\_\_ in the position of account manager, the original organizational chart identified the same individual as an assistant manager. The petitioner has not explained the change in position titles. Nor has the petitioner addressed the director's adverse comments suggesting that \_\_\_\_\_

position may not be that of a professional. Regardless, even if the AAO were to accept \_\_\_\_\_ position as one of a professional, the remainder of the beneficiary's subordinate staff was comprised of non-professional, non-supervisory, and non-managerial employees. Moreover, while this determination is irrelevant to qualifying as an executive as defined by the Act, it is also irrelevant to qualifying as a manager if, as here, the petitioner fails to show that a majority of the beneficiary's time will be spent on managerial duties.

Finally, the AAO does not overlook the beneficiary's discretionary authority and his overall position with respect to others in the petitioner's organizational hierarchy. However, the petitioner is a sales-based organization where selling products is an essential function. The fact that the petitioner employed only one sales assistant at the time the petition was filed suggests that the sales function was also carried out by others within the petitioning organization, including the beneficiary. In light of the petitioner's failure to specify the actual duties the beneficiary would perform on a daily basis coupled with its lack of an adequate support staff, the AAO cannot conclude that the beneficiary would primarily perform duties of a qualifying nature. For this reason, the petition may not be approved.

Furthermore, the record supports a finding of ineligibility based on an additional ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Although the petitioner has provided a number of its financial records including bank statements and corporate tax documents, none of the submitted documentation is sufficient to enable the AAO to conclude that the petitioner conducted business on a "regular, systematic, and continuous" basis. *Id.* Even though the petitioner is a sales-based organization, the record lacks any invoices or sales receipts to suggest ongoing sales activity during the requisite 12-month period.

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, service records show the petitioner's previously approved 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, 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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, 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).

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 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.