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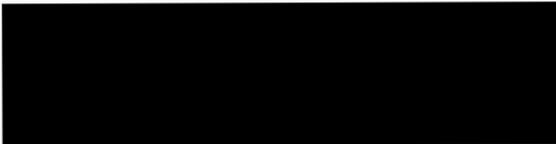
Office: TEXAS SERVICE CENTER

Date: MAR 06 2007

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

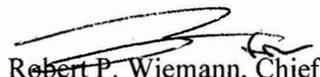
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center.<sup>1</sup> The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation engaged in the business of renting, selling, and installing video and audio equipment. It seeks to employ the beneficiary as its general manager. 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 managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of her 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 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

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<sup>1</sup> The record shows that the Form I-140 that is the subject of the present matter was initially denied in a decision dated July 29, 2005. However, the basis for that denial was erroneous. Accordingly, the petitioner's subsequent motion disputing the erroneous decision was granted via service notice dated August 22, 2005. The director has since issued another denial dated February 16, 2006. This latest decision is the subject of the appeal in this matter.

second issue is whether the petitioner established that the beneficiary would be primarily employed in the United States 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.

The petitioner did not provide additional information or documents in support of the petition. Accordingly, on August 22, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following information to assist in determining the beneficiary's employment capacities abroad and in the proposed position in the United States: 1) the beneficiary's position titles; 2) a list of the duties associated with each position as well as the percentage of time allotted to each of the listed duties; 3) the job

titles, educational levels, and brief descriptions of the duties performed by the beneficiary's subordinates; 4) a statement describing the beneficiary's position within each entity's organizational hierarchy; and 5) a statement discussing the product and/or service providers within each entity.<sup>2</sup>

The petitioner provided a response dated October 3, 2005. The response contained the following description of the beneficiary's proposed employment in the United States:

[The beneficiary] has a senior and highest executive managerial [full[-t]ime position in [the petitioning entity].

His [m]anagerial capacity [is] demonstrated by his in [sic] charge of direction, management coordination, activities and operation of the corporation.

He exercises broad discretion over day-by-day operations. He has full responsibility for recruiting, hiring, training and dismissing employees, discipline promotion and remunerations. [The beneficiary] throughout his employment, as a key managerial employee with proprietary knowledge about the field of [a]udio [v]isual [m]ultimedia [p]rojectors product lines, has demonstrated considerable skills and expertise in the area of decision making, establishing relations of dealerships with American companies . . . . He also implement[s] policies and adopt[s] strategies to improve business holding full authority over all executive decisions aimed to achieve profitability goals set by the main company.

The petitioner provided the following percentage breakdowns for the proposed position:

1. Plan, [o]rganize, [s]upervise, [c]ontrol and [d]irect and direct [sic] [the petitioning entity] in accordance with the guidelines set by the company[.] (25%).
2. Responsible for the overall business and program management of the company[.] (15%).
3. Plan and review the annual budget of the company[.] (5%).
4. Properly keep accurate information in [the] [c]orporation's books and other records, reports and official documents to the managers and stockholders[.] (5%).
5. Periodically assess the total services of the company, keeping the stock holders of the company informed of its progress, problems, needs, and make recommendations accordingly[.] (10%).
6. Develop organizational revenue diversification and marketing plan[.] (10%).
7. Develop and plan new programs with managers and stockholders[.] (10%).

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<sup>2</sup> The director also previously issued an RFE dated May 7, 2005 and a notice of intent to deny (NOID) dated June 27, 2005. However, both notices lead to an improperly issued denial, which is now moot pursuant to the director's granting the petitioner's motion to reconsider the matter. In so doing, the director issued another RFE, which is addressed above.

8. Follow up implementation of corporate policies[.] (5%).
9. Select, hire, train, and direct personnel, supervise employee[s] and subcontractors. (5%).
10. Maintain regular communication with the [p]arent [c]ompany from Brazil giving monthly reports on the company operations and financial status[.] (10%).

The petitioner also provided its organizational chart identifying three managerial employees, including a financial manager, an administrative manager, and a sales and marketing manager as the beneficiary's immediate subordinates. The financial manager is shown as having two subordinates including a purchaser and an accounts payable and receivable employee; the administrative manager is shown with three subordinates, one of whom is identified as an independent contractor; and the sales and marketing manager is shown with two immediate subordinates, one of whom is an independent contractor. The sales and marketing department is shown as having five sales representatives, four of whom are identified as independent contractors.

With regard to the beneficiary's position abroad, the foreign entity provided the following statement:

[The beneficiary] was the senior executive in [f]ull[-t]ime managerial position, in charge of [the foreign entity]. He was responsible for planning, organizing, supervising, controlling and directing all commercial and administrative operations in that [r]egion of the company. In addition[,] he had the full responsibility for the staffing and supervision of the company, [sic] over which he had hiring, training and firing authority. He exercised wide latitude and discretionary authority over the work of the company's staffing. He was very familiar with the organization methods and procedures of our company.

The following percentage breakdown of responsibilities was also provided:

1. Managing, directing, supervising and coordinating overall [r]egion operations and formulating policies to be followed[.] (20%).
2. Develop [r]egion plans and strategies, prepare reports, forecast performance and engage in long-range planning and identifying business opportunities[.] (10%).
3. Oversee daily management of the [r]egion business and conducting general administration affairs of the company[.] (20%).
4. Supervising, coordinating and controlling the job performance of the staff and attend employees [sic] meeting[s.] (15%).
5. Direct negotiations with providers and approve purchase orders and contract terms[.] (10%).
6. Maintain regular communications with our [d]irectors, giving monthly reports on the company operations and financial status[.] (5%).

7. Approve [the] budget and keep records of the [r]egion operations[.] (10%).
8. Select[ed], hire[d], training [sic] and fired managers and supervisors[.] (10%).

The petitioner identified the job titles of the beneficiary's subordinates at the foreign entity and provided their brief job descriptions. The petitioner also stated that the foreign entity's service providers are its engineers, consultants, and computer experts.

In a decision dated February 16, 2006, the director denied the petition concluding that the petitioner failed to establish duties for the foreign and U.S. entities as being primarily within a qualifying managerial or executive capacity. While the AAO concurs in the overall conclusion regarding the petitioner's eligibility, the director's underlying analysis contains errors that must be addressed. More specifically, the director commented on the beneficiary's responsibilities regarding staff recruitment and employee supervision as well as his overall discretion with regard to matters concerning his subordinate staff. Based on his observations regarding these responsibilities, the director concluded that the beneficiary's duties abroad and his proposed duties in the United States cannot be deemed to be primarily within a qualifying managerial or executive capacity. The AAO notes, however, that the responsibilities mentioned by the director merely demonstrate the beneficiary's discretionary authority with respect to the subordinate staff of both entities. Unless the record shows that the beneficiary spends a majority of his time overseeing a staff that is not comprised of managerial, supervisory, or professional employees, the director's comments have no factual basis. As observed in the present matter, there is no evidence that the beneficiary's subordinate staff, either abroad or in the United States, has been or would be comprised solely of non-managerial, non-supervisory, or non-professional employees. Additionally, the director's comments suggest that she may not have considered the possibility that the beneficiary's past and/or proposed positions may be those of a function manager or even within an executive capacity, neither of which would require employee supervision.

Furthermore, when examining the executive or managerial capacity of the beneficiary, the Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). As such, the director's determination that the beneficiary's positions abroad and in the United States involve the performance of primarily non-qualifying tasks suggest that the petitioner provided a sufficiently detailed description of duties, which enabled the director to reach such a conclusion. However, the AAO observes that the statements and percentage breakdowns provided by the petitioner in this proceeding are primarily comprised of broad job responsibilities rather than specific job duties. For instance, with regard to the position abroad, the petitioner stated that the beneficiary managed, directed, supervised, and coordinated company policies, supervised the daily management of the company, and supervised the company staff, all of which cumulatively comprised 55% of the beneficiary's time. With regard to the beneficiary's proposed position in the United States, the petitioner stated that the beneficiary will plan, organize, supervise, control, and direct the U.S. company, be responsible for the petitioner's overall business and program management, and develop and plan new programs, all of which would cumulatively comprise 50% of his time. With regard to both job descriptions the petitioner has used broad terminology, which fails to convey an understanding of the specific tasks that comprise the beneficiary's daily work schedule. 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). While the petitioner has adequately illustrated the high degree of the beneficiary's discretionary authority, the record lacks a detailed explanation of the actual duties the beneficiary performed abroad and would perform in the United States on a daily basis. Therefore, contrary to the director's observation, the record lacks sufficient information to render any

conclusion as to the nature of tasks the beneficiary primarily performed abroad and would perform for the U.S. petitioner. Accordingly, the director's erroneous comments are hereby withdrawn.

Notwithstanding the director's flawed reasoning, the record suggests that the petitioner has failed to establish that the beneficiary's foreign or proposed employment fits the parameters of qualifying managerial or executive capacity. As stated above, the petitioner has failed to provide adequate descriptions of the beneficiary's actual daily tasks. 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.

Additionally, 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, the petitioner uses both terms interchangeably making it impossible to determine which of the two definitions should be applied. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Counsel perpetuates the confusion further, referring to the beneficiary on appeal as "a high level executive and manager." While counsel adequately conveys the beneficiary's key role within each of the organizations, questions still remain as to what duties the beneficiary primarily performed abroad and what duties he would primarily perform during his employment for the petitioner.

Finally, counsel refers to the petitioner's two previously approved L-1A petitions naming the same beneficiary as in the instant matter. 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).

Moreover, 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, counsel refers to the petitioner's organizational chart, which identified 16 employees including independent contractors. It is noted, however, that the record lacks evidence of the petitioner's employment of any of the independent contractors. While the petitioner provided tax documentation to account for other employees named in the organizational chart, the record does not contain documentation establishing the employment of independent contractors. 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)). As the record lacks documentation to establish the petitioner's employment of independent contractors, the AAO questions the petitioner's overall ability to relieve the beneficiary from engaging in primarily non-qualifying tasks.

Accordingly, based on the evidence provided, it cannot be found that the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity.

Lastly, the record supports a finding of ineligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, the record contains a total of three stock certificates two of which indicate that they are Certificate No. 1. The first Certificate No. 1 was issued by the petitioner on September 7, 1999 and was submitted, along with Certificate No. 2, in support of a prior Form I-140, which the petitioner filed in 2004. Certificate No. 1 shows that the beneficiary acquired ownership of 3,749 shares of the petitioner's stock and Certificate No. 2 indicates that [REDACTED] owned the remaining 3,751 of the petitioner's issued shares of which there were a total of 7,500. The second Certificate No. 1 was also issued by the petitioner and was submitted in support of the Form I-140, filed on April 1, 2005, which is the subject of the present matter. Unlike the first Certificate No. 1, the more recent stock certificate was issued on January 18, 2005 and shows that 3,825 shares were issued to Sisinfo Consultores Asociados, Ltda., the beneficiary's foreign employer. Since the petitioner is only authorized to issue 7,500 shares, it would be impossible for the more recent Certificate No. 1 to coexist with the previously issued Certificate No. 2, since that would result in the issuance of more than the authorized number of shares. Furthermore, the existence of two different No. 1 stock certificates, both of which indicate that they were the first to be issued, gives rise to serious doubt as to the authenticity of either document and, consequently, the petitioner's claimed ownership. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record contains no documentation to suggest that the considerable inconsistency with regard to the petitioner's ownership has been resolved.

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.

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.

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.