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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **OCT 09 2007**  
SRC 06 021 51263

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

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

  
Robert P. Wiemann, 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 limited liability company organized in the State of Georgia. It seeks to employ the beneficiary as its president. 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 it would employ the beneficiary 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 primary issues in this proceeding call for an analysis of the beneficiary's job duties during his employment abroad as well as his proposed job duties in his prospective position with the U.S. petitioner.

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 October 21, 2005 stating that it would like to permanently employ the beneficiary in the position of president. The petitioner also provided an organizational chart showing the beneficiary at the top of the hierarchy with the secretary/treasurer as his direct subordinate. The chart shows that the store manager is the secretary/treasurer's direct subordinate. The chart further indicates that the three remaining tiers in the hierarchy consist of a sales manager and an assistant sales manager, a supervisor of beauty supply and a bookkeeper, and two clerks, respectively. The petitioner did not provide any information about the beneficiary's duties abroad or his proposed duties in the United States.

Accordingly, on June 28, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following information regarding the beneficiary's foreign employment and his proposed employment in the United States: 1) a list of the beneficiary's duties accompanied by a percentage

of time spent abroad on each duty and time the beneficiary would be expected to spend on each proposed duty; 2) the job titles and brief description of duties of the beneficiary's subordinates, if any; 3) an explanation of who provided the services for the company abroad and who would provide the services of the U.S. petitioner; and 4) the W-2 statements issued by the petitioner to its employees in 2004 and 2005.

In response, the petitioner provided a letter dated September 19, 2006 from the petitioner's counsel, who listed all of the exhibits submitted to address the director's RFE. Among the exhibits was a letter dated September 18, 2006 from the foreign entity. The letter contained the following information regarding the beneficiary's foreign employment:

We hereby confirm that [the beneficiary] was the [m]anaging [d]irector of this company from 1995 to 2001. In the position, [the beneficiary] served as our chief executive officer. He managed the company and established organization goals and policies. He was responsible for all administrative functions and financial activities of the company; reviewed and approved prospective investments for real estate properties; exercised a [sic] wide latitude of discretionary decision-making, including decisions involving hiring, firing and promotions, and the daily operation of the company. He reported to the [c]ompany's [b]oard of [d]irectors and ensured that HDI remained a profitable company.

In a separate submission, which is also part of exhibit 3, the beneficiary directly supervised the following eight positions: an assistant managing director, a manager of properties, a supervisor of construction, an employee who was in charge of leasing, a marketing individual, an administrative clerk, a company driver, and a supervisor of renovations. Although the list of subordinates indicated that the property manager handled the daily operation of properties, the petitioner did not provide any specifics as to the daily operational duties. The petitioner also provided the following percentage breakdown of the beneficiary's foreign job duties:

Operations management responsibilities amount[ed] to 50% consisting of[:]

- a. Meetings with prospective vendors—10%
- b. Meetings with current major clients and government agencies—15%
- c. Internal work meetings with [m]anager (director reports [sic]) on current projects—25%

Financial and [b]ank responsibilities amounted to 50% consisting of[:]

- a. Meetings and activities related to investments and related financial activities—35%
- b. Evaluations of new principal opportunities—15%

Additionally, the petitioner submitted the following percentage breakdown of the beneficiary's proposed employment in the United States:<sup>1</sup>

Operations management responsibilities amount to 50% consisting of[:]

- a. Meetings with prospective vendors—10%
- b. Meetings with current major clients and government agencies—15%
- c. Internal work meetings with [m]anager (director reports [sic]) on current projects—25%

Financial and [b]ank responsibilities amount to 50% consisting of[:]

- a. Meetings and activities related to investments and related financial activities—35%
- b. Evaluations of new principal opportunities—15%

On October 2, 2006, the director denied the petition. While he did not specifically address any deficiencies with regard to the description of the beneficiary's foreign employment, the director's reference to "the beneficiary's job assignments" suggests that the director's adverse findings apply to the beneficiary's employment abroad as well as to his proposed employment in the United States. The director properly concluded that the petitioner failed to establish that either of the beneficiary's positions can be deemed to be primarily managerial or executive. While the AAO concurs with the director's overall conclusion, it is noted that the petitioner's description of the beneficiary's proposed employment does not include business marketing, staff recruitment, and staff supervision, as indicated in the director's decision. As such, the director's erroneous observation is hereby withdrawn.

On appeal, counsel vehemently opposes the basis for the director's denial, claiming that the prior approvals of the petitioner's L-1A nonimmigrant petitions are inconsistent with the adverse decision in the present matter. More specifically, counsel contends that the director's review of the matter on prior occasions in the petitioner's nonimmigrant petitions had resulted in approval of the beneficiary's managerial and executive capacity. Counsel cites *Omni Packaging, Inc. v. INS* in support of his argument that Citizenship and Immigration Services (CIS) must specify how the previous adjudications were in error. 733 F. Supp. 500 (D.C.P.R. 1990). Based on the court's reasoning in *Omni Packaging, Inc. v. INS*, counsel further asserts that denial of a third preference classification on the same record as an L-1 visa and extension that were approved is an abuse of discretion without specific elucidation stating why the previous approvals were in error. *Id.* First, it should be noted that the present matter is a first preference immigrant petition, not a third preference case. More importantly, however, counsel fails to note that the court in *Omni Packaging* revisited the issue and later determined that the legacy Immigration and Naturalization Service had properly denied the

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<sup>1</sup> Although the director acknowledged that the petitioner submitted a percentage breakdown of the beneficiary's proposed position, it is unclear whether this document was submitted in support of the most recently filed Form I-140, which is the focus of the present discussion, or whether it was submitted in support of the petitioner's previously filed Form I-140 (receipt no. SRC 04 080 50579). Regardless, as this document is a matter of record contained in the record of proceedings currently being reviewed by the AAO, the position breakdown will be considered.

immigrant petition and that it was not estopped from finding that the alien was not a manager or executive after having determined that he was a manager or executive for purposes of issuing an L-1 visa. *See Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996).

While the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same statutory definitions of managerial and executive capacity, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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. 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 25, 29-30 (D.D.C. 2003) (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 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 approvals 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, in this matter, the current decision denying the Form I-140 immigrant petition is consistent with the director's denial of the petitioner's prior immigrant petition (SRC 04 080 50579).

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).

Thus, counsel's statements suggesting that the director must adhere to the prior approvals of the petitioner's nonimmigrant petitions are without merit.

Alternately, counsel asserts that the beneficiary "remains minimally engaged" in non-qualifying tasks and claims that the beneficiary's main focus is "set[ting] the strategy and direction of the company." However, in further discussing the beneficiary's proposed employment, counsel merely paraphrases the statutory definition of executive capacity without specifying any of the actual duties the beneficiary would be expected to

perform on a daily basis. See § 101(a)(44)(B) of the Act. While counsel generally suggests 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. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. See 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner's own descriptions of the beneficiary's foreign and proposed job duties are only marginally less vague than the broad statements provided by counsel to describe the beneficiary's proposed U.S. employment. Specifically, while both the foreign and proposed positions involve "[i]nternal work meetings with [the] [m]anager," something that purportedly consumed and continues to consume 25% of the beneficiary's time, the petitioner provides no explanation as to the specific events that take place at these meetings, the specific subject matter at these meetings, or the beneficiary's specific role and contribution at such meetings. Similarly, the petitioner provides no information as to the beneficiary's role and his specific duties as they relate to investments and financial activities, which are the subject of meetings that consumed and would continue to consume 35% of the beneficiary's time. Thus, based on the information provided by the petitioner, at least 60% of the beneficiary's time has been and would continue to be spent in meetings whose subject matter is entirely unclear and during which the beneficiary's actual duties also remain unknown. As previously indicated, 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.

Lastly, counsel suggests that the beneficiary's proposed position is within an executive capacity, claiming that the beneficiary directs a function of the organization.<sup>2</sup> However, this claim is contradicted by counsel's subsequent claim that the beneficiary's position involves the supervision of managerial and professional level employees, which is inconsistent with the role of an executive directing a function and is irrelevant with regard to the definition of executive capacity.<sup>3</sup> See section 101(a)(44)(A)(ii) of the Act. Regardless, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the present matter, this highly relevant information is effectively absent. Instead of providing the beneficiary's specific day-to-day duties with regard to the beneficiary's foreign and proposed positions, the petitioner provides broad statements without further explanation of how the beneficiary's role fits with the specific nature of the business conducted by the two companies that are relevant to the present discussion. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Moreover, the fact that counsel paraphrases portions of the statutory definition of executive capacity, while simultaneously maintaining that the beneficiary would oversee a managerial and professional staff requires further explanation. 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 fails to provide the necessary explanation to clarify the confusing statements made on appeal.

Lastly, the information provided in the organizational chart, which the petitioner provided initially in support of the Form I-140 in October 2005, is inconsistent with the petitioner's fourth quarterly wage report for 2005,

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<sup>2</sup> Refer to p. 6 of counsel's appellate brief.

<sup>3</sup> Refer to p. 7 of counsel's appellate brief.

which reflects the employees who were paid by the petitioner at the time the Form I-140 was filed. Specifically, of the nine individuals listed in the organizational chart, only four, including the beneficiary, were identified in the relevant quarterly wage report. Although the AAO acknowledges the petitioner's submission of another organizational chart in response to the RFE, the chart's title clearly indicates that the names contained therein are reflective of the petitioner's staffing structure as of 2006, not 2005 when the Form I-140 was filed. Nevertheless, absent a full and credible explanation for the inconsistency between the October 2005 organizational chart and the fourth quarterly wage report for 2005, it cannot be found that the majority of the petitioner's claimed employees were actually employed at the time the Form I-140 was filed. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity. Despite the emphasis placed on the need for a specific description of the beneficiary's duties, the petitioner has provided generalizations and broad statements that fail to convey an understanding of the actual tasks that occupied the primary portion of the beneficiary's time during his employment abroad and those tasks that would occupy his time during his proposed employment in the United States. Additionally, the petitioner has failed to provide an adequate explanation of the nature of its business, what daily operational tasks are required for the petitioner's daily function, and who, if not the beneficiary, would perform the non-qualifying tasks on a daily basis. Thus, based on the evidence furnished, it cannot be found that the beneficiary has been employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate means:*

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50

joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the petitioner claims to be a wholly owned subsidiary of the beneficiary's foreign employer. In support of this claim, the petitioner provides its operating agreement wherein the foreign entity is named as the petitioner's sole member and, consequently, its sole owner. However, while the petitioner may be wholly owned by the beneficiary's foreign employer, Article 5, section 5.1(a) of the operating agreement states that control of the petitioner lies with the board of managers, who have the power to "bind the Member and the Company" in accordance with various provisions discussing the board of managers' authority and discretion. Furthermore, Exhibit A, which is appended to the operating agreement, lists three individuals who are named the first three managers of the petitioning entity. Therefore, while the petitioner may be wholly owned by the beneficiary's foreign employer, it appears control of the petitioner lies with three individuals rather than the entity that owns it. As such, it cannot be found that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer, and the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). 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, *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.