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[REDACTED]

FILE: [REDACTED]
SRC 06 120 52123

Office: TEXAS SERVICE CENTER

Date: JUL 09 2008

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.¹ The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida. The petitioner operates as an Italian restaurant chain and seeks to employ the beneficiary as its director of operations. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner failed to meet its burden of proof and denied the petition on the two following independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes both grounds of the director's decision and submits a brief as well as additional documentation in support of his arguments. After a thorough review of the submissions, the AAO finds that the petitioner has met its burden of proof with regard to the first ground cited in the denial. As such, the director's adverse findings with regard to the first ground are hereby withdrawn. The remainder of this discussion will address the director's adverse findings with regard to the beneficiary's position with the foreign entity.

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.

¹ The AAO notes that counsel specifically asked that Citizenship and Immigration Services (CIS) treat the petitioner's Form I-290B as a motion to reopen/reconsider. See 8 C.F.R. § 103.5(a)(2) and (3), respectively. However, in reviewing a petitioner's motion, the director has the discretionary authority to forward the record to the AAO in the event that the petitioner fails to meet the regulatory requirements for a motion. Accordingly, the record has been forwarded to the AAO to be treated as an appeal.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The primary issue in this proceeding is whether the beneficiary was employed abroad by a qualifying entity 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 submitted a letter dated January 27, 2006, in which the petitioner stated that the beneficiary's position abroad was in the position of general manager, which included "overseeing and managing the company's overall plans, budgets, policies and transactions; overseeing and coordinating daily operations, including all facets of sales, expense control, inventory management, vendor relationships and financial performance." Although the petitioner provided a list of 1,186 employees that were part of the foreign entity's staffing structure, the position titles were in Spanish with no English language translation to accompany the list.

On May 23, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to describe, in greater detail, the beneficiary's foreign position, including his specific job duties as well as the job titles and job duties of the beneficiary's subordinates. The petitioner was also asked to include an organizational chart of the foreign entity to illustrate the beneficiary's position with the company's hierarchy.

In response, the petitioner submitted a letter dated July 31, 2006, which included the following statement regarding the beneficiary's employment abroad:

[The beneficiary] was responsible for the overall management and supervision of operational management decisions. He was in charge of ensuring all operational aspects of the company were conducted in a cost-efficient and productive manner, reviewing personnel requirements and providing guidance regarding the proper execution of work according to [the] company's standards. [The beneficiary] was responsible for supporting [the] market and [the] company's direction, and monitoring the execution and adjustment of overall plans[.]

Although the petitioner provided a detailed chart illustrating its own organizational hierarchy, including the names and position titles of the beneficiary's subordinates, the same is not true of the organizational chart for the foreign entity, which included no job titles. Instead, the chart named the beneficiary's department (as well as the two other departments at the same level within the organization) and the four divisions within the beneficiary's department. Although a translated list of positions was provided as part of the response, the list did not include the names of the employees that occupied those position titles, nor were there any identifying factors that placed the position titles within the specific departments or divisions listed in the organizational chart. Lastly, of the claimed 1,186 employees, only 123 position titles appeared on the English language translation, which was unaccompanied by any documentation to show that the translation originated from a certified translator such that proper evidentiary weight can be given to the document. *See* 8 C.F.R. § 103.2(b)(3).

In a decision dated August 18, 2006, the director denied the petition finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The director properly noted the deficient organizational chart, which failed to identify the beneficiary by name and job title, instead naming only the department where the beneficiary was employed. The director properly focused on the extreme lack of detail in the petitioner's statement regarding the beneficiary's job duties abroad, concluding that the petitioner failed to convey an adequate understanding of tasks the beneficiary performed to help reach the company's business goals.

On appeal, counsel challenges the director's finding, asserting that the beneficiary has been employed in both a managerial and an executive capacity. However, counsel's supporting arguments address only the director's

findings with regard to the beneficiary's proposed position with the U.S. petitioner. The only document submitted on appeal with regard to the beneficiary's foreign employment is a letter dated September 18, 2006 in which the foreign entity's general manager stated that the beneficiary was employed by the foreign entity from 1998 to 2002 as the new business development manager, a job title that is different from the one cited in the January 27, 2006 support letter, which referred to the beneficiary's foreign position as that of general manager. It is noted that this inconsistency regarding the beneficiary's job title abroad has neither been acknowledged nor resolved. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The current general manager of the foreign entity further stated that the beneficiary was directly responsible for the foreign business operation and its expansion into a chain restaurant. However, no follow-up explanation is provided to clarify how the beneficiary's foreign position falls under the statutory definitions for managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, respectively. Furthermore, 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. In the present matter, despite the director's specific request for a detailed description of job duties, the petitioner's submissions consist of the beneficiary's vague job responsibilities. Precedent case law has firmly established that 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Where, as here, the crucial information and proper supporting evidence is missing, the AAO is unable to conclude that the beneficiary's foreign employment consisted primarily of managerial and/or executive duties.

Additionally, the record contains documentation that leads the AAO to question whether the beneficiary was, in fact, employed by the foreign entity for the requisite one-year period prior to coming to the United States as a nonimmigrant. Specifically, the petitioner has indicated that the beneficiary was employed abroad from June 1998 to November 2002. However, in the Form G-325A, the beneficiary indicated that he lived in Florida as early as February 2000 and did not provide his last foreign address to assist CIS in determining when he last resided abroad. The record also shows that the beneficiary was issued employment authorization in July 1998 and that the authorization was valid until July 1999, a time during which the beneficiary previously claimed employment abroad. Lastly, the record shows that the applicant was married in the United States in February 2000, thereby leading the AAO to question whether he returned to Colombia to continue his purported employment with the foreign entity as previously claimed. Thus, in light of these numerous anomalies and the petitioner's failure to supplement the record with the required information regarding the beneficiary's foreign employment, the AAO cannot conclude that the requirements enumerated in 8 C.F.R. § 204.5(j)(3)(i)(B) have been met. For this reason, the petition may not be approved.

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 final decision. More 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.

In the present matter, the petitioner has maintained the claim that it is a subsidiary of Meals, Mercadeo de Alimentos de Colombia S.A. Among its supporting documents, the petitioner provided Articles of Amendment to Articles of Organization filed on June 28, 2002, showing Meals de Colombia Ltda. among its managers receiving a distribution of 71.8% of the petitioner's profits and losses.² In response to the RFE, the petitioner provided exhibit 7, which included membership certificate nos. 7-9 accompanied by the Articles of Amendment to Articles of Organization. While these documents show a change in the ownership and profit/loss distribution, effective in February 2006, they show that Meals de Colombia owns 51% of the petitioning entity and, therefore, maintains a controlling interest in Four Runners Investments, LLC. However, the record lacks documentation to establish a connection between Four Runners Investments, LLC, the U.S. petitioner, and Archie's Gourmet Pizza. Furthermore, the petitioner provided a photocopy of an article from *Pizza Today* from February 2006 identifying the beneficiary as the owner of Archie's Gourmet Pizza. Thus, even if the petitioner is doing business as Archie's Gourmet Pizza, there is a possible discrepancy with regard to the company's 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).

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.

² Exhibit 8, submitted in support of the Form I-140, contains a certified translation of the foreign entity's Certificate of Existence and Legal Representation showing that it is doing business as Meals de Colombia S.A.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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, 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. CIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. 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).

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.