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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 04 2004

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:

SELF-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, Director
Administrative Appeals Office

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. 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 Florida in January 1998. It is a marketing company dedicated to the telecommunications business. 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 determined that the petitioner had not established that the beneficiary had been employed in a managerial or executive capacity for the foreign entity or would be employed in a managerial or executive capacity for the United States entity.

On appeal, the petitioner submits a letter in response to the director's decision.

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):
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> * * *
>
> (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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary's assignment for the petitioner will be primarily 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
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner stated that it had three employees. In a September 6, 2002 letter appended to the petition, the petitioner identified the employees as president (the beneficiary's position), a general manager, and a technical manager. The petitioner also indicated that it employed three part-time sales agents. The petitioner stated that the beneficiary's duties as president included:

Personnel

Evaluating performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives. Directing staffing, training and performance evaluations.

Marketing

Development of new customer bases in the United States, promoting company services and keeping abreast of new developments in market research techniques through seminars, trade shows, periodicals and trade journals.

Analyzing competitive companies in term of price and offers and representing company at trade associations meeting to promote services.

Operations

Directing the management and growth of the company.
Directing the day-to-day operations and customer service matters.
Planning, developing, and establishing policies and objectives of business organization in accordance with board directives and corporation charter.
Directing and coordinating activities of [the petitioner], to obtain optimum efficiency and economy of operations to maximize profits.
Planning business objectives, developing organizational policies to coordinate functions and operations of the company, establishing responsibilities and procedures for attaining objectives.
Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives an[d] planning in accordance with current conditions.
Directing and coordinating formulation of financial statements to programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.
Serving as chairman of committees, such as management executive, and sales.
Maintaining the excellence [sic] support supplied by the company in Argentina, to existing customers, including the day-to-day quotation activity and assistance.
Traveling to visit customers in Argentina to promote service and to establish and maintain customer relations.

The petitioner also noted that the beneficiary had been performing the same tasks of president since 1993 for Visworld in Argentina.

On February 19, 2003, the director requested additional evidence including: (1) the petitioner's organizational chart listing all employees by name and title, a brief description of each employee's duties, and evidence of wages paid to employees; and (2) additional details regarding the beneficiary's position and the percentage of time spent on the various duties.

In a March 4, 2003 response, the petitioner provided the identical position description previously submitted.

The director determined that the beneficiary's daily duties largely consisted of the tasks necessary to produce a product or provide the services of the organization. The director also observed that the record did not establish that the beneficiary actually supervised employees. The director concluded that the petitioner had not established that the beneficiary was eligible for the I-140 managerial/executive visa classification.

On appeal, the beneficiary asserts that her duties are solely managerial duties. She also lists the petitioner's employees as holding the positions of executive manager, (her position), administrative assistant, and engineer specialist. The beneficiary also references her past approvals as an L-1A intracompany transferee and submits past approval notices.

The petitioner submits the duties for the president's position that was used to support the previous L-1A petitions. The position description is identical to the position description initially submitted with the petition in this proceeding. The petitioner also submits the beneficiary's 2001 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, showing the beneficiary had been paid $38,000 for the year. The petitioner also submits a letter from its accountant stating that the beneficiary is the petitioner's general manager.

The petitioner's documents and the beneficiary's assertion are not persuasive. 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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager.

The petitioner has provided, in part, a vague and nonspecific description of the beneficiary's duties. For example, the petitioner states that the beneficiary will perform duties such as: "[d]irecting the management and growth of the company," and "[d]irecting the day-to-day operations and customer service matters," and "[p]lanning, developing, and establishing policies and objectives of business organization in accordance with board directives and corporation charter," and "[d]irecting and coordinating activities of [the petitioner], to obtain optimum efficiency and economy of operations to maximize profits." These statements do not clarify the beneficiary's daily duties. Moreover, such broad statements can encompass a wide range of duties that are not necessarily managerial or executive duties.

In addition, the petitioner indicates that the beneficiary is: "[p]lanning business objectives, developing organizational policies to coordinate functions and operations of the company, establishing responsibilities and procedures for attaining objectives," and "[r]eviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives an[d] planning in accordance with current conditions," and "[d]irecting and coordinating formulation of financial statements to programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity." The petitioner does not, however, further define the policies, procedures, strategies, and objectives. The petitioner also does not clarify who carries out or implements the petitioner's policies, procedures, strategies, and objectives, if not for the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

Further, the beneficiary's duties associated with developing new customer bases, promoting company services, analyzing competitive companies, and performing other market research are not traditionally managerial or executive tasks. The petitioner provides no evidence of other employees who would relieve the beneficiary from performing primarily non-qualifying duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, even though the petitioner describes the beneficiary as evaluating the performance of executives and directing the staffing, training, and performance evaluations, the petitioner has not provided evidence that it actually employed individuals other than the beneficiary when the petition was filed. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. The petitioner has not established that the beneficiary's duties will be primarily managerial or executive. For this reason, this petition may not be approved.

The second issue in this proceeding is whether the beneficiary's assignment for the foreign entity was in a managerial or executive capacity. The petitioner initially stated that the beneficiary had been the foreign entity's general manager for three years prior to entering the United States as a nonimmigrant. The petitioner indicated that the beneficiary's tasks comprised the same duties as those listed for the proposed position in the United States. The director requested additional information regarding the beneficiary's daily duties for the foreign entity and the number and positions of the people she supervised. In response, the petitioner again provided the same general description provided for the beneficiary's proposed position.

The director noted that the petitioner's response did not address the questions raised in the request for evidence. The director determined that the record did not contain evidence that the beneficiary actually supervised any employees abroad. The director concluded that the record did not demonstrate that the beneficiary had been employed in a managerial or executive position with the foreign entity.

On appeal, the petitioner submits the same position description of the beneficiary's duties for the foreign entity as had been previously submitted. The petitioner also lists three individuals that the foreign entity allegedly employs, in addition to the beneficiary. However, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Additionally, the petitioner provides no independent documentary evidence to substantiate that the foreign entity employed individuals under the beneficiary's supervision. The petitioner has not provided evidence on appeal to overcome the director's decision on this issue.

Finally, the petitioner's reference to the past approvals of the beneficiary's status as an L-1A intracompany transferee is not relevant to this proceeding. It must be noted that many I-140 immigrant petitions are denied after Citizenship and Immigration Services (CIS) approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *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). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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 I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L1-A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

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, supra*. 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). Furthermore, 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.