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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 03 2006

SRC 04 184 51106

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner was organized as a limited liability company in the state of Delaware and claims to be doing business as an investor in small businesses. It seeks to employ the beneficiary as its managing director. 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 on the following independent grounds of ineligibility: 1) the beneficiary would not be employed in the United States in a managerial or executive capacity; and 2) the petitioner failed to submit sufficient evidence establishing a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's findings 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 first issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted a letter dated March 20, 2004, which provided the following list of the beneficiary's proposed job responsibilities:

1. Research potential small business investments;

2. Expand operations of [the petitioner];

3. Direct, oversee, coordinate the management of [the petitioner] and its global operations;

4. Implement policies and procedures relating to the corporate objectives of [the foreign entity]; and

5. Participate in exhibitions, trade shows; [sic] technical forums; [sic] evaluation of businesses; [sic] marketing and pro-active evaluation of business acquistion [sic] opportunities; [sic] contact prospects; [sic] proposal preparation and presentations; [sic]

On April 13, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the beneficiary's proposed employment. Specifically, the director asked that the description include the beneficiary's position title, a list of all duties accompanied by a percentage of time to be spent performing each duty, and the number of subordinates reporting to the beneficiary along with their job titles, job duties, and educational levels. The director also asked the petitioner to identify the employee(s) who provide(s) the services of its organization and to include its organizational chart illustrating the beneficiary's position within the organizational hierarchy. Additional documentation was also requested in the form of the petitioner's wage reports, W-2 tax statements, and income tax returns for 2003 and 2004.

The petitioner responded to the director's request in a letter dated July 1, 2005, which listed, verbatim, each item enumerated in the director's request. With regard to the request for the beneficiary's job duties, the petitioner provided letters that had been previously submitted in support of the nonimmigrant L-1A petition. The first letter was dated January 8, 2003 and was written by the petitioner's prior counsel, who provided the following description of the beneficiary's position:

> [The beneficiary] has been responsible for all contact [sic] negotiations, client relations, and overseeing the management of the company. In addition . . . [the beneficiary] has been establishing the U.S. subsidiary by contacting companies in which the [p]arent [c]ompany was interested in investing, and negotiating contracts and stock purchase agreements with those companies. The estimated time breakdown of his activities is: [c]ontract-related work—40%; [c]lient [r]elations/[m]arketing—15%; [g]eneral [m]anagement—45%. . . .

The petitioner supplemented counsel's description with its own statement, which described the beneficiary's proposed position as follows:

> [The beneficiary] will be employed as [p]resident of [the petitioner] . . . . As [p]resident, [the beneficiary] will implement and establish policies and objectives of [the foreign entity] in the United States. He will research potential small business investments, with an eye to expanding the corporation. He will direct, oversee and coordinate business contracts in the entire operation of the company's market, and will develop other relevant policies and procedures implementing the overall objective of [the foreign entity].

Although the petitioner acknowledged the director's full request, which included an organizational chart, specifics regarding the petitioner's staffing structure, and a detailed list of the beneficiary's actual day-to-day duties *at the time the Form I-140 was filed*, the petitioner's response did not contain any of this pertinent information.

On July 20, 2005, the director denied the petition noting that the petitioner failed to submit sufficient evidence to establish its need for a primarily managerial or executive position and concluded that the beneficiary would not primarily perform qualifying duties on a daily basis.

On appeal, counsel contends that the director's review of the matter on one prior occasion in the petitioner's nonimmigrant petition had resulted in approval of the beneficiary's managerial and executive capacity. Counsel asserts that Citizenship and Immigration Services (CIS) failed to "specifically elucidate" how the previous adjudication was in error. Counsel cites *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) for the proposition that denial of a third preference classification on the same record as an L-1 visa that was approved is an abuse of discretion without specific elucidation stating why the previous approval was in error. Counsel fails to note, however, that the court in *Omni Packaging* revisited the issue and later determined that the legacy Immigration and Naturalization Service had properly denied the 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 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).

Furthermore, 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). However, while 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, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 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). 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 at 29-30 (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 prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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).

Counsel continues his argument, stating that the beneficiary primarily establishes policies and objectives of the petitioner, expands the foreign entity's trade and investment in the United States, and directs the petitioner's potential investments. Counsel goes on to provide specific examples of instances where the beneficiary used his discretionary authority to make decisions that would directly affect the petitioner. However, while 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. 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).

In the instant matter, the beneficiary's job description is primarily comprised of vague job responsibilities, which include expanding the petitioner's operations and implementing policies and procedures. While the beneficiary will likely execute a number of duties in an attempt to meet these general responsibilities, the responsibilities alone do not clarify CIS's understanding of what the beneficiary will actually be doing on a day-to-day basis. The regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Although the director reiterated the need for this information in the RFE, the petitioner chose to supplement the record with more vague statements, which also fell short of meeting the regulatory requirement. *See* 8 C.F.R. § 204.5(j)(5).

Although the petitioner was more specific in stating that the beneficiary would research potential investments and attend exhibitions and trade shows, these are the petitioner's necessary operational tasks, which cannot be deemed to be of a qualifying nature. It is noted that 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. at 604. As the petitioner failed to provide the percentage breakdown of duties as requested in the director's RFE, the AAO is unable to determine the portion of the beneficiary's time that would be attributed to these nonqualifying tasks. Although counsel provides this requested information in the appellate brief, the AAO notes that the petitioner was put on notice of required evidence (via the RFE) and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Therefore, the AAO will not consider this evidence on appeal for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Counsel further claims that the beneficiary directs and advises two companies in which the petitioner has ownership interests. However, since neither of the two companies is the petitioner in the instant matter, the

work performed by the beneficiary in managing the companies is irrelevant regardless of the petitioner's direct relationship as an investor. Part 5, Item 2 of the petitioner's Form I-140 states that the petitioner is an investor in small businesses. Thus, its goal is to continue finding successful businesses in which to invest for the purpose of making a profit. In the instant matter, the record indicates that the beneficiary is the person that would actually seek out potential investments, negotiate the contracts, directly communicate with the petitioner's clients, and oversee the management of the companies in which the petitioner ultimately invests. While this description is only a brief overview of the beneficiary's proposed position, it strongly suggests that the beneficiary will carry out all of the petitioner's operational tasks, qualifying or not. The fact that the beneficiary is the petitioner's sole employee, as indicated by the W-2 statements and the petitioner's tax returns, further supports the director's conclusion that the petitioner is unable to relieve the beneficiary from spending a majority of his time performing nonqualifying duties, as there is no one else within the organization to perform them.

Counsel asserts that the complex nature of the beneficiary's functions justify the petitioner's need for a full-time executive. Contrary to counsel's interpretation of the director's decision, CIS does not deem it unreasonable for the petitioner to have a full-time executive. Rather, CIS deems it unreasonable, given the lack of any support staff, that the beneficiary's duties would primarily be of a qualifying managerial or executive nature. Thus, while the AAO does not question the complex nature of the beneficiary's duties or his heightened degree of discretionary authority, the petitioner has failed to establish that the petitioner has reached a level of complexity wherein the managerial or executive duties would comprise the primary part of the beneficiary's time. For this initial reason, this petition cannot be approved.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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 petitioner's initial support letter dated March 20, 2004, the petitioner stated that it is a subsidiary of Imtex, which is located in Singapore. The petitioner did not submit any documentation to support its claim. Accordingly, in the RFE, the director instructed the petitioner to provide evidence to establish that the

beneficiary's foreign employer and the U.S. petitioner have a qualifying relationship pursuant to the above regulatory definitions.

In response, the petitioner submitted an affidavit dated November 17, 2002 from its secretary stating that the petitioner issued 100% of its outstanding shares. The petitioner also submitted its membership certificate No. 1, stating that the beneficiary owns 500 of the petitioner's outstanding shares, and membership certificate No. 2, stating that the beneficiary's wife owns the other 500 shares of outstanding stock. Although the petitioner previously claimed that it was the foreign entity's subsidiary, no mention was made of this earlier claim and no documentation was provided to establish who owns and controls the beneficiary's foreign employer, despite the director's instruction in the RFE for the petitioner to submit any and all evidence that would establish the existence of a qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner.

In the denial, the director pointed to the discrepancy between the affidavit indicating that the beneficiary owns all of the petitioner's outstanding shares and the two membership certificates, which indicate that the beneficiary only owns 50% of the U.S. petitioner.

While the director's claims are valid in light of the lack of evidence establishing the foreign entity's ownership, the AAO must also point to the fact that the petitioner has consistently maintained the claim that it is a subsidiary of the foreign entity, thereby implying that it is owned and controlled by the foreign entity, not by any single individual. 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 appeal, counsel attempts to explain the discrepancy that was noted by the director by providing a photocopy of a transfer document dated November 16, 2002, wherein the beneficiary's wife transferred the entire portion of her 500 shares of the petitioner's stock to the beneficiary, thereby giving him control over the entire 1000 shares of stock.

While the submitted documentation seemingly resolves the discrepancy that was noted by the director, it does not establish the existence of a qualifying relationship. 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; *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.

Even if the AAO were to overlook the petitioner's prior claims suggesting that it is a subsidiary, rather than an affiliate, of the foreign entity, a qualifying affiliate relationship cannot be properly determined without first establishing who owns and controls the foreign affiliate. In the instant matter, the petitioner shows that it is majority owned and controlled by the beneficiary. Thus, the petitioner must also establish that the foreign entity is majority owned and controlled by the beneficiary. It is noted that 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 petitioner has failed to provide essential documentation establishing the foreign entity's ownership and control, the AAO cannot determine that the beneficiary's foreign employer and U.S. petitioner have an affiliate relationship.

Additionally, though not discussed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In the instant matter, the petitioner has provided documentation showing that it has invested in two small businesses. However, this evidence does not establish that the petitioner has been making similar investments on a "the regular, systematic, and continuous" basis.

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 issue addressed 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 she shows that the AAO abused it 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.