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**U.S. Citizenship  
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Services**

*By*

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FILE: WAC 04 008 52256 Office: CALIFORNIA SERVICE CENTER Date: **APR 03 2006**

IN RE: Petitioner:   
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-REPRESENTED

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<sup>1</sup> was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation operating as an entertainment promoter and publisher. It seeks to employ the beneficiary as its president and 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 determined that the beneficiary would not be employed in the United States in a managerial or executive capacity and denied the petition.

On appeal, the beneficiary, on behalf of the petitioner, disputes the director's finding 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.

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<sup>1</sup> The AAO notes that on the first page of the body of the denial, the director indicated that this matter involves a Form I-129 filed by the petitioner. This statement was incorrect. A Form I-129 is filed by a petitioner seeking to classify a beneficiary as a nonimmigrant intracompany transferee. The petitioner in the instant matter filed a Form I-140 seeking to employ the beneficiary permanently as a multinational manager or executive. Although the error is duly noted, it has no bearing on the AAO's findings in this matter, as the director's decision was clearly based on the relevant provisions cited in 8 C.F.R. § 204.5(j), which pertain directly to Form I-140 petitions.

The primary 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 September 7, 2003, which provided the following description of the duties to be performed by the beneficiary under an approved petition:

Since May 1999, [the beneficiary] has performed in his current position of [p]resident. In this high level position, [he] has four employees reporting to him. In addition, he manages a staff of ninety employees at the Russian parent company in Moscow.

Furthermore, he determines and implements the most beneficial business and financial policies for the corporation, being solely responsible for the setting of the goals and policies of the corporation. [The beneficiary] sets company policies and objectives and develops strategies to combine the creative resources of Russian cinematographers [sic] with the commercial opportunities of the American movie business using modern technologies and the internet. Under his supervision and direction, several documentary series . . . were produced and distributed worldwide.

Planning, which is one of [the beneficiary's] managerial functions, specifically involves setting the organizational vision, goals and objectives. [The beneficiary] created a vision for the company. . . . [He] has developed [the petitioner]'s vision to become a full range media company serving the Russian community in the U[.]S[.]A[.], including: publishing, movie development, production and distribution of films and books, advertisement and entertainment. [The beneficiary] creates goals—long-term accomplishments the organization wishes to attain, as well as objectives—[sic] specific, short-term statements detailing how to achieve the goals.

[The beneficiary] does strategic planning (major goals) and tactical planning (short-term statements about what is to be done, who is to do it, how it is to be done) for the [petitioner].

On a typical day, [the beneficiary] focuses on operational and financial planning. For example, he spends many hours per week meeting with specific supervisors, such as the editor of "Russian Ad Newspaper," [sic] for the purpose of scheduling the specific dates and times for the publication of the newspaper's next issue, including determining when a new issue should be available for readers. Another example is meeting with the ticket sales manager to strategize the sale of an upcoming Russian spectacle. . . .

A second managerial function . . . involves organizational leadership[,] which means allocating resources such as funds for the directions he chooses as well as assigning tasks and establishing procedures for accomplishing [the petitioner]'s objectives. For instance, [the beneficiary] has chosen to build [the petitioner] as a flat organizational structure. He based his choice on his determination that this sort of structure is more responsive and customer friendly. . . . True to this model, he relies heavily on teamwork with delegation of significant duties to each manager and in turn his careful supervision.

The petitioner further claims that the beneficiary's subordinate staff is comprised of professional, skilled employees whom the beneficiary has trained. The petitioner submitted its organizational flow chart listing the following four filled positions: ticket sales manager, marketing manager, publishing manager, and operation manager. The chart also shows a film production manager position, but indicates that this position was vacant when the chart was created. The petitioner submitted a separate employee list with each employee's corresponding salary and position title. It is noted that the indicated salaries of the operation manager and

ticket sales manager indicate that these individuals were either employed on a part-time basis or received compensation that was below California's state minimum wage requirement for 2003.

On December 20, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a more detailed description of the beneficiary's job duties, listing each duty and an approximate percentage of time the beneficiary spends performing each duty. The petitioner was also asked to submit an organizational chart describing its managerial hierarchy and staffing levels as of the date the petition was filed in October 2003. The director instructed the petitioner to clearly identify the beneficiary's position in the chart, his subordinates' names and job titles as well as their job duties and educational levels.

The petitioner responded, providing an organizational chart and the requested job descriptions. While the organizational chart names the same individuals that were previously named in the petitioner's employee list, the company hierarchy as well as several of the employees' position titles were significantly altered. More specifically, the initial organizational chart suggests that the petitioner is comprised of two tiers of employees—the beneficiary assuming the top tier and the remaining four employees at the second tier directly subordinate to the beneficiary. The more recently submitted organizational chart suggests that the petitioner is comprised of three tiers—the beneficiary once again assuming the top tier, two directors and an accountant at the second tier, and the marketing manager and sales manager at the bottom tier, which is directly subordinate to the networking/production director. Additionally, the more recent organizational chart indicates that the second tier is comprised of an accountant, a networking/production manager and an editor/publishing director. However, in the prior chart, the networking/production manager assumed the position title of marketing manager and the prior chart made no mention of an accountant. Furthermore, the person currently named as the marketing manager previously assumed the title of operation manager, while the current sales manager previously assumed the more specific job title of *ticket* sales manager. Although the petitioner provided the position descriptions of the networking/production manager and editor/publishing director, there are no job descriptions for the marketing manager or the sales manager, both of which were positions shown as directly subordinate to the beneficiary in the original organizational chart. The petitioner did not explain the reason for rearranging its organizational chart or its failure to include an accountant in the original chart, if the petitioner did in fact employ an account at the time it filed its Form I-140.

The petitioner's response also contained the following job description for the beneficiary:

[The beneficiary] gives direction to the [petitioner], provides leadership and decides how to use organizational resources to accomplish goals. As [p]resident/CEO, he looks at the "big picture," [sic] and his decisions make a major difference in the direction and continued success of the company. His managerial functions include planning, organizing, leading, and controlling people and other resources of [the petitioner] and Russian Ad Newspaper.

**Planning involves setting the company'[s] vision, goals and objectives.** This function includes anticipating trends and determining the best strategies and tactics to achieve goals and objectives. Planning is a continuous process, which takes hours of [the beneficiary's] every day activity. . . . strategic planning is becoming more difficult because changes are occurring so fast that plans—even those set for just a few months into the future—may soon be obsolete, especially in the publishing and online business in which [the petitioner] is involved. Therefore, [the beneficiary] is responsible for making shorter-term plans that allow for quick responses to customer needs and requests. At weekly meetings every Monday, he

is, for example, setting plans for the next issue of the "Fact Magazine" with . . . Mr. [REDACTED] for making goals, developing content and discussing issue topics with . . . Mr. [REDACTED] for the internet website . . . . [The beneficiary] also oversees the financial aspects of the business, such as quarterly and annual budgets. He is also responsible for planning weekly activities for the company, such as organizing and promoting upcoming concerts and shows and setting goals for future tickets [sic] sales. With respect to these activities, [the beneficiary] must, on a day-to-day basis, develop detailed, short-term statements about what is to be done, which employees will be responsible for certain tasks, and how the tasks will best be completed. He further sets work standards and schedules necessary to implement the tactical objectives. For example, a detailed operational plan will generally include the specific dates for the certain job to be completed and the quality specifications this job must meet, all of which requires a strong intellectual command of the intricacies of the online and paper publishing and promotion business.

\* \* \*

**All of [the beneficiary's] management functions involve decision-making.** The rational decision-making is a series of every day steps he follows to make logical, intelligent, and well-founded decisions regarding the future growth and direction of the business. [The beneficiary] organizes the firm, allocating resources, assigning tasks, and establishing procedures for accomplishing goals and objectives.

It is noted that the petitioner did not provide a percentage breakdown indicating the amount of time the beneficiary spends carrying out his duties.

On April 13, 2005, the director denied the petition noting various deficiencies in the petitioner's statements regarding the beneficiary's job duties. The director determined that the job descriptions lacked sufficient detail about the beneficiary's actual duties and failed to indicate the percentage breakdown of the duties performed on a regular basis.

On appeal, the beneficiary submits a statement indicating that he manages all of the petitioner's essential functions and its employees. He claims to have control over the petitioner's financial matters and states that he functions at the top of the company's organizational hierarchy. The beneficiary disputes the director's determination that he does not have the ability to act as a top-level executive and refers to the career successes he achieved during his employment abroad.

Contrary to the beneficiary's perception, Citizenship and Immigration Services (CIS) did not draw any conclusions as to the beneficiary's ability to act as a top-level executive. Rather, CIS focuses on the beneficiary's actual duties and whether or not the description of the beneficiary's duties suggests that the beneficiary would primarily perform within a managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner has provided enough information to allow for the conclusion that the beneficiary is at the top of the petitioner's organizational hierarchy with the discretionary authority to make all of the petitioner's financial and business decisions. However, this information does not necessarily establish that the beneficiary primarily performs duties of a qualifying nature. The director attempted to elicit this crucial information by issuing an RFE that specifically requested a detailed description of duties accompanied by a percentage breakdown of time spent on each of the beneficiary's duties.

While a response was provided, the petitioner's description was more broadly focused on the beneficiary's responsibilities, such as planning, organizing, and leading, but provided little information of the actual duties that are involved in fulfilling those responsibilities. For example, the petitioner indicated that the beneficiary oversees the financial aspect of the business. However, the petitioner did not describe how the beneficiary executes this oversight and who actually performs the tasks that require the beneficiary's oversight. The petitioner also failed to specify the duties involved in and the amount of time allotted to performing the duties related to the planning of weekly activities. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). **Planning is a broad term and cannot be deemed a duty. While the AAO can assume that the beneficiary most likely performs a variety of activities in order to achieve the successful planning of weekly activities, the petitioner's description simply does not contain the necessary level of specificity that would reveal what the beneficiary actually does on a day-to-day basis.**

The petitioner also indicates that there are three tiers within its organizational hierarchy—the beneficiary at the top tier and two managers at the second tier separating the beneficiary from the lowest tier, which is presumably comprised of non-professional, non-managerial, and non-supervisory personnel. However, this version of the petitioner's organizational hierarchy was not introduced until after the director issued the RFE. Prior to the RFE, the petitioner submitted an organizational chart, which suggests that the beneficiary was directly responsible for managing all of the petitioner's personnel, regardless of whether they are managerial, supervisory, or professional. 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). In the instant matter, the petitioner does not explain or even acknowledge that the two organizational charts, both submitted in an effort to explain the petitioner's organizational hierarchy, are significantly different and illustrate two different versions of one company's staffing levels.

Furthermore, the petitioner did not explain the change in the position titles of several of its employees. Namely, the petitioner has used the position title of marketing manager to refer to two different employees, depending on the organizational chart used for reference. While the first chart refers to Mr. [REDACTED] as the marketing manager, the second organizational chart uses the same position title for one of Mr. [REDACTED] subordinates and changes Mr. [REDACTED] position title to something else entirely. The petitioner also failed to explain why it initially referred to [REDACTED] specifically as its ticket sales manager, but used the more general title of sales manager when referring to the same individual in the more recent organizational chart.

It is noted that doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. In the instant matter, the petitioner's updated organizational chart and altered position titles seemingly suggest that the beneficiary directs the overall organization through the managerial tier of employees. However, this was not how the organizational hierarchy was depicted when the petition was initially filed. Based on the initial organizational chart and position titles, the beneficiary appears to be at the top of the organizational hierarchy. However, the initial indication was that the organization is comprised of only two levels of employees—the beneficiary at the top level and the remaining employees directly below him, regardless of whether those subordinates are professional, supervisory, or managerial employees. The record contains no meaningful explanation that would account for the change in the petitioner's overall

organizational structure and strongly suggests that the petitioner had not achieved a level of complexity where the beneficiary would be separated from the lower level employees while primarily performing managerial or executive duties. 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)). In the instant matter, the petitioner has not submitted sufficient evidence to enable the AAO to conclude that the beneficiary would be employed in a qualifying managerial or executive capacity.

As a final note, the record shows that two L-1A petitions were previously approved. 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, 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).

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.