U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2006

WAC 05 147 51035

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, 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 engaged in the sale of natural skin products. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition based on three independent grounds of eligibility: 1) the beneficiary was not employed abroad in a qualifying managerial or executive capacity; 2) the beneficiary would not be employed in a managerial or executive capacity; 3) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; and 4) the petitioner failed to provide evidence establishing that the foreign entity (with whom a qualifying relationship is claimed) continues to do business abroad.

On appeal, counsel disputes the director's conclusions and urges the AAO to overturn the denial.

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 two issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established at the time it filed the Form I-140 that the beneficiary would be primarily employed 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 statement dated April 20, 2005, which contained the following description of the beneficiary's position abroad:

> [The beneficiary] served as [c]hief [f]inancial [o]fficer for [the foreign entity] with great success from February 2000 to February 2003. As [c]hief [f]inancial [o]fficer, [the beneficiary] was responsible for directing the financial affairs of the company, with duties including establishing economic and financial objectives and policies; preparing financial analyses; and directing and coordinating the company's financial affairs, including

> maintaining records, filing financial statements, and engaging in strategic planning and forecasting.
>
> In his capacity as [c]hief [f]inancial [o]fficer, [the beneficiary] served in both an executive and managerial capacity. [He] directed the management of the financial component of [the foreign entity], establishing financial goals and policies and exercising considerable latitude in discretionary decision-making, and receiving only general supervision from [the foreign entity]'s [b]oard of [d]irectors. Furthermore, [the beneficiary] was responsible for the management of an essential function within [the foreign entity]—namely, the financial function—and exercised discretionary authority over day-to-day operations in the area of finance.

With regard to the beneficiary's proposed position in the United States the petitioner provided the following statements:

> In this capacity [as president], [the beneficiary] has functioned since February 2003 as [the petitioner]'s top executive and assumed duties including planning, developing, and establishing [the petitioner]'s corporate policies and objectives; and further fulfilling financial, administration, operations, and distribution functions.
>
> The position of [p]resident of [the petitioner] has been both managerial- and executive-level, involving as it does the direction of the management of [the petitioner]'s corporate policies and objectives; the establishment of [the petitioner]'s business goals and policies and the exercise of considerable latitude in discretionary decision-making; the receipt of only general supervision from the company's [b]oard of [d]irectors; the management of an essential function within [the petitioner]—namely, business; and the exercise of discretionary authority over day-to-day operations.

On August 2, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in eliciting further information regarding the beneficiary's foreign employment and in an effort to determine the beneficiary's employment capacity in the proposed position in the U.S.: 1) the petitioner's and foreign entity's organizational charts illustrating the staffing levels and identifying the employees of each respective entity by name and position title; 2) a detailed description of the beneficiary's abroad and proposed day-to-day duties with a percentage of time assigned to each duty in order to determine how much of the beneficiary's time has been and would be devoted to each of the listed duties; 3) the job descriptions of the beneficiary's subordinates, if any; 4) a description of the specific executive decisions the beneficiary made during a six-month time period; and 5) the foreign entity's payroll records establishing the beneficiary's prior employment as well as the petitioner's quarterly wage reports for the last four quarters and tax documentation regarding the petitioner's payroll expenses.

In response, the petitioner provided a statement dated October 24, 2005 reiterating the list of responsibilities that were previously enumerated in the Form I-140 support letter. With regard to the beneficiary's foreign and U.S. positions, the petitioner stressed that the beneficiary has and would continue to occupy the highest position within each of the respective hierarchies. With respect to the beneficiary's position with the petitioner, the petitioner stated that the beneficiary supervises the company's employees, including those who are outsourced to perform the petitioner's daily operational tasks.

On November 21, 2005, the director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying capacity for at least one out of the three years *prior to filing the instant Form I-140*. *See* 8 C.F.R. § 204.5(j)(3)(A). This interpretation of the regulations is directly supported by section 203(b)(1)(C) of the Act. That being said, the AAO acknowledges the additional provisions of 8 C.F.R. § 204.5(j)(3)(B), which are consistent with Congress's intent to extend the classification of multinational manager or executive to include those nonimmigrant managers or executives who have already been transferred to the United States rather than merely limit the classification to individuals who remain abroad when the Form I-140 is filed on their behalf. *See* 56 Fed. Reg. 30703, 30705 (July 5, 1991). However, 8 C.F.R. § 204.5(j)(3)(B) applies only in instances where the petitioner can provide sufficient evidence to establish that the beneficiary's U.S. employment is "for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three in the three years preceding entry as a nonimmigrant . . . ." In the instant matter, the director determined that the petitioner failed to provide sufficient evidence establishing its employment of the beneficiary. Therefore, the provisions of 8 C.F.R. § 204.5(j)(3)(B) do not apply and the petitioner is left with the burden of establishing that the beneficiary was employed abroad in a qualifying capacity for at least one out of the three years *prior to filing the instant Form I-140*. *See* 8 C.F.R. § 204.5(j)(3)(A). As previously stated, the director concluded that the petitioner failed to meet this requirement.

The director also concluded that the petitioner did not provide the requested details regarding the beneficiary's specific daily job duties or any of the requested financial information regarding the petitioner's quarterly wages and payroll summaries.

On appeal, counsel asserts that none of the documentation that was requested by the director in the RFE is specifically mentioned either by statute or regulation. While counsel is mostly correct, Citizenship and Immigration Services (CIS) has broad discretionary authority to request additional evidence, even that which is not specifically enumerated. *See* 8 C.F.R. § 103.2(b)(8). As such, the director may request whatever documentation he deems necessary to determine the petitioner's eligibility. In the instant matter, the director requested a detailed description of the beneficiary's duties as well as a number of financial documents in an apparent attempt to determine whether the petitioner has employed the beneficiary and to obtain detailed information about the nature of the beneficiary's primary daily duties, the petitioner's organizational hierarchy, and its overall ability to relieve the beneficiary from having to perform nonqualifying duties. Thus, contrary to counsel's assertion, the documentation requested by CIS is relevant in determining the petitioner's eligibility. As such, counsel's assertion is without merit.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed abroad and will be employed by the U.S. petitioner in a primarily managerial or executive capacity. In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As properly observed by the director, the petitioner has failed to comply with CIS's request for a detailed description of the duties the beneficiary would perform on a daily basis. Nor has the petitioner provided its organizational chart or evidence documenting who was performing its daily operational tasks at the time the Form I-140 was filed. Without this relevant information the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties. The record also lacks sufficient information regarding the beneficiary's duties abroad. Though not specifically noted by the director, the

record shows that the petitioner failed to comply with the RFE request for a detailed list of the beneficiary's duties abroad with a percentage breakdown of time spent performing each duty. As such, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity. For these initial reasons, the petition may not be approved.

The third 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 support of the Form I-140, the petitioner provided a number of incorporation documents and stock certificates indicating that the foreign entity is the parent of the petitioning entity. However, in the RFE, the petitioner was informed that this evidence was not sufficient, as it does not establish that the foreign entity actually paid for its claimed ownership. As such, the petitioner was asked to provide additional evidence in the form of wire transfer documents, Notice of Transaction Pursuant to Corporations Code § 25102(f), and minutes of meeting. None of the requested documentation was provided with the petitioner's response. The AAO notes that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

While counsel disputes the director's conclusion and reiterates the petitioner's claim on appeal, 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)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the petitioner has failed to provide the requested documentation, the AAO cannot conclude that it has a qualifying relationship with the beneficiary's foreign employer as claimed.

The fourth issue in this proceeding is whether the claimed foreign parent entity continues to do business. *See* 8 C.F.R. § 204.5(j)(2) for definition of *multinational*. Despite the director's conclusion that the petitioner

failed to provide the requested evidence to establish that the foreign entity continues to do business, counsel fails to address this issue on appeal. Therefore, the petitioner has failed to overcome the director's fourth ground for deeming the petitioner ineligible to classify the beneficiary as a multinational manager or executive.

Finally, counsel makes numerous references to 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, 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 assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. As previously indicated, 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).

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 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

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.