U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2006

WAC 04 114 53762

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 Director, California Service Center, denied the employment-based petition. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO), which was dismissed by the AAO. The matter is again before the AAO on a motion to reopen and reconsider. The AAO will grant the motion. The prior decisions of the director and AAO will be affirmed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is doing business as a travel and tour operator. The petitioner seeks to employ the beneficiary as its vice-president of administration and controller.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. On appeal[1], counsel claimed that the beneficiary's position in the United States company would be both managerial and executive in nature.

The AAO dismissed the appeal, concluding that the petitioner had not established that the beneficiary would be employed as a manager or executive of the United States entity. In its December 21, 2005 decision, the AAO, stressing that the beneficiary's employment capacity would be based on his position and job duties at the time of filing the petition, determined that the beneficiary would be performing non-qualifying administrative and operational tasks of the organization. The AAO also concluded that the beneficiary would not be supervising managerial, professional or supervisory employees who would relieve the beneficiary from performing these tasks. The AAO further determined that the petitioner had failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On motion, counsel contends that Citizenship and Immigration Services (CIS) failed to consider the beneficiary's position as vice-president/controller of the petitioning entity and his contribution to the petitioner's success in the United States. Counsel claims that the record demonstrates that the beneficiary would be employed in both a managerial and executive capacity, and submits a brief in support of the motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to

[1] The AAO notes that counsel filed Form I-290B, and noted in an attached letter, dated May 18, 2005, that an appellate brief and evidence would subsequently be submitted. Counsel submitted a brief in support of a motion to reconsider with the petitioner's notice of appeal. The director declined to treat the appeal as a motion and forwarded to the AAO for review. Counsel subsequently submitted a brief in support of the appeal on July 5, 2005. In its analysis of the instant matter, the AAO relied on counsel's appellate brief.

reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial 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):
>
> * * *
>
> > (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 or 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, 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 issue in the instant matter is whether the beneficiary would be employed by the United States entity in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly

supervised; 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 instant motion, filed on January 20, 2006, the petitioner's counsel submits a brief in which she contends that the AAO's dismissal of the petitioner's May 20, 2005 appeal was a "grave abuse of discretion." Counsel stresses "the importance of the beneficiary's position and contribution to the [petitioning] company," which counsel claims that the AAO failed to consider, and addresses the "results" achieved the beneficiary in his position as vice-president/controller. Specifically, counsel states:

The duties of the beneficiary can be summarized simply below and still meet the requirements of [§ 101(a)(44)(A) of the Act].

(1) The beneficiary will be managing the Los Angeles branch;

(2) He supervises the work of all people under him in the organizational chart who are either supervisory, professional or managerial employees;

(3) He has the authority to hire and fire personnel; and

(4) He definitely exercises discretion over the day-to-day operations of the activity or function as discussed in the Decision.

* * *

[A] simple description of [the] beneficiary's duties within the organization will show that he also met the requirement of [§ 101(a)(44)(B) of the Act].

(1) Beneficiary directs the management of the organization, specifically the Los Angeles branch;

(2) He established goals and policies of the organization, component, or function of the organization which was manifested in his development of the Quality Manual;

(3) He exercises a wide latitude in discretionary decision making especially as the President primarily focuses his attention on the other branches; and

(4) He receives only general instructions from the President regarding the supervision of the other employees and even the running of the Los Angeles branch.

Counsel further contends that the beneficiary's job duties go beyond those of a first-line supervisor, stating:

> [A]s Vice President/Controller, the beneficiary's duties include development of organization management plans for U.S. operations, marketing strategies, preparation of business plans, analyze and monitor travel trends among Filipino Americans, in charge of all administrative matters of the company such as human resources management, bad debt collection, disposition of personnel rules and regulations, enforcement of company rules and regulations, [and] institution of Quality System Management for the company.

Counsel also notes the "pivotal" role that the beneficiary played in "rescuing the company from the crippling effects of the September 11, 2001 tragedy." Counsel states that in the role of "executive and manager" of the United States company, the beneficiary assisted in increasing the company's revenues during the years 2001 through 2003. Counsel challenges the AAO's review of the beneficiary's job description and states that the AAO's expectation that the petitioner could "narrow [a manager's] duties in one or two pages . . . is contrary to what really happens in a real business."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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. § 204.5(j)(5).

As instructed in its December 21, 2005 decision, the AAO again stresses that it will determine the capacity in which the beneficiary will be employed based on his position in the company and job duties at the time of filing the immigrant visa petition. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant motion, counsel failed to address the AAO's references to inconsistencies in the record with respect to the initial position assigned to the beneficiary as "vice-president/controller" and the position of "quality management coordinator," which was subsequently noted in the petitioner's response to the director's request for evidence. A clarification of the true position to be held by the beneficiary at the time of filing is particularly relevant, as counsel's appellate brief and brief in connection with the instant motion stress job

duties performed by the beneficiary in his capacity as the quality management coordinator. The job description originally assigned to the beneficiary appeared to encompass more of the actual administrative functions of the business, whereas the second iteration of the job has the beneficiary managing the company's quality management system. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The limited outlines of the beneficiary's purported managerial and executive employment provided by counsel on motion are not sufficient to overcome the AAO's well-founded findings. Counsel claims in its January 19, 2006 brief that the beneficiary's employment as a manager and executive "can [each] be summarized" in four brief statements, and essentially restates the statutory definitions of "managerial capacity" and "executive capacity." *See* §§ 101(a)(44)(A) and (B) of the Act. Counsel's recitation of the relevant statutory criteria is not sufficient to establish the beneficiary's classification as a manager or executive. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, counsel incorrectly asserts that the AAO "put meaning on [each] term that is greater than what it appears under [the statute]." The regulation at 8 C.F.R. § 204.5(j)(5) specifically requires that the petitioner submit a letter with the immigrant visa petition "clearly describ[ing] the duties to be performed by the alien." Case law clarifies the petitioner's responsibility in establishing the beneficiary's eligibility for classification as a manager or executive, dictating that a petitioner's blanket claim of employing the beneficiary as a manager or executive without a description of how, when, where and with whom the beneficiary's job duties occurred is insufficient for establishing employment in a primarily managerial or executive capacity. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The court further explained the importance of "[s]pecifics" in determining whether the beneficiary's job duties are primarily managerial or executive in nature, and noted the insufficiency in merely "reiterating the regulations." *Id.* at 1108. The court also stated that "[t]he actual duties themselves reveal the true nature of the employment." *Id.* As a result, the AAO's previous analysis of the beneficiary's position in the United States was consistent with relevant case law. Counsel did not cite in her motion any precedent decisions that would form a basis for her claim that the AAO overemphasized the statutory meaning of "managerial capacity" and "executive capacity." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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).

Counsel also stresses the beneficiary's role in "rescuing" the petitioning entity after September 11, 2001, and maintains it is evidence of the beneficiary's role as a manager or executive. Counsel's blanket claim and reference to the petitioner's increase in gross revenues are not sufficient to demonstrate that the beneficiary

would occupy a primarily managerial or executive position in the United States company. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Additional clarification of the beneficiary's position as vice-president and controller is particularly important, as counsel's claim is not consistent with the record. As addressed in the AAO's December 21, 2005 decision, the record indicates that the beneficiary would be responsible for such non-managerial and non-executive tasks as researching, monitoring, and analyzing trends in travel, creating "measures" for proper payment or the collection of payments for issued tickets, mailing payment invoices to sub-agents, ensuring "prompt" collection of accounts receivable, handling refund requests and legal matters, and issuing "prepaid ticket advises" and hotel vouchers. In addition, the beneficiary would handle the company's administrative and personnel matters, including human resources, debt collection, office leases, recording personnel data, and training employees. The additional job description offered by counsel on motion addresses the beneficiary's responsibilities of developing the company's marketing strategies, analyzing travel trends, and controlling "all administrative matters of the company," which are not typically deemed to be managerial or executive in nature. The petitioner previously noted that the beneficiary would devote approximately 40 percent of his time to performing these non-managerial and non-executive tasks. However, these time allocations are based on an outline provided one year after the filing of the petition when the petitioner revised the beneficiary's position to include the role of quality management coordinator. Again, the petitioner has failed to document on motion the amount of time the beneficiary spent performing these tasks on the date of filing. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The record does not establish what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion is actually non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The AAO notes that counsel did not challenge on motion the AAO's additional finding that the petitioner did not employ a subordinate staff on the date of filing that would perform the lower-level tasks associated with payments, collections, and refunds, or handling refund requests and legal issues. Despite the employment of ticket controllers, the employees' responsibilities did not encompass the specific non-managerial and non-executive job duties performed by the beneficiary, such as ensuring ticket payments, collecting unpaid tickets, sending payment statements to sub-agents, and handling refund requests. Also, counsel failed to clarify those tasks performed by the petitioner's accountant. The AAO noted in its previous decision that while the petitioner identified responsibilities held by its accountant, some of which included collecting on unpaid accounts, the overlap of the accountant's job duties with the beneficiary's creates confusion as to the actual tasks performed by the accountant, and more importantly, those to be performed by the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, counsel has not addressed the AAO's finding that the beneficiary would not supervise a staff of managerial, supervising or professional employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

At the time of filing, the beneficiary's subordinate staff consisted of a ticket controller and two sales personnel. The AAO concluded in its earlier decision that the beneficiary did not supervise the "head office manager" and "San Jose branch manager" on the filing date. The AAO notes that counsel did not challenge this finding on motion. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the company's ticket processing or sales functions. 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)). Counsel's additional claim that the beneficiary would supervise branch managers who are professionals was based on the petitioner's staffing levels after the filing of the petition when the beneficiary was identified as managing the activities of the three branch offices. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. As the three employees working subordinate to the beneficiary on the date of filing are not professionals, the beneficiary would be functioning in a position comparable to that of a first-line supervisor, rather than in a primarily managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(4)(i) (stating that "[a] first-line supervisor is not considered to e acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional"). As a result, the record does not corroborate counsel's claim on motion that the beneficiary's job duties exceed those of a first-line supervisor.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the previous decisions of the director and AAO are affirmed.

The AAO notes that the petitioner neglected to address on motion its additional finding that the beneficiary was not employed abroad in a primarily managerial or executive capacity. The petitioner represented in documentation submitted with its March 15, 2005 response that the beneficiary devoted 67 percent of his time to his role as the company's quality management representative. The beneficiary's related job duties, however, do not fall directly under traditional managerial or executive duties as defined in the statute. *See* §§ 101(a)(44)(A) and (B) of the Act. For example, the beneficiary was responsible for orienting supervisors and employees on the quality management system, assisting employees in preparing each department's "business process," collecting, reviewing, and revising data obtained from employees, and auditing and guiding employees on failures to comply. Based on the petitioner's representations, it appears that the beneficiary performed the specific functions associated with the foreign entity's quality management rather than managing the qualify control system. Again, 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. Accordingly, the AAO's previous decision with respect to this issue is affirmed.

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).

The AAO again recognizes that CIS previously approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary. 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 L-1 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 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). Again, due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

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).

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. Here, that burden has not been met.

ORDER: The decision of the AAO dated December 21, 2005 is affirmed.