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

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 26 2007

EAC 05 155 51132

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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation seeking 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 two independent grounds: 1) the petitioner failed to establish that the foreign entity continues to do business; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief along with additional documentation in an effort to overcome the director's adverse findings.

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 AAO concludes that, based on a thorough review of the record, the petitioner has submitted sufficient documentation to establish that the foreign entity continues to do business. *See* 8 C.F.R. § 204.5(j)(2). As the petitioner has overcome this portion of the director's denial, the AAO will address the remaining basis for the director's decision, i.e., whether the petitioner provided sufficient evidence to establish that it would employ the beneficiary 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 letter dated April 27, 2005, which contained the following list of duties and responsibilities assigned to the beneficiary as part of his proposed position with the U.S. entity:

- Develop [a] market for [the petitioner];
- Promote [the petitioner's] name in the United States;

[Be r]esponsible for managing and directing the entire U[.]S[.] operation;

- Identify new markets for penetration in the United States;
- Hire and supervise other workers for management[;]
- Plan, direct and execute all marketing activities;
- Initiate and implement advertising strategies;
- Acquire new businesses;
- Conduct marketing research, negotiate sales and payment terms with U[.]S[.] customers;
- Develop marketing strategies to reach both retailers and consumers;
- Maintain regular communication with the foreign company in India regarding day-to-day operations of the company.

On January 18, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, evidence of the petitioner's staffing, including a job description for each employee and evidence of wages paid to each individual in 2004 and 2005. The director instructed the petitioner to include an hourly breakdown identifying every employee's job duties and the amount of time allotted to each task.

In response, counsel submitted a letter dated April 13, 2006 in which he asserted that the beneficiary functions in both a managerial and an executive capacity in his position with the U.S. petitioner. With regard to the former, counsel paraphrased the statutory definition found in section 101(a)(44)(A) of the Act, claiming that the beneficiary manages the organization, directs daily operations, supervises employees, and makes decisions regarding the business as well as personnel matters. With regard to the claimed executive capacity, counsel again paraphrased the relevant statutory definition asserting that the beneficiary directs the management of the organization, establishes goals and policies, and maintains discretionary authority. *See* section 101(a)(44)(B) of the Act.

In addition, a number of supporting documents were submitted. Among them was the petitioner's organizational chart, which showed the beneficiary at the top of the organization's hierarchy. His immediate subordinates were identified as an office manager with one subordinate and a marketing manager with two subordinates. As the chart was undated, it is unclear when this organizational hierarchy was actually in effect. While the petitioner also submitted a separate list of its current employees, naming each employee and his/her position title, and a separate list of employee names and their respective salaries for 2005, these lists are neither consistent with one another nor with the organizational chart. First, while the chart lists a total of six positions, the salary summary for 2005 lists a total of eight and the current list of employees lists seven. Second, while the chart identifies [redacted] as the petitioner's office manager, the employee list identifies him/her as a shift manager at the Subway Restaurant and does not list an office manager's position as part of its organization. Third, while the organizational chart names Pritpal Singh as the petitioner's marketing manager, neither this position nor the employee who occupied it appear to have continued with the organization, as neither is included in the employee list and, based on the $900 salary paid to this employee in 2005, it is unclear when the petitioner actually employed him. Lastly, in reviewing each employee's salary for

2005 and then comparing these salaries with those earned by the same employees in 2004, it appears that only the beneficiary, [redacted] (whose position title remains unclear), and [redacted] (who was identified as [redacted] subordinate but whose position title was not revealed in the organizational chart) were employed on a full-time basis in 2005. Based on the salaries provided, the remaining employees either were not employed on a full-time basis or were only periodically employed by the petitioner in 2005. The AAO cannot make an affirmative conclusion either way, as the petitioner did not provide sufficient documentation to determine when exactly each individual was employed and the number of hours they worked, respectively.

Finally, although specifically instructed to provide an hourly breakdown of duties performed by each employee, the petitioner failed to do so and instead provided general job descriptions for seven employees. 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). The following job description was attributed to the beneficiary in the petitioner's "List of Current Employees:"

> All executive duties—develop new market and planning [sic] of business expantion [sic], acuire [sic] new business, cunduct [sic] marketing research, negotiate sales and payment terms with U[.]S[.] customers, maintaing [sic] of all financial records, [and] managing [sic] human resources[.]

Despite counsel's insistence that the beneficiary's position falls within the statutory definitions of both managerial and executive capacities, the petitioner did not provide any specific duties or responsibilities that would fall under the heading of either capacity.

On June 27, 2006, the director issued an adverse decision in which he noted that the petitioner did not submit documentation establishing that the beneficiary supervises a subordinate staff of professional, managerial, or supervisory personnel, which led to the conclusion that the petitioner failed to establish that the beneficiary's proposed employment would be in a managerial or executive capacity.

On appeal, counsel reiterates his earlier claim that the beneficiary would be employed in both a managerial and an executive capacity. With regard to the beneficiary's purported employment in a managerial capacity, counsel asserts that the petitioner may employ only the beneficiary and still establish that such employment is within a managerial capacity. Counsel bases this argument on the concept of a function manager. However, as previously stated and expressly suggested by the submission of an organizational chart, which shows the beneficiary in the position of managing others, the function manager duties claimed for the first time on appeal appear to be a material change in the offered position. On appeal, 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 the 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Moreover, even if the petitioner were to have maintained all along that the beneficiary would be employed as a function manager, there is little to support this claim. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8

U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In the present matter, while the director expressly instructed the petitioner to provide a detailed description of the beneficiary's job duties, the petitioner has failed to do so. Rather, the petitioner has provided general statements, primarily focusing on the beneficiary's broad job responsibilities, not specific tasks he would carry out in an attempt to satisfy those responsibilities. In fact, even those duties that were mentioned specifically, i.e., conducting market research and negotiating the terms of sales and payment transactions, cannot be deemed as qualifying managerial or executive tasks.

Additionally, in light of the dubious information regarding the petitioner's staffing structure, the AAO cannot conclude that the petitioner was adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying tasks. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

Further, counsel's focus on the beneficiary's place within the petitioner's organizational hierarchy is misplaced. While this factor is important, it must be considered along with other key factors such as the actual duties performed by the beneficiary and the petitioner's overall ability to relieve the beneficiary from having to primarily perform tasks of a non-qualifying nature. In the present matter, not only does the record lack the necessary detailed information regarding the beneficiary's proposed daily job duties, but it also fails to establish, with proper documentation, the petitioner's staffing at the time the Form I-140 was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Lastly, when claiming that the beneficiary is both a manager and executive, counsel must do more than merely paraphrase the statutory definitions for managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, respectively. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Merely suggesting that the beneficiary's position title and overall place within the petitioning organization are implicit of a multinational executive is not enough. 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). As the petitioner has failed to provide the necessary information regarding the beneficiary's proposed job duties and has provided documentation that fails to clearly define the petitioner's personnel structure during the relevant time period, the AAO cannot conclude that the beneficiary warrants classification as a multinational manager or executive.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. 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." Although the petitioner is described as a retail operation and has provided several of its tax returns and copies of its bank statements, these documents do not show the frequency of the petitioner's sales transactions. As such, these documents cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.*

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 ground of ineligibility discussed 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 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 1043, *aff'd,* 345 F.3d 683.

As a final note, service records show 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 Citizenship and Immigration Services (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 25, 29-30 (D.D.C. 2003) (recognizing that CIS approves some petitions in error).

Moreover, as pointed out by the director, 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 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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petition(s) were approved based on the same unsupported assertions that are contained in the current record, the approvals 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).

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.