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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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 22 2007
SRC 03 196 51248

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Erica Feldman

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The petitioner subsequently filed a motion to reopen or reconsider, which was dismissed by the director. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant visa 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 Texas that appears to be operating as an employment staffing service[1]. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary had been employed by the foreign entity or would be employed by the United States organization in a primarily managerial or executive capacity.

On appeal, the petitioner's current counsel contends that Citizenship and Immigration Services (CIS) incorrectly concluded that the beneficiary was working in the United States organization without the assistance of a subordinate staff as a result of its interpretation of the petitioner's 2003 and 2004 federal income tax return, which failed to account for compensation in the form of salaries or wages. Counsel states that the beneficiary supervises over 100 workers, who are categorized on the petitioner's tax return as consultants. In support of the appeal, counsel submits the petitioner's quarterly tax reports for 2005 and the first quarter of 2006.

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.

[1] On its 2003 and 2004 federal income tax returns and quarterly tax returns, the petitioner represents itself as a staffing service. However, on the Form I-140 and the Form SS-4, Application for Employer Identification Number, the petitioner is identified as being engaged in retail sales, importing and exporting. Also, an April 20, 2001 commercial lease entered into by the petitioner identifies its use as a retail store. 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).

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 first issue in the instant proceeding is whether the beneficiary was employed in the foreign 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-
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> (i) Manages the organization, or a department, subdivision, function, or component of the organization;
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> (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 a May 4, 2005 letter from the petitioner, the beneficiary was identified as occupying the position of general manager of middle eastern imports for the foreign company, during which he supervised a marketing and sales manager, warehouse and shipping manager, and administrative manager.

In a May 23, 2005 decision, the director concluded that the beneficiary had not been employed by the foreign entity in a primarily managerial or executive capacity. The director noted that despite its request for additional evidence of the beneficiary's foreign employment, the petitioner failed to submit a description establishing that the beneficiary's prior overseas employment was comprised of primarily managerial or executive job duties. The director further noted the limited amount of evidence offered by the petitioner with respect to the foreign entity or the beneficiary's former position, particularly "specific information about the employees supervised by the beneficiary." The director found that the record did not establish the beneficiary's employment as a manager or executive of the foreign entity. Consequently, the director denied the petition.

On motion and on appeal, counsel for the petitioner neglects to address the beneficiary's employment in the foreign entity. The minimal documentary evidence submitted by counsel with the petitioner's June 24, 2005 motion to reopen or reconsider pertains to the foreign entity's business operations and is not suggestive of the capacity in which the beneficiary was employed in the foreign entity. 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).

The AAO concurs with and affirms the director's finding that the petitioner failed to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner's brief and undocumented statements of the managerial position held by the beneficiary in the foreign entity are simply insufficient to establish his former employment in a primarily managerial or executive capacity, particularly in light of the director's request for a detailed explanation of the beneficiary's overseas position, including his "daily duties" and the job duties performed by those supervised by the beneficiary. The petitioner's 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 AAO further notes that the foreign entity's organizational chart depicts its staffing levels in May 2005, approximately four years after the beneficiary's departure from the foreign company, and therefore, is not probative of the capacity in which the beneficiary was employed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (requiring a petitioner to establish eligibility at the time of filing the immigrant visa petition). As a result, the petitioner has failed to establish that the beneficiary occupied a primarily managerial or executive position in the foreign entity. Accordingly, the appeal will be dismissed.

The next issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner filed the instant petition on July 8, 2003, noting the beneficiary's employment as the president of the twenty-three-person United States company. In an appended Form ETA 750, Application for Alien Employment Certification, the beneficiary's job duties were described as:

> Manage overall operations of the business, setup [sic] goals and policies, negotiate & enter into contracts, make decisions regarding management & company objectives. Shall be responsible for employing persons, supervising their work, and terminating employment if required. Overal[l] will be responsible for ove[r]seeing the day[-]to[-]day operations of the company.

In its June 1, 2003 letter, the petitioner also stated that in the position of director-president, the beneficiary "directs the overall operation of the company," hires, trains, and supervises all managerial employees, and controls the company's finances, including its tax filings. The petitioner noted the "wide discretionary authority" delegated to the beneficiary from the foreign parent company, and his working relationship with the petitioner's suppliers and customers, which he developed by "test marketing products."

The AAO recognizes documentary evidence submitted with the Form I-140, including the petitioner's March and June 2002 quarterly tax reports, a lease agreement identifying the petitioner[2] as the landlord of leased premises, and a second April 20, 2001 lease agreement. The quarterly tax reports, in particular, are not representative of the petitioner's staffing levels on the date of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (requiring a petitioner to establish eligibility 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). The petitioner did not offer additional evidence of the beneficiary's proposed employment capacity in the United States organization.

The director issued a notice of intent to deny on April 6, 2005 requesting that the petitioner submit a description of the beneficiary's employment in the United States entity, including his specific daily and supervisory job duties, the percentage of time the beneficiary would spend performing each task, and the names, job titles, and job duties of the employees directly supervised by the beneficiary. The director instructed that "an analysis of the [beneficiary's] day-to-day responsibilities" is needed in order to determine whether he would occupy a primarily managerial or executive position in the United States company. The director asked that the petitioner also submit an organizational chart reflecting the beneficiary's position in the company and his subordinate employees.

The petitioner responded in a letter dated May 4, 2005, stating that as the president of the company, the beneficiary supervises five managers who occupy the positions of vice-president, operations manager, human resources coordinator, marketing and sales manager, and administrative manager. The petitioner provided a brief statement of the job duties performed by the operations and administrative managers and the human resources coordinator. An attached organizational chart also depicted a lower-level staff comprised of sales and contract personnel, clerks, an accountant, and a secretary. The AAO notes that the petitioner did not submit names or the specific number of workers employed in the lower-level positions, however, the same individuals are identified on the organizational charts for the United States and foreign entities as occupying the positions of operations manager and administrative manager.

An appended September 30, 2003 quarterly tax return reflects wages in the amount of approximately $1,200,000, however, the record does not contain personnel records or a state quarterly report identifying the workers employed on the filing date.

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[2] While the landlord is identified as "Stitchwell Houston, Inc." the company's address is the same as the address identified for the petitioning company on its application for an employer identification number.

The director concluded in her May 23, 2005 decision that the petitioner would not employ the beneficiary in a primarily managerial or executive capacity. The director emphasized the petitioner's failure to provide the requested description of the specific job duties related to the beneficiary's position as president of the petitioning organization, and noted that the petitioner's "limited staffing level[s]" suggest that the beneficiary's job duties would be primarily non-managerial and non-executive in nature. The director also noted that the petitioner failed to submit copies of its Internal Revenue Service (IRS) Form W-2 issued to each employee during the years 2003 and 2004. The director ultimately concluded that the record was not sufficient to support the petitioner's claim of employing the beneficiary in a primarily managerial or executive capacity. Consequently, the director denied the petition.

On June 24, 2005, the petitioner's present counsel filed a motion to reopen and reconsider the director's denial of the immigrant visa petition. Counsel explained that the petitioner's former counsel failed to promptly forward to the petitioner the director's notice of intent to deny, which required documentation from the overseas company, and alleged that the petitioner "submitted what they could gather quickly" before the deadline. In his June 21, 2005 brief, counsel broadly referenced "documents previously requested but not submitted" by the petitioner. Appended to the brief were the petitioner's 2003 and 2004 federal income tax returns and documentation related to the foreign entity's business operations.

The director dismissed the motion in a June 20, 2006 decision, noting that the petitioner had not addressed the beneficiary's specific daily job duties or overcome the previous finding that the petitioner's limited staffing levels would not support the beneficiary in a primarily managerial or executive position. The director further noted that the petitioner had not identified any compensation in the form of wages or salaries paid to workers in 2003 or 2004. Accordingly, the director affirmed her previous denial of the petition.

Counsel for the petitioner filed the instant appeal on July 20, 2006. On the Form I-290B, counsel challenges the director's denial of the petition based on his erroneous interpretation of the petitioner's federal income tax returns. Counsel explains that the petitioner's employees are categorized on its federal income tax return as consultants, and, as a result, compensation paid by the petitioner to the "consultants" is reflected as a deduction of the company. Counsel expresses disbelief in CIS' interpretation that the petitioning entity could realize more than $4 million in gross receipts and sales in 2003 without the employment of a lower-level staff. Counsel suggests a review of the petitioner's federal quarterly tax returns as a "better gauge" of the compensation paid by the petitioner to its employees. Counsel submits the petitioner's state tax reports for the second, third and fourth quarters of 2005 and the first quarter of 2006. Counsel asserts that the record demonstrates that the beneficiary would be employed as a manager or executive.

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.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Here, the limited account of the beneficiary's proposed employment in the United States entity prevents an understanding of the true capacity in which the beneficiary would be employed. Counsel's statement on the Form I-290B that the beneficiary "qualifies as a 'manager' or 'executive" also inhibits a determination of how the beneficiary would

be employed in the petitioning organization. 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)).

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 emphasized by the director, the petitioner failed to document the specific managerial or executive job duties to be performed by the beneficiary as president. The job descriptions offered on the Form ETA 750 and in the petitioner's June 1, 2003 letter are essentially a restatement of portions of the statutory definitions of "managerial capacity" and "executive capacity," and fall severely short of documenting the beneficiary's purported eligibility for classification as a manager or executive. *See* §§ 101(a)(44)(A) and (B) of the Act. The regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to submit a clear description of the job duties to be performed by the beneficiary. 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).

More importantly, the petitioner essentially disregarded the director's request for a detailed description of the beneficiary's proposed position in the United States organization, including the beneficiary's specific job duties and the amount of time spent on each. In response, the petitioner stated only that the beneficiary "manages the business through five managers," and identified the names and positions of four of the five subordinate employees. Similarly, on motion and on appeal, the petitioner fails to submit an additional explanation of what job duties the beneficiary would perform in the position of president. The petitioner's repeated failure to offer a detailed description of the managerial or executive job duties related to the beneficiary's proposed employment undermines its claim of employing the beneficiary in a primarily managerial or executive position and precludes a finding that the beneficiary qualifies for the requested classification. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.* at 1108.

In addition, the record contains only limited evidence of the petitioner's staffing levels on the date of filing. The petitioner represented on the Form I-140 the employment of 23 workers. Counsel stresses on appeal that the petitioner's workers are categorized as consultants on its income tax return, and that the petitioner's quarterly tax returns offer a better depiction of the petitioner's staffing levels. The record contains a copy of the petitioner's federal tax return for the quarter ending September 30, 2003, the period during which the instant petition was filed, which reflects wages in the amount of $1,206,895.95. While this large figure suggests that the petitioner contracted out a considerable amount of its work, there is no evidence in the record clarifying who the petitioner employed on the filing date and the positions occupied by its workers. Although the record contains the petitioner's organizational chart, the quarterly tax return, which identifies only the amount of wages paid during that period and not the specific employees, does not corroborate the purported employment of a vice-president and four managers, positions that would be essential to supporting the beneficiary in a primarily managerial or 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).

Moreover, as noted earlier, the same two individuals are identified as occupying the positions of operations manager and administrative manager in the foreign and United States organizations. The petitioner has not addressed this inconsistency or sufficiently accounted for the performance of these functions in the United States entity. 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. at 591-92.

Furthermore, the petitioner's true staffing levels on the filing date are called into question given that the record fails to identify the company's exact operations in the United States. As mentioned previously, on the Form I-140, the petitioner represents itself as an import, export, retail, services, and investment company. In its appended June 1, 2003 letter, the petitioner broadly referenced the beneficiary's relationship with the company's "suppliers and customers" and his role in "test marketing [the company's] products." On its Form SS-4 application, the petitioner noted its proposed activity of "retail-sales." In contrast, the petitioner's quarterly federal tax returns and counsel's statements on appeal identify the petitioner as a staffing company. The AAO notes that in its May 4, 2005 response to the director's notice of intent to deny, the petitioner again referenced its operations in broad terms, noting that the beneficiary "manages the business," but mentioned the existence of "staffing employees," thus suggesting that it is providing staffing services.

The conflicting representations of the petitioner's business in the United States cast doubt on its claimed staffing levels and occupied positions, and raise questions as to whether the purported subordinate staff is sufficient to support the beneficiary in a primarily managerial or executive capacity. Absent a clarification of the specific operations performed by the petitioner, the beneficiary's true role in the United States company and the tasks performed by his lower-level staff remain undefined, thus precluding the AAO from determining the capacity in which the beneficiary would be employed. 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. at 591-92. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States company in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO recognizes that CIS previously approved two L-1A nonimmigrant visa petitions filed by the petitioner on behalf of the beneficiary. 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 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 25 (D.D.C. 2003).

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). 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 approvals 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 appeal is dismissed.