U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 07 2007

EAC 05 097 50030

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 Maryland corporation engaged in importing and exporting Latin American food. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her arguments.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The primary issue in this proceeding is whether the petitioner 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 provided a letter dated February 3, 2005, which included the following description of the beneficiary's proposed employment:

> [The beneficiary]'s duties will continue to be to direct operations to [the petitioner's] operations, to sign and negotiate contracts, manage, direct, and coordinate activities such as purchasing, wholesaling and distributing to foreign Latin American markets merchandise such as foods and other goods. He will also continue to coordinate activities related to import of Salvadorian foods and other goods, including wholesaling and distribution to retailers, formulate pricing policies and coordinate advertisement ad [sic] publicity of merchandise.

On October 17, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide evidence of the petitioner's staffing, including the number of employees and a detailed description of

each employee's duties, including the beneficiary's, accompanied by a breakdown of the hours devoted on a monthly basis to each duty.

In response, the petitioner provided a copy of its organizational chart identifying six positions within the company's hierarchy. The beneficiary's position is identified as the senior-most position; his direct subordinate is identified as an operations manager; and her four subordinates include two sales representatives, a delivery person, and a warehouse worker. Each individual is identified by name and each individual's brief job description is provided within the petitioner's response statement dated January 6, 2006. The following is the beneficiary's hourly breakdown of duties:

- Coordinates the import of groceries from El Salvador (4h/week)
- Coordinates the distribution of merchandise in the United States (12h/week)
- Plans and develops market strategies (4h/week)
- Supervises all of [the] employees (10h/week)
- Plans and develops price and selling policies (4h/week)
- Plans and develops promotions and marketing strategies (4h/week)
- Negotiates and signs business contracts (4h/week)
- Supervises all operations of [the petitioner] (6h/week)

Total work hours: 48h/week

The petitioner also provided two W-2 statements issued in 2004 as well as copies of checks made out to individuals named in its organizational chart.

On February 21, 2006, the director denied the petition noting that the petitioner failed to provide sufficient evidence to establish the payment of salaries to all of the individuals named in the organizational chart. The director specifically rejected the petitioner's claim that the "other deductions" figure in the petitioner's 2004 tax return represents the salaries paid to employees. The director further noted the lack of evidence to support the petitioner's claim that the copies of checks submitted in response to the RFE represent payments made to the company's employees. The director ultimately concluded that the petitioner failed to establish that it has experienced sufficient growth to support an individual who would primarily perform qualifying managerial or executive duties.

On appeal, counsel contends that the director's analysis is erroneous, as there is no growth requirement in the relevant statute or regulations and that evidence of the petitioner's significant financial growth suggest that the petitioner would have satisfied any such requirement. However, a thorough reading of the decision suggests that the petitioner's growth as an organization and the advancement of its stage of development were the focus of the director's analysis. While counsel's appellate brief properly points out that the description of the beneficiary's job duties is key to determining whether the beneficiary would be employed in a qualifying

capacity,[1] an analysis of a petitioner's staffing structure is often appropriate in order to determine whether the petitioner was adequately staffed during the relevant time to relieve the beneficiary from having to perform the non-qualifying daily operational tasks that are associated with providing the petitioner's services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). When a petitioning entity is inadequately staffed, it is unlikely that the beneficiary would be relieved from having to perform primarily non-qualifying tasks.

In the present matter, the petitioner provided an organizational chart that seemingly suggests a staffing structure in which the beneficiary is relieved from having to perform primarily non-qualifying operational tasks. However, the organizational chart is not itself evidence; rather, it is a claim by the petitioner regarding its alleged personnel structure. As such, the director looked to the petitioner's tax documentation in an effort to determine the amount of money spent in salaries. The AAO notes that the director properly concluded that the petitioner's 2004 tax documentation, including a corporate tax return and two W-2 statements, failed to corroborate the staffing structure illustrated in the petitioner's organizational chart. The director also properly commented on the insufficiency of the copies of checks made out to individuals named in the petitioner's organizational charts. While the beneficiary's checks and those of [redacted] clearly show that payments received represented the respected salary of each individual, only two of [redacted] checks state that they are payments to a contractor. The AAO is unable to conclude that the remainder of the checks made out to [redacted] represented payment for services rendered to the petitioner. With regard to the checks made out to [redacted], the memo for the check dated August 26, 2005 states "contract," which does not clearly establish that [redacted] is a contracted employee. Furthermore, none of the remaining checks made out to [redacted] contain any indication at all that they were payments for services rendered. Accordingly, as the record lacks sufficient evidence to establish the petitioner's staffing composition, the AAO is unable to determine whether the petitioner had the capability of relieving the beneficiary from having to perform primarily non-qualifying tasks.

Counsel asserts on appeal that "the number of employees supervised is not determinative as to whether an individual is acting in a managerial or executive capacity." With regard to this issue, the Act provides that, when staffing levels are used as a factor as a determining factor in denying a visa to a multinational managerial or executive capacity, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, there is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

In addition, it is important for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics*

[1] *See* 8 C.F.R. § 204.5(j)(5).

Corp. v. INS, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

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). In the instant matter, while the petitioner has provided CIS with a list of the beneficiary's general responsibilities, there is no information as to the specific duties that would be performed in executing those responsibilities. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Merely stating that the beneficiary would coordinate the distribution of merchandise provides insight as to the beneficiary's responsibilities, but does not explain what actual tasks are involved in such coordination. Similarly, the petitioner indicated that the beneficiary would supervise the company's employees and all of the company's operations, but fails to explain the actual supervisory duties involved in such oversight. Moreover, the petitioner's organizational chart suggests that the beneficiary would have only one direct subordinate who would supervise the remaining company employees. It is entirely unclear what supervisory tasks could possibly occupy over 20% of the beneficiary's time when the beneficiary is shown as having only one direct subordinate. The broad job description provided in the instant matter fails to illustrate the beneficiary's daily activity and does not explain how others would relieve the beneficiary from having to perform primarily non-qualifying tasks. As such, the AAO cannot conclude that the beneficiary would primarily perform managerial or executive duties.

Furthermore, the record supports a finding of ineligibility based on at least one additional ground that was not previously addressed in the director's decision. More specifically, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to entering the United States as a nonimmigrant. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed description and hourly breakdown of the beneficiary's daily activities during his employment abroad. However, in response to the RFE, the petitioner listed two of the beneficiary's broad job responsibilities and failed to specify any of the actual tasks performed by the beneficiary during his employment with the foreign entity. 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.

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.

As a final note, counsel makes a brief reference to the petitioner's current approved L-1 employment of the beneficiary. However, 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). 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.

Furthermore, 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 at 1043, *aff'd,* 345 F.3d 683.

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.