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

PUBLIC COPY

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[redacted]

FILE: [redacted] OFFICE: TEXAS SERVICE CENTER Date: AUG 0 1 2008

SRC 06 137 50846

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, Texas Service Center. The petitioner subsequently filed a motion before the director seeking to have the matter reopened and reconsidered. The director dismissed the petitioner's motion. The matter is now before the Administrative Appeals Office (AAO) on appeal, which is subject to a *de novo* review. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida. It seeks to employ the beneficiary as its administration and marketing 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 based her first adverse decision upon two findings: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On motion, counsel argued that the director misconstrued the beneficiary's job description causing him to make an erroneous finding with regard to the nature of the job duties the beneficiary would primarily perform for the petitioning entity under an approved Form I-140.

Upon reviewing counsel's brief, the director determined that the petitioner failed to meet the requirements of a motion to reopen and a motion to reconsider and dismissed both motions.[1]

On appeal from the director's most recent decision, counsel submits a brief asserting that the director placed undue emphasis on the non-managerial tasks included in the beneficiary's position description, and failed to take note of the percentages of time assigned to other duties, which counsel deems are within a managerial capacity.

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] *See* 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties during her employment abroad as well as her proposed job duties in the prospective position with the U.S. petitioner. Specifically, the AAO seeks to determine whether the beneficiary was employed abroad and whether she would be employed in the United States in a qualifying 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 December 28, 2006,[2] which includes the following breakdown of the beneficiary's duties and responsibilities as administration and marketing manager for the petitioning company:

- Oversee and control all office administration and marketing of the enterprise. (35%)
- Manage/oversee document and records control. (2.5%)
- Coordinate, develop, and manage a marketing plan for [the petitioner]. (15%)
- Propose and implement, under general manager's supervision, marketing budget. (2.5%)
- Plan and prepare promotional material and advertising. (2.5%)
- Monitor market fluctuations and adjust strategies as necessary. (2.5%)
- Oversee and coordinate quality control measures. (2.5%)
- Visit properties and client premises to assure quality of services. (5%)
- Oversee, direct, and coordinate the activities of all subcontractors. (20%)
- Negotiate contracts with subcontractors for services. (2.5%)
- Authorize billing and payouts to subcontractors. (2.5%)
- Interface with clients as necessary to determine needs and concerns. Assign subcontractors as required to ensure customer satisfaction. (5%)
- Report to [the] [g]eneral [m]anager. (2.5%)

[2] It is noted that the date on the petitioner's support letter appears to be erroneous, as the Form I-140 was filed on March 28, 2006. By December 28, 2006, the petition had already been denied and the matter was before the director once again on motion. However, this error is not material to the outcome of this matter and is merely noted for the record.

It is noted that the petitioner did not discuss the job duties that the beneficiary performed during her employment abroad.

On May 22, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide documentation to assist Citizenship and Immigration Services (CIS) in determining the beneficiary's employment capacity in her positions overseas and for the U.S. petitioner. Specifically, the petitioner was asked to provide the beneficiary's position titles and job duties, the job titles and brief job descriptions of the subordinates who report/reported to the beneficiary, and the beneficiary's level of authority and level of seniority within each respective organization.

In response, counsel submitted a letter dated August 11, 2006, which contained the foreign entity's organizational chart and the percentage breakdown of the beneficiary's duties and responsibilities during her employment abroad. The organizational chart showed three tiers of employees with the managing director at the top of the hierarchy, the beneficiary as the administrator/general office manager in the next tier, and a travel agency and company secretary as the beneficiary's direct subordinates, whose duties were also provided. The percentage breakdown of the beneficiary's duties was as follows:

- Manage all office administrative duties of the U[.]K[.] Ltd. division. (30%)
- Supervise staff and oversee the coordination of office personnel's duties. (15%)
- Send e-mails, faxes and letters to coordinate with [the] U[.S[.] [c]ompany. (10%)
- Direct subordinate personnel on the proper preparation of client's [sic] vacation bookings. (5%)
- Maintain database of clientele, monitor use of the internet reservation system, and web page design. (5%)
- Liaise with clients to answer queries. (15%)
- Ensure customer satisfaction. (10%)
- Report status of [the] company directly to owner/[m]anager [d]irector. (10%)

With regard to the beneficiary's U.S. position, counsel restated the percentage breakdown the petitioner provided in support of the Form I-140 and expanded on the responsibility to which 35% of the beneficiary's time was initially allotted. Specifically, counsel explained that the beneficiary's responsibility for overseeing and controlling office administration and marketing includes the following job duties: receiving payments; counting daily receipts; preparing daily banking; preparing billing invoices; monitoring, tracking, and filing all billing from subcontractors; completing the company's payroll; and preparing and submitting quarterly tax forms. Counsel asserted that management of all administrative and marketing functions is an essential component of the company, which the beneficiary manages, arguing that the beneficiary is therefore a function manager.

On September 8, 2006 the director denied the petition, concluding that neither the beneficiary's foreign nor her proposed employment can be deemed to be within a managerial or executive capacity. The director specifically found that the job duties counsel listed in response to the RFE in her attempt to expand on one of the beneficiary's proposed job responsibilities were general office administration duties and cannot be deemed as qualifying tasks within a managerial or executive capacity.

As previously noted, counsel's motions to reopen and reconsider were dismissed, resulting in the petitioner's appeal of the director's latest adverse decision. On motion and most recently on appeal, counsel maintains the argument that the job duties the director specifically enumerated in her decision accounted for only 35% of the beneficiary's time and that the beneficiary should not be deemed as someone who primarily performs non-qualifying tasks. Counsel refers to the remaining items on the list as managerial duties and asserts that the beneficiary would spend "a very minimal amount of time" carrying out non-qualifying tasks.

While it appears that the director may have misinterpreted the amount of time attributed to the job duties specifically listed in counsel's response to the RFE, the AAO cannot conclude that the remainder of the duties and responsibilities included in the beneficiary's job description establish that she would be employed as a function manager within a qualifying managerial capacity.

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). In the present matter, the beneficiary's list of duties suggest that at least 20% of her time would be spent managing a staff of subcontractors, whom the petitioner has not established as being managerial, supervisory, or professional. *See* sections 101(a)(44)(A)(ii) and (iv) of the Act. Thus, in addition to the 35% of the beneficiary's time that is attributed to clearly administrative, non-qualifying tasks, the 20% that would be spent on personnel management indicates that at least 55% of the beneficiary's time would be spent on non-qualifying tasks.

Additionally, in order to establish that the beneficiary is a function manager, 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, because 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 this matter, while the beneficiary assumes a senior position in relation to the essential function that she manages, she also carries out many of the duties related to the essential function. As noted above, at least 55% of the beneficiary's time is attributed to office administration and first-line supervision of non-professional personnel. In addition to these non-qualifying tasks, the beneficiary would market the petitioner's services and deal directly with clients to provide proper customer service, thereby indicating that another 12.5% of the beneficiary's would be spent on job duties that also do not fall within the scope of managerial capacity.

Despite counsel's emphasis on the beneficiary's role within the petitioning organization, the petitioner does not merely manage or supervise the marketing and office administration; rather, she primarily performs the underlying duties that are associated with these functions. Counsel's attempt to break down each separate administrative task for the purpose of establishing the minimal time that is attributed to each one is ineffective

when the essence of the beneficiary's position involves primarily performing the daily mundane tasks that are necessary for the petitioner's everyday function.

With regard to the beneficiary's employment abroad, counsel did not provide any further information either on appeal or on motion to overcome the director's determination that the petitioner failed to establish the beneficiary's prior employment within a qualifying capacity. Without further evidence and information, the record indicates that the director's adverse finding was warranted.

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, 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. CIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. 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 was 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. 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).

Accordingly, 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.