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U.S. Citizenship and Immigration Services

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FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: DEC 01 2008

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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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a New Jersey corporation that seeks 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 determined that 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 and additional documentation in support of the petitioner's claim.

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 beneficiary would be employed in a capacity that is managerial or executive.

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 18, 2006 in which the beneficiary was identified as the company president assigned with management and oversight of the investment concerns in the United States. The beneficiary was described as carrying out the "executive/managerial" function of the organization, which seeks further investments. The petitioner provided the following description of the beneficiary's prospective employment:

> [The beneficiary] analyzes financial reports of the first investment of [the petitioner]. After reviewing and evaluating the reports of daily store operation, he establishes a comparative analysis each month of sales figures, which is used to plan the company's financial goals and business growth. Based on the comparative analysis that [the b]eneficiary prepares after analyzing the financial reports as stated above, [the b]eneficiary will prepare a plan to increase sales for the following month based upon the sales figures of the current report and thus establish financial goals for the investment company. Examples of these [sic]

> establishing and implementing these financial goals include negotiating lower marketing agreements with suppliers in [the b]eneficiary's managerial capacity. Also, [the b]eneficiary will research current market trends via [the] Internet and industry publications to determine the best products for potential profit to the company. From this research, [the b]eneficiary will develop marketing strategies for the current investment. An example is [the b]eneficiary's decision to include lottery participation to increase profit for the investment. Additionally, [the b]eneficiary meets weekly with Chevron representatives to negotiate the sales prices of fuel as well as sales promotions. [The b]eneficiary's negotiation of the sales prices is based in part upon his current market research and his sales plans, so he is better able to estimate profit. . . . [The b]eneficiary is also responsible for researching additional investment opportunities for [the petitioner] besides the convenience store, with review of same with his CPA. After researching these additional investment opportunities, [the b]eneficiary will determine which will be the best investment opportunity. In this manner, [the] beneficiary continues to direct the financial management of [the petitioner] by determining [its] next investment and also attends to legal matters . . . .

The petitioner also provided an employee list, which included the beneficiary in the position of president, a manager, a shift manager, and two cashiers.

On October 2, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a description of the beneficiary's specific job duties; the employees to be supervised in his prospective position with the U.S. entity; a copy of the petitioner's organizational chart illustrating the beneficiary's position compared to others within the hierarchy; the job duties that will be performed by the beneficiary's subordinates; and the W-2 statements issued by the petitioner in 2006 as well as the petitioner's most recently submitted tax return, signed and dated.

The petitioner's response included a letter from counsel dated October 25, 2007 in which counsel repeated the key aspects of the job description that was initially provided by the petitioner and which has been restated above. Counsel's response also referred to a number of supporting documents that were provided as examples of the beneficiary's role in recent investment opportunities, supplier negotiations, and other business-related discretionary decisions, including obtaining lottery authorization for and hiring personnel to work at the gas station/convenience store currently operated by the petitioner.

The petitioner also provided an updated organizational chart accompanied by a separate list of employees, including their names, job titles, brief job descriptions, and respective salaries. The updated chart and corresponding employee list indicates that two additional positions had been added to the petitioner's organizational hierarchy and the individual previously identified as the store manager had been replaced with another employee since the Form I-140 had been filed.

On January 25, 2008, the director issued a decision denying the petition, noting that the job descriptions provided by the petitioner failed to state the beneficiary's day-to-day job duties. The director also observed that the wages indicated in the Form W-2s issued by the petitioner in 2006 are not indicative of full-time employees, with the exception of the beneficiary, and that this leads to the conclusion that the beneficiary acts as a first-line supervisor. The director also reviewed the information provided in the petitioner's most up-to-date organizational chart, pointing out that with the exception of naming the beneficiary in his prospective position, no other employees were named. That observation, however, is incorrect, as the record contains a

corresponding list of employees as well as their respective salaries and position descriptions, thereby indicating that the petitioner provided the relevant information. That being said, the AAO notes that eligibility must be established at the time of filing, not at some later date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As such, any changes that may have taken place within the petitioner's organizational hierarchy after January 10, 2007, i.e., the hiring of additional employees, cannot be considered for the purpose of determining eligibility at the time of filing. Rather, the petitioner must establish that it was eligible to classify the beneficiary as a multinational manager or executive with the organizational hierarchy that was in place when the petition was first filed. Here, the petitioner's initial organizational chart identified a total of five employees, including the beneficiary, at the time of filing. It is the petitioner's burden to establish that the four employees that worked under the beneficiary, directly or indirectly, were able to relieve him from having to primarily perform non-qualifying tasks. The petitioner has not met this burden.

When examining the executive or managerial capacity, the AAO will analyze four key components. First, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). As the second, third, and fourth components, respectively, the AAO will consider the provided job description in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, a comprehensive review of these components indicates that an approval is not warranted.

First, with respect to the beneficiary's job description, the director provided express instructions in the RFE, adequately notifying the petitioner that a more detailed job description was one that would include specific job duties. In fact, the underlying implication of the director's request for more information regarding the proposed employment was that the information previously submitted was somehow deficient. Therefore, providing more of what had been provided earlier would not satisfy the director's request. Here, counsel's description of the beneficiary's proposed employment merely paraphrased the petitioner's earlier submission. Instead of providing specific job duties to explain what the beneficiary would actually do on a daily basis, counsel used the same vague terminology as was previously used by the petitioner without conveying a meaningful understanding of the petitioner's organizational hierarchy and how the employees within that hierarchy function on a daily basis to relieve the beneficiary from having to primarily perform non-qualifying operational tasks.

Moreover, counsel's interpretation of the beneficiary's job duties indicates that the beneficiary would conduct the research, analysis, and negotiations required to carry out the petitioner's goal of continued investment in U.S. businesses and that he would also conduct negotiations with the suppliers of the petitioner's current business operation. It is noted that 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).

While the AAO acknowledges the beneficiary's decision making authority, as conveyed via the job description, and the beneficiary's position within the petitioner's organizational hierarchy, this component alone does not establish that the primary portion of the beneficiary's job duties would be within a managerial or executive capacity. As stated above, the beneficiary's position within the organizational hierarchy (and the inherent discretionary authority that often follows) is but one component and must be considered in light of

other relevant information. As discussed above, the beneficiary's job description has been found lacking in crucial characteristics. More specifically, 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). Without a clear statement of specific job duties, the AAO lacks a sufficient basis upon which to conclude what the beneficiary's employment capacity would more likely be. This issue is yet further confused in the present matter, where the most adequately described tasks are those that are deemed non-qualifying, including researching and analyzing investment opportunities, meeting with investors, and negotiating with the suppliers of the petitioner's current retail operation.

On appeal, counsel attempts to dispel the notion that the beneficiary would be performing non-qualifying tasks during the primary portion of his working hours by providing a percentage breakdown of the beneficiary's time allocation. However, this information does not effectively overcome the director's decision. First, there is no clear indication that the additional job description is a depiction of the job duties the beneficiary would have performed at the time the Form I-140 was filed. As discussed above, at the time of filing, the petitioner's entire organizational structure was comprised of five employees, including the beneficiary. Furthermore, a review of the Form W-2s for 2007, which were submitted on appeal, suggests that no one but the beneficiary could have been working a full-time work schedule based on the hourly wages the petitioner indicated for each of its employees. For instance, while the petitioner indicated that its store manager was working 40-50 hours per week at an hourly rate of $7.50, the total salaries of the store managers for 2007 indicate that the employee filling this position could not have worked more than 31 hours per week at that rate of pay.[1] Similarly, while the petitioner indicated that the shift manager, [redacted] was working 40-50 hours per week at an hourly rate of $6.00, her 2007 W-2 statement indicates that the most she could have worked was 32 hours per week. Bearing in mind that the top two store employees were working considerably fewer hours than what the petitioner indicated, the AAO is left to question whether the gas station/convenience store was adequately staffed such that it was able to relieve the beneficiary from having to primarily perform operational tasks associated with running a retail business.

Second, according to the time distribution provided by counsel, it appears that researching and analyzing investment opportunities, meeting with investors, and negotiating with the suppliers of the petitioner's current retail operation, tasks which the AAO deems to be non-qualifying, would cumulatively comprise approximately 60% of the beneficiary's time. *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. at 604. Counsel also indicates that approximately 10% of the beneficiary's time would be allotted to reviewing the company's training plans and ensuring that all employees are properly trained. However, it is unclear what type of training the beneficiary would be reviewing, who would create the training material, and whether such training is an ongoing daily or even weekly process that should be considered as part of the beneficiary's regimen.

Thus, after thorough consideration of the four components discussed above, i.e., the description of the beneficiary's proposed employment, the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the

[1] In light of the petitioner's more updated list of employees, it appears that [redacted], who previously occupied the position of store manager, was replaced by [redacted]. However, the rate of pay for both individuals was the same. As such, in order to reach a conclusion as to the average hourly work week for the store, the AAO added the 2007 W-2 wages of both managers.

daily operational tasks, the AAO cannot conclude that the petitioner was ready and able to employ the beneficiary in a primarily managerial or executive capacity at the time the Form I-140 was filed. As discussed above, the job description, while failing to convey a meaningful understanding of the beneficiary's daily job duties, indicates that the beneficiary would primarily perform non-qualifying tasks. Furthermore, the petitioner's organizational structure is indicative of an entity that is still in need of a top or senior-level empmloyee who will actively participate in the organization's daily operational tasks, including devoting time on a need basis to the petitioner's existing retail operation. The fact that an individual manages a small business does not necessarily establish eligibility for classification as multinational manager or executive in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. In light of these findings, the AAO cannot approve the instant petition.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 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 his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. However, the petitioner failed to provide the requested information without which the AAO cannot determine whether the beneficiary was employed abroad in a qualifying managerial or executive capacity. 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).

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the present matter, the petitioner claims that it is a wholly-owned subsidiary of the foreign entity. However, the petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S) for 2005 and 2006. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved.

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 grounds 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. 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 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 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 petitions 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).

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.