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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: DEC 13 2013

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:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for filing a Form I-290B is $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 is a California corporation that 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 concluded that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition on that basis. On appeal, counsel disputes the director's decision and submits a brief addressing the basis for denial.

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 submitted sufficient evidence to establish that it would employ the beneficiary 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 May 8, 2008, which described the beneficiary's proposed employment. The petitioner stated that the beneficiary would oversee a project manager, a chief designer, and "other employees" in his role as leader of the petitioner's operation. The petitioner also listed the following components that would comprise the beneficiary's proposed employment: setting guidelines for business operations, including sales prospects, promotions, hiring, and market research; developing marketing strategy and creating a financial plan; obtaining customer feedback regarding the petitioner's new products and services; and reviewing and reporting on employee performance.

On February 17, 2009, the director issued a request for evidence (RFE) instructing the petitioner to provide a supplemental description of the beneficiary's proposed employment. The petitioner was asked to describe the beneficiary's proposed employment in greater detail, specifying the actual duties the beneficiary would perform and the time the beneficiary would allocate to each task. The petitioner was also asked to illustrate its organizational hierarchy by providing an organizational chart depicting all of the petitioner's departments,

employees and their position titles, and the job duties and percentage breakdowns of the beneficiary's subordinates.

In response, the petitioner provided a letter dated April 8, 2009 in which the petitioner repeated the four job components that were included in the petitioner's initial support letter and added a fifth component to establish that the beneficiary would lead e-commerce projects in North America. The petitioner indicated that the beneficiary set up a customer call center in Tokyo, Japan to offer customers site maintenance and shipping services. The petitioner stated that the beneficiary's lead role in acting as the liaison between the U.S. and Tokyo offices, his strategic marketing and financial plan development, his hiring and firing authority, and his leading role in new business development are the functions that qualify him for classification as a multinational manager or executive.

With regard to the petitioner's organizational hierarchy, the petitioner submitted an organizational chart that depicts the beneficiary as the employee at the top-most tier of the organization. The chart shows that the beneficiary's direct subordinates include the project manager of the web magazine division, general manager of the web system development division, a sales manager, and manager of the administration division. With the exception of the web magazine division, the three remaining divisions depict at least one support position subordinate to each of the three division managers. The web system development division identifies a project manager and a designer as the general manager's subordinates; the sales division shows a sales position subordinate to the sales manager; and the administration division lists the names, but does not provide the position titles of the two employees depicted as subordinates of the manager.

In a separate chart, the petitioner provided the names, job titles, and position breakdowns for the web magazine division employee, the general manager and designer in the web system development division, and the sales manager and sales employee in the sales division.

In a decision dated June 8, 2009, the director denied the petition noting that the petitioner failed to provide a comprehensive and detailed job description that would support a determination that the proposed employment would involve primarily managerial- or executive-level tasks. Rather, the director found that the evidence of record indicates that the beneficiary would perform routine duties that do not meet the criteria of what is deemed to be managerial or executive. The director also determined that the petitioner failed to establish that the beneficiary would supervise professional, managerial, or supervisory employees.

On appeal, counsel asserts that the beneficiary's proposed employment would require overseeing two managers and three specialists. Included in that list of subordinates were a project manager and a designer from the web system development division, a sales manager and sales specialist from the sales division, and the editor of the web magazine division. The AAO notes, however, that counsel's representations are different from the information that was previously presented in the petitioner's submissions. For instance, while counsel indicates that Tom Tahastos is the project manager of the web system development division, the petitioner's organizational chart identified Mr. [redacted] the general manager of that division with [redacted] as the division's project manager. Additionally, the organizational chart depicts the general manager of the web system development division as the beneficiary's direct subordinate, indicating that the two remaining employees in that division—the project manager and designer—are subordinate to the division's general manager rather than to the beneficiary himself. This information is inconsistent, however, with the supplemental employee list and job breakdown, which indicates that only the general manager and designer are part of the web system development division and shows that the general manager actually

assumes the role of project manager for 30% of his time. 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. 582, 591-92 (BIA 1988).

The above described inconsistencies leave the AAO without a means of determining exactly who is employed within the web systems development division and whom the beneficiary directly oversees as his subordinate(s). Such information is important for the purpose of determining how the petitioner is staffed and whether the beneficiary would be overseeing the work of managerial, supervisory, or professional employees. Although the web system development general manager is depicted as a managerial employee, the same cannot be stated of the project manager. Nor is there evidence establishing that the designer is a professional employee, regardless of either employee's position title. In light of the inconsistencies created, the AAO is unable to determine whether the position of project manager is supervisory, as previously depicted in the organizational chart. As such, the AAO must question whether this position is one that can be deemed professional. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." As provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only the occupations listed in section 101(a)(32) of the Act but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. In the present matter, the petitioner has not provided any information about the educational credentials of the designer or the project manager. Thus, assuming that neither position is supervisory or managerial, the record lacks sufficient information to establish that either position is one that can be deemed professional.

Counsel also claims that the beneficiary would oversee the work of the sales specialist. However, as with the positions discussed above, the petitioner has not provided adequate information to enable the AAO to determine that this position is that of a professional employee. As the petitioner did not clearly state how much of the beneficiary's time would be spent overseeing the work of non-managerial, non-supervisory, and non-professional employees, the petitioner has not adequately documented the proportion of time the beneficiary would allocate to non-qualifying tasks.

In addition, a number of the job duties that have been readily attributed to the beneficiary's proposed position appear to be non-qualifying daily operational tasks. For instance, the petitioner has indicated that the beneficiary would be charged with determining the marketing strategy and financial planning. In light of the petitioner's staffing, which does not include either a marketing or an accounting employee, the presumption is that the beneficiary would actually carry out the underlying marketing-related tasks and perform any bookkeeping associated with the company's financial planning. Similarly, the tasks of communicating with customers and creating reports to document customer feedback are also daily operational tasks that are necessary to provide services. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform do not comprise the majority of the duties of his proposed position. 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).

In the present matter, despite the director's RFE instruction, the petitioner did not assign time allocations to any of the job duties attributed to the beneficiary's proposed employment. It is therefore impossible to determine the proportion of time the beneficiary would allocate to qualifying versus non-qualifying tasks. Furthermore, as discussed at length in the preceding paragraphs, the petitioner's organizational chart is misleading as the supplemental information regarding the petitioner's organizational hierarchy is not consistent with the information that is conveyed in the chart. The petitioner's continued references to the beneficiary as general manager did not carry over to the chart, which identifies Tom Thastos as the general manager of the web system development division. In addition to the list of non-qualifying tasks that have been attributed to the beneficiary's proposed position, the record does not establish that the beneficiary's personnel management duties would focus primarily on the oversight of managerial, supervisory, or professional subordinate employees.

In summary, while the record adequately conveys the beneficiary's role as head of the petitioning entity, this is but one factor that U.S. Citizenship and Immigration Services (USCIS) considers in determining whether the beneficiary's proposed employment can be deemed as that of a managerial or executive employee. In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Here, the AAO cannot conclude that the facts presented herein are sufficient to establish that the beneficiary would primarily perform managerial- or executive-level job duties within the context of the petitioner's staffing composition. The fact that the beneficiary would be tasked with numerous operational job duties strongly indicates that the petitioner was not able to employ the beneficiary in a primarily managerial or executive capacity. Therefore, on the basis of this determination, the AAO finds that the petitioner is not eligible for the immigration benefit sought herein and the petition cannot be approved.

Additionally, while the director did not specifically reach a definitive conclusion from his adverse observations of the beneficiary's foreign job assignment, the AAO finds that the record does not establish that the petitioner meets the criteria of 8 C.F.R. § 204.5(j)(3)(i)(B), which 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 petitioner's description of the beneficiary's job duties during his employment abroad indicates that a considerable portion of the beneficiary's time was allocated to non-qualifying tasks, including handling the initial client consultation, conducting research, negotiating and communicating with clients, and seeking out new business. Similar to the description of the beneficiary's proposed employment, the description of the beneficiary's foreign employment was not accompanied by evidence establishing the proportion of time that was attributed to these non-qualifying tasks. Accordingly, the AAO cannot conclude that the beneficiary's employment abroad was primarily comprised of tasks within a qualifying managerial or executive capacity.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(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, the record shows that USCIS previously approved nonimmigrant L-1 employment of the beneficiary. In light of this information, the AAO notes that 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. USCIS 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 approval does not preclude USCIS 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 USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS 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).

If any 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 USCIS 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.