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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: TEXAS SERVICE CENTER Date: DEC 27 2010

[redacted]

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, with a fee of $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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a U.S.-based branch office of a foreign entity that seeks to employ the beneficiary as its assistant vice 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 denied the petition based on two independent grounds of ineligibility: 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 appeal, counsel disputes the director's conclusions and submits a brief asserting that the beneficiary's role with the foreign entity was that of a function manager. With regard to the beneficiary's proposed employment, counsel states that the beneficiary oversees the work of two direct subordinates and that he co-manages nine analysts in the Dublin office. Counsel also claims that the beneficiary functions at a senior-level position with respect to a function within the organization, thus indicating that the beneficiary's role within the U.S. entity is also that of a function manager.

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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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, [redacted] the petitioner's senior vice president of human resources, submitted a letter on behalf of the petitioner dated September 2, 2008, claiming that the beneficiary's employment abroad consisted of two phases. The petitioner indicated that the first phase consisted of training and courses, followed by the second phase during which the beneficiary was appointed to the position of

analyst. No further information was provided to describe the training phase of the foreign employment. The petitioner stated that once the beneficiary assumed the position of analyst, he was assigned the following list of responsibilities: procuring new business which includes developing new business relationships, managing his unit's portfolio, interacting with the head office, and monitoring client exposure.

With regard to the beneficiary's proposed position, [redacted] stated that the beneficiary would continue to monitor and direct the loan process, and develop new financial models for credits. He further noted that the beneficiary currently trains and supervises credit analysts, reviews their work product, and coordinates their project assignments. [redacted] did not clarify whether the training and oversight responsibilities would remain part of the beneficiary's proposed employment.

On November 28, 2008, the director issued a request for evidence (RFE) instructing the petitioner to provide additional information with regard to the beneficiary's foreign and proposed employment in order to assist U.S. Citizenship and Immigration Services (USCIS) to determine the beneficiary's employment capacity in both positions. Namely, the petitioner was asked to provide supplemental job descriptions for both positions, listing the beneficiary's specific daily job duties and the percentage of time allocated to individual tasks. The petitioner was also asked to provide the U.S. entity's organizational chart.

In response, [redacted] vice president of human resources, provided a letter dated December 29, 2008 on behalf of the petitioner, stating that the London office, where the beneficiary was previously employed, was new during the time of his employment and thus only housed two employees—the beneficiary and the beneficiary's superior. [redacted] stated that during the first eighteen months of the employment abroad, the beneficiary underwent training and was ultimately promoted to the position of a senior bank official during the summer of 2003. In a more detailed breakdown of the various phases of the beneficiary's employment with the petitioning entity, [redacted], human resources specialist, indicated that from February 25, 2002 through August 9, 2003 the beneficiary assumed the role of graduate bank official/analyst and that from August 10, 2003 through June 27, 2004 he was promoted to the position of senior bank official/analyst.

In light of the above, it appears that of the two years and four months that the beneficiary spent working for the petitioner's branch office abroad, the beneficiary spent less than eleven months in his position as senior bank official. The remainder of his time abroad was spent training for the elevated position of senior bank official. It is noted that any time the beneficiary spent in training cannot be deemed as qualifying employment within a managerial or executive capacity, as the beneficiary could not have been directing the management of an organization or managing an organization or a department or function within an organization. It is further noted that the criteria for meeting the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B) requires the petitioner to establish that not only was the beneficiary employed during the requisite time period, but that at least one year of that time period was spent working in a managerial or executive capacity. The information presented in the RFE response indicates that eighteen months of the beneficiary's time abroad was spent in training and thus outside of the managerial or executive capacity. As such, the AAO cannot conclude that the beneficiary was employed in a managerial or executive capacity for the requisite one-year time period, regardless of whether the ten-plus months the beneficiary spent in the position of senior bank official would be deemed as employment in a qualifying managerial or executive capacity. Therefore, the AAO need not address the specific job duties of the beneficiary's position as senior bank official, which the beneficiary occupied for less than one year during the relevant three-year time period.

With regard to the beneficiary's proposed employment with the U.S. branch office, [redacted] provided the following percentage breakdown:

a. Day[-]to[-]day supervision of professional level staff and training for credit analysis and providing feedback on their performance. 25%

b. New business development in terms of lending and deposit gathering. This requires meeting with new and existing clients and developing relationships that will lead to new business opportunities. 15%

c. Provide on-site training for use of AIB proprietary systems for new hires. These systems include a newly deployed credit application process, the bank's internal financial models and the use of the bank's database to track customer accounts. 10%

d. Managing credit applications for new lending opportunities. 30%

e. Managing the existing loan portfolio to ensure companies are performing as required, highlight underperforming customers and preparing credit papers for amendment of terms and conditions of loans. 20%

The record was also supplemented with the petitioner's organizational chart, which shows the beneficiary's position of assistant vice president of corporate and leverage. The chart depicts a vice president of corporate and leverage as the beneficiary's direct superior and two associates as his direct subordinates.

On April 13, 2009 the director issued a decision denying the petition after determining that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. With regard to the beneficiary's proposed employment, the director noted that the petitioner's organizational chart shows the beneficiary supervising only two employees.

Pursuant to the discussion above, the AAO finds that the beneficiary's period of training during his employment abroad cannot be deemed as time spent in a qualifying managerial or executive capacity. As the beneficiary's subsequent period of employment abroad in the position of senior bank official was for less than the requisite one year during the relevant three-year time period, the AAO need not determine whether such employment was in a qualifying managerial or executive capacity. The AAO thereby affirms the director's conclusion with regard to the beneficiary's foreign employment without further analysis.

With regard to the beneficiary's proposed employment, counsel addresses the director's observation regarding the petitioner's organizational hierarchy, stating that the beneficiary has two direct subordinates in the U.S. office as well as an additional nine indirect subordinates who work out of the office in Dublin, Ireland. Counsel challenges the director's emphasis on the number of employees that are under the beneficiary's supervision, pointing out that there is no statutory requirement as to the number of employees the beneficiary must oversee. Counsel asserts that the beneficiary functions at a senior level with respect to the corporate and leverage function.

Counsel's statements indicate that the beneficiary is both a personnel and a function manager. These two types of managerial capacities are inherently at odds with one another. The term "function manager" applies

generally when a beneficiary does not supervise or control the work of a subordinate staff, as does a personnel manager. Rather, this term applies to an individual who 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). Any time a claim is raised that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, 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. 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. *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). The petitioner may not claim to employ the beneficiary in the role of a function manager as a default mechanism when the petitioner cannot establish the beneficiary's role as a personnel manager whose primary concern is to manage a subordinate staff of managerial, supervisory, and/or professional employees.

In the present matter, the record lacks evidence to support the finding that the beneficiary would be employed as a function or personnel manager. In reviewing the description of the beneficiary's proposed employment, the AAO notes that a considerable portion of the beneficiary's time would be spent carrying out the tasks that are necessary to provide the services offered by the petitioner. More specifically, the petitioner indicated that the beneficiary would allocate 15% of his time to developing new business, which would require meeting with new and existing clients. While counsel asserts that only senior-level managers are allowed client interaction in comparison to junior staff members, who are allowed little to no client interaction, the AAO fails to see how the performance of a task that is indicative of providing a service, albeit the service of a top-level professional employee, can be deemed as a task within a managerial capacity. Merely stating that the beneficiary is allowed to interact with clients does not necessarily establish that the beneficiary meets the specific criteria set forth in section 101(a)(44)(A) of the Act.

The petitioner also indicated that the beneficiary would devote 10% of his time to providing training for new employees, which the AAO also deems as a non-qualifying task. Although the petitioner indicates that 25% of the beneficiary's time would be attributed to supervising and training a professional level staff, it is unclear what portion of the 25% would be specifically allocated to supervising versus training such staff. As noted above, training subordinates has not been shown to be a qualifying task.

The remaining 50% of the beneficiary's time is devoted to making decisions regarding credit applications, new lending opportunities, and existing loan portfolios, and preparing paperwork to amend loan terms. While these tasks are important to the success of the petitioning company, the AAO similarly finds that they are tasks that are required for the provision of services to the petitioner's clients and thus cannot be deemed as tasks performed in a qualifying managerial or executive capacity.

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 are only incidental to his/her proposed position. In the present matter, it is apparent that the beneficiary's proposed employment in a banking institution is of a professional nature and requires a high level of knowledge in order to bring in new business and retain existing clientele. However, the AAO cannot

overlook the requirements of the proposed employment, which focuses heavily on client interaction, whether to provide existing customers with high-level banking services or to sell the petitioner's services to new clients. The beneficiary's job description indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this additional reason, the petition may not be approved.

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

Furthermore, if a previous nonimmigrant petition were approved based on the same information that is 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 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 a nonimmigrant petition 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.