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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

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OFFICE: TEXAS SERVICE CENTER

Date:

NOV 23 2010

IN RE:

[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:

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 Florida 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 and denied the petition on that basis.

On appeal, counsel submits a brief disputing the director's conclusion and underlying analysis.

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 April 22, 2008, which includes the following description of the beneficiary's proposed employment:

As President, [the beneficiary] is responsible for directing and coordinating the management of all essential functions within our organization This includes the oversight, development and implementation of strategic plans aimed at expanding the overall positioning of our distributed products within our designated markets. As such, [the beneficiary]'s duties include growing and developing business relationships in observance with our corporate objectives, which also involves expanding relations with regional and national customers; planning and developing organizational policies and objectives and implementing them through subordinate administrative personnel in order to achieve our long and short term goals and to effect operational efficiency; directing the promotion and distribution of our imported products; reviewing and analyzing pricing, sales, distribution and

marketing data regarding the practices and preferences of our customers as well as our competitors; developing new markets to increase our market share and to obtain a firmer competitive position in the industry; analyzing budget requests . . . ; conferring with administrative personnel, and reviewing activity, operating, sales and financial reports to determine necessary changes in programs or operations; reporting on a monthly basis to our parent company in Dubai; and authorizing and executing major capital expenditures in coordination and consultation with our parent company in Dubai.

On January 15, 2009, the director issued a notice of intent to deny (NOID) instructing the petitioner to provide a description of the beneficiary's job assignment in greater detail, including the actual job duties associated with the beneficiary's goal-setting, policy-making, and discretionary decision-making responsibilities. The petitioner was asked to provide the beneficiary's exact daily job duties as well as an organizational chart showing the beneficiary's position and the positions of the beneficiary's subordinates.

In response, the petitioner submitted a letter dated February 2, 2009, which included the following itemized list of duties and responsibilities that are attributed to the beneficiary's proposed employment:

- Growing and developing business relationships in observance with our corporate objectives, which also involves expanding relations with regional and national customers;
- Designing and implementing the course of business, which entails analyzing financial data as well as micro and macro-economic conditions to determine company goals, courses of action, and policies;
- Preparing and formulating operating plans and strategies to meet our business objectives, as well as reviewing and implementing those plans and strategies . . . ;
- Considering solutions or alternate methods and implementing changes to increase overall efficiency;
- Establishing goals and policies with respect to the creation of new projects and plan development;
- Reviewing and analyzing pricing, sales, distribution and marketing data regarding the practices and preferences of our customers as well as our competitors;
- Reviewing and executing effective marketing and sales plan;
- Establishing corporate budgets for marketing, purchasing, and sales efforts;
- Planning and developing organizational policies and objectives and implementing them through subordinate administrative personnel in order to achieve our long and short term goals and to effect operational efficiency;
- Directing the promotion and distribution of our imported products;

- Developing new markets . . . ;
- Designating primary and secondary markets for advertisements and client negotiations;
- Analyzing budget requests . . . ;
- Conferring with administrative personnel, and reviewing activity, operating, sales and financial reports . . . ;
- Reporting on a monthly basis to our parent company . . . ;
- Authorizing and executing major capital expenditures in coordination and consultation with our parent company in Dubai (UAE), which includes decision-making in the areas of investment of capital for existing operations and expansion of business, organizational structure, distribution of assignments, as well as retention/dismissal of all employees and independent contractors;
- Developing and growing our staff and team.

The petitioner also provided the names, job titles, and salaries for all of its employees in its Florida and New York offices. The petitioner's organizational chart depicts the beneficiary at the top of a hierarchy that includes nine supporting positions—six in the Florida office and four, including the beneficiary, in the New York office. The beneficiary's direct subordinates include an accountant, an inventory manager, a computer information systems (CIS) manager, and a manager. The inventory manager oversees a product developer and designer, who oversees a diamond grader, all three of whom work in the Florida office. The manager, who works out of the New York office, oversees a secretary in the New York office and a sales assistant in the Florida office, who oversees a sales associate in the New York office.

In a decision dated March 10, 2009, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would primarily perform job duties within a qualifying managerial or executive capacity. In support of this conclusion, the director made various dubious observations with regard to the petitioner's organizational structure. First, the director noted that the beneficiary has "only five employees under his direct control, one of whom was only recently hired." Second, the director determined that the petitioner's organizational chart shows that the beneficiary has no subordinates other than an information systems manager, an inventory manager, a diamond grader, and product developer and designer, and an accountant, whom the director deemed as a recent addition to the organization.

On appeal, the AAO has conducted its own independent analysis of the record and concurs with the director's conclusion regarding the ultimate basis for denial. The AAO finds, however, that the director's underlying analysis is flawed, as it mischaracterizes the beneficiary's list of subordinates, places undue emphasis on the petitioner's staffing, and fails to adequately stress the deficiencies in the job description that was provided in response to the RFE. The director's finding that the beneficiary has "only" five subordinates indicates that this was an adverse finding. No further clarification was provided to explain why five subordinates would not have been sufficient and how this factor contributed to the ultimate denial of the petition. Additionally, in enumerating the position titles of the beneficiary's subordinates, the director erroneously included the diamond grader, a position that is shown as the direct subordinate of the product developer and designer, not a

direct subordinate of the beneficiary. The director also failed to note the position of manager as one of the beneficiary's subordinates and indicated that the accountant position was newly added. With regard to the latter observation, the record indicates that while the individual who now occupies the position of accountant was a recent hire, the position itself appears to have been previously filled by someone else, thus indicating that the accountant position was part of the petitioner's organizational hierarchy at the time the Form I-140 was filed.

Notwithstanding the imprecision of the director's analysis, the AAO finds that the petitioner failed to provide a detailed description of the beneficiary's proposed job duties and was thereby unable to establish that the beneficiary's time would be primarily allocated to the performance of tasks within a qualifying managerial or executive capacity.

A detailed job description is required by regulation and is germane to determining whether the beneficiary would be employed within a qualifying capacity. See 8 C.F.R. § 204.5(j)(5). Published case law reiterates the significance of a job description, finding that 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). Although other factors, including the petitioner's staffing and the beneficiary's discretionary authority, are also important for the purpose of determining a beneficiary's managerial or executive capacity, they alone, without a detailed description of the proposed job duties, are insufficient. The petitioner must provide a job description that adequately delineates the beneficiary's specific tasks and establishes that the primary portion of the beneficiary's time would be allocated to qualifying, rather than the non-qualifying, job duties. 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 the proposed position. 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, the job description submitted in response to the NOID fails to convey a meaningful understanding of the specific tasks that the beneficiary would be expected to perform on a daily basis. The director was very clear in the instructions to the NOID, expressly asking the petitioner to provide details in describing the beneficiary's "exact daily duties." Despite these instructions, the petitioner used broad terminology without fully explaining how the various broadly stated business objectives and job responsibilities fit the specific context of the petitioner's jewelry business. For instance, the petitioner stated that the beneficiary would design and implement the course of business, prepare and formulate operating plans, consider solutions and implement changes, establish goals and policies, and plan and develop organizational policies and objectives. While these five items convey a sense of the beneficiary's discretionary authority, they provide no insight as to the specific means by which the beneficiary would go about meeting these objectives, i.e., the underlying daily tasks the beneficiary would perform. In fact, these generic job responsibilities may be applied to managers or executives in any number of different industries with little indication as to how they apply specifically to the petitioner's jewelry business.

Additionally, due to the lack of detail, a number of the job responsibilities indicate that the underlying job duties may be of a non-qualifying nature. Specifically, the petitioner stated that the beneficiary would develop business relationships with regional and national customers, establish corporate budgets, and develop

new markets, all of which are indicative of operational tasks. Furthermore, the petitioner failed to clearly establish the beneficiary's specific role in reviewing and executing marketing plans and directing product promotion, thereby indicating that the beneficiary may be directly involved in various marketing-related tasks as well. As previously stated, 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. at 604. The AAO cannot affirmatively conclude that the primary portion of the beneficiary's time would be allocated to qualifying managerial or executive tasks when the petitioner fails to provide a detailed job description that actually delineates the proposed tasks.

On appeal, counsel addresses the director's adverse comments regarding the petitioner's organizational hierarchy by specifying the job titles, salaries, and educational levels of the beneficiary's subordinates. As the AAO discussed above, evidence of the petitioner's staffing levels would not necessarily result in an approval or denial of the petition. Rather, evidence of the petitioner's organizational make-up must be considered in light of the beneficiary's proposed job duties. Although counsel asserts that the beneficiary does not perform the petitioner's day-to-day operational tasks and allocates his time to managing essential functions, in order to determine that the beneficiary would assume the role of a function manager, 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. As discussed above, the petitioner has failed to provide a detailed description of the beneficiary's proposed job duties. Moreover, the term function manager is reserved for individuals who manage functions, not personnel. As the petitioner has attributed certain personnel management responsibilities to the beneficiary's proposed position, it does not appear that the term function manager is applicable to the beneficiary in the present matter.

In summary, the AAO finds that the record lacks sufficient information about the tasks the beneficiary would perform on a daily basis in his proposed position with the U.S. entity. While the AAO does not dispute the beneficiary's discretionary authority, a factor that has been stressed by the petitioner and is reiterated by counsel on appeal, a thorough description of job duties is required in order to determine that the beneficiary would allocate the primary portion of his time to managerial- or executive-level tasks. As the petitioner has failed to provide this crucial information, the AAO cannot conclude that the beneficiary would be employed within a qualifying managerial or executive capacity. On the basis of this conclusion, the instant petition cannot be approved.

Additionally, while the director did not ultimately make an affirmative determination with regard to the beneficiary's employment abroad, the AAO finds that the petitioner failed to establish that the beneficiary was previously employed by the foreign entity within a qualifying managerial or executive capacity as 8 C.F.R. § 204.5(j)(3)(i)(B) requires. Similar to the record's lack of an adequate description of the beneficiary's proposed job duties, the petitioner was equally vague about the job duties the beneficiary performed during his employment abroad, despite express instructions in the NOID asking the petitioner to provide such information. Although the petitioner discussed the beneficiary's practical experience and the hands-on knowledge he gained as a result, a detailed description of the beneficiary's foreign employment was not

provided. As such, the AAO cannot conclude that the beneficiary was employed abroad in 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, counsel makes numerous references to the petitioner's current approved L-1 employment of the beneficiary, asserting that such prior approvals indicate that the petitioner has already established that the beneficiary was employed abroad and would be employed by the petitioning entity in a qualifying managerial or executive capacity.

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. U.S. Citizenship and Immigration Services (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. 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. at 597. 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 though 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).

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.