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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

B4

[redacted]

DATE: SEP 15 2011 OFFICE: TEXAS SERVICE CENTER [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 Florida corporation that seeks to employ the beneficiary as its 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 grounds of ineligibility. The director determined that 1) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity and 2) the petitioner failed to establish that it had the ability to pay the beneficiary's proffered wage as of the date the petition was filed.

On appeal, counsel disputes the director's findings and provides an appellate brief accompanied by additional supporting documentation in an effort to overcome the grounds for denial. After reviewing the supplemental documentation, the AAO finds that the petitioner has submitted sufficient evidence establishing its ability to pay and has therefore overcome the second ground that served as a basis for denial. As such, this decision will address the beneficiary's prospective employment with the U.S. entity as the remaining ground cited in the director's decision.

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 provided 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, [redacted], president of the petitioning entity, submitted a letter dated October 14, 2008 on the petitioner's behalf. [redacted] provided the following statements describing the beneficiary's proposed employment with the U.S. entity:

> [The beneficiary] has continued to undertake the executive responsibilities of Vice-President for us. [He] is responsible for managing the entire company operation; he has the ultimate authority over the managerial personnel. He hires and dismisses the employees under his supervision; he is also fully responsible for the financial viability of the company. He prepares budgets and financial reports; [sic] and approves budget expenditures. He plans, directs and coordinates operational activities at the highest level of management with the help of subordinate managers and establishes internal control procedures. . . .

The petitioner provided a quarterly federal tax return and a federal quarterly report for the second quarter of 2008, both showing five employees. The petitioner also claimed five employees at Part 5, No. 2 of the Form I-140.

Also in support of the Form I-140, the petitioner provided an opinion letter dated June 16, 2008 from [redacted] a professor of management and information systems at the Seattle Pacific University's School of Business and Economics. [redacted] concluded that the beneficiary's position with the foreign entity and his proposed position with the petitioning entity both fit the definition of executive capacity and laid out the reasons for his assertions.

In a decision dated July 7, 2009, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity. The director found the proposed job description to be overly vague, consisting primarily of general job responsibilities and lacking a definitive description of the beneficiary's specific job duties.

On appeal, counsel challenges the director's reference to the published decision of *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990), pointing out that the petitioner in the present matter seeks immigrant visa classification while the petitioner in the cited decision sought to classify the beneficiary as a non-immigrant.

The AAO finds counsel's argument unpersuasive. Although there are understandably inherent differences between the immigrant classification sought in the present matter and the non-immigrant classification sought in the *Fedin Bros.* case, both visa classifications rely on the same definitions of managerial and executive capacity. The cited decision merely points out that a description of the beneficiary's job duties must be weighed heavily when determining the nature of the beneficiary's employment. As such, the fact that *Fedin Bros.* involves a nonimmigrant rather than an immigrant petition is not relevant and does not weaken the director's point. Moreover, the regulation at 8 C.F.R. § 204.5(j)(5) expressly instructs the petitioner to provide a detailed description of the duties to be performed when submitting the Form I-140. The cited case law merely reaffirms the regulatory provision that emphasizes the importance of an adequate job description.

Counsel also asserts that the beneficiary will perform managerial and executive job duties and refers to a supplemental list of duties and responsibilities that [redacted] provided in his August 2, 2009 statement submitted on appeal. The list consists of the following:

- Responsible for further developing the company's presence and growth in the United States, Brazil, South America, and the Caribbean . . . .

- Facilitates, manages, and further develops relationships with various shipping lines and carriers . . . .

- Works with company strategic alliances worldwide. Reviews custom brokerage contracts and serves as a liaison between customer brokers and major clients worldwide.

- Directly in charge of successfully negotiating customer and carrier contracts on a large scale for the entire North American, Brazilian, and Latin American regions.

- Responsible for supervising, overseeing, and motivating sales staff managers to work on and identify business development leads . . . .

- Oversee the Compliance with International Trade Organizations Provisions and Regulations in Clients International Business Relations . . . .

- Maintains and creates relationships with ocean and air shipping agents . . . .

- Ensures that agents and shipping companies meet company requirements to be an agent company customer ocean and air shipping broker, including legal and insurance requirements.

- Manages company costs for [the] entire United States, Brazil, South American and Caribbean region. Reviews costs and budgets of company subsidiaries and agent costs. Makes recommendations to ensure that costs are within budgets.

- Uses strong analytical skills to evaluate current business trends and to position company expertise and services accordingly. Maintains knowledge of company market competitors . . . and identifies weaknesses of competitors and strengths to ensure [that the] company [is] in line with business trend movements within the industry.

- Develops the company's marketing strategy by analyzing the demand for company services and identifying potential customers . . . .

- Responsible for managing and developing sales, operations and support of the multi-modal, international transportation and customs brokerage business for the company . . . .

- Works to build and coordinate partnerships internally/externally to enhance customer/network growth and overall company profitability . . . .

- Responsible for implementation and oversight of all compliance related items dealing with functioning as [f]reight [f]orwarder.

- Exercises executive decision-making authority and reports directly to the Board of Directors in the United States and in Brazil. Approves all contracts and business agreements proposed by management and client customers. Sets and finalizes all purchasing, financial and market share agreements based on [the] business plan through subordinate administrative, logistic,

and marketing personnel. Sits with managers on [a] monthly basis to compare actual sales and financial results with forecasted results.

- Responsible for global corporate planning and overall international company vision. Responsible for reviewing possible company office openings in other countries. Responsible for interviews with the customers and brokers to determine the best commercial opportunities. Negotiates contracts with real estate brokers for warehouse space and office space. Negotiates the contracts with the air transporters and ocean liners.

[redacted] further added that the beneficiary oversees the work of an administrative manager and a sales manager and noted that both departments hire seasonal workers as needed.

After reviewing the newly submitted information, the AAO finds that the job description does not establish that the primary portion of the beneficiary's time would be allocated to tasks within a managerial or executive capacity. While the new job description clearly contains more information about the proposed position than the job description that was initially provided in support of the petition, the AAO nevertheless finds that a number of [redacted] statements are still too general and fail to convey a meaningful understanding of the beneficiary's job duties. For instance, while [redacted] indicated that the beneficiary would be "responsible" for the company's growth, he did not cite any specific daily tasks the beneficiary would perform in order to meet this responsibility. Similarly, the AAO is uncertain as to the tasks involved in the beneficiary's responsibility for implementing and overseeing the compliance of the freight forwarder or his responsibility for corporate planning. The underlying tasks associated with these general responsibilities are simply not covered in the provided job description.

The AAO also notes that while the beneficiary would be assigned a number of operational tasks, no information was provided to establish how much time would be allocated to carrying out the non-qualifying elements that appear to be inherent to the proposed position. For instance, it is not readily apparent that tasks such as communicating with shipping lines and carriers, serving as the liaison between customs brokers and clients, negotiating various contracts with customers and carriers, and conducting market research to develop a marketing strategy are tasks within 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. 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 petitioner has not established that the non-qualifying tasks are only incidental to the beneficiary's proposed employment.

Furthermore, little information was provided about the petitioner's organizational hierarchy and the personnel whom the petitioner employed at the time of filing. The AAO notes that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that U.S. Citizenship and Immigration Services (USCIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q*

Data Consulting, Inc. v. INS, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Thus, while the number of employees the petitioner had at the time of filing is not the sole factor considered in determining a petitioner's eligibility, it is clearly relevant, as a petitioner with a limited staff may be unable to relieve the beneficiary from having to primarily perform tasks of a non-qualifying nature. In the present matter, the record does not contain sufficient information about the petitioner's staffing. As such, the AAO cannot affirmatively determine that the petitioner was adequately staffed to support the beneficiary in a primarily managerial or executive capacity. Additionally, the AAO notes that the record lacks information about the beneficiary's direct subordinates. Although the petitioner claims that the beneficiary would oversee the work of two managerial employees, without a more detailed description of the petitioner's organizational hierarchy and the employees' specific placements, the AAO cannot determine whether the managerial position titles are accurate in conveying the nature of the respective positions. As such, the AAO cannot determine that the beneficiary oversees the work of managerial or supervisory employees despite their assigned position titles.

Lastly, with regard to the petitioner's submission of an opinion statement from a university professor regarding the issue of the beneficiary's employment capacity, the AAO finds that such documentation has little probative value in the instant proceeding. Other than reaffirming the petitioner's own claim, there is no evidentiary value in the statements of an individual who has no personal knowledge of the beneficiary's proposed employment, the petitioner's organizational hierarchy, or the relevant statutory provisions that apply to the matter at hand. Thus, the AAO views the opinions of the third party individual as little more than an extension of the petitioner's claim rather than evidence that supports the claim. Where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In summary, the record as presently constituted is not persuasive in demonstrating the petitioner's eligibility for the immigration benefit sought. As noted above, the record lacks sufficient information about the beneficiary's prospective job duties and fails to establish that the petitioner's organizational hierarchy at the time the Form I-140 was filed was sufficient to relieve the beneficiary from having to allocate the primary portion of his time to non-qualifying tasks. Therefore, based on the evidence furnished, the AAO cannot conclude that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this 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 that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. As such, 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 a subsequent 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 the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church*

Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that 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).

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.