identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B4

DATE: MAY 29 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [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: SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 CFO and 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.

In support of the Form I-140 the petitioner submitted a statement dated October 21, 2009, which described the nature of the petitioner's business and included information pertaining to the beneficiary's foreign and proposed employment. The petitioner also provided both entities' financial and corporate documents.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated February 18, 2010 informing the petitioner of various evidentiary deficiencies and allowing the petitioner the opportunity to supplement the record with documents establishing eligibility.

The petitioner provided a response, which included supplemental information pertaining to the beneficiary's foreign and proposed employment as well as additional supporting evidence in the form of wage, tax, and bank documents.

After reviewing the record, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. The director therefore issued a decision dated June 14, 2010 denying the petition. The director found that the petitioner offered insufficient information about the beneficiary's job duties with each entity and also questioned the petitioner's ability to relieve the beneficiary from having to primarily carry out non-qualifying tasks given the company's limited support staff.

On appeal,[1] the petitioner submits a statement from the beneficiary asserting that the director "misunderstood and mischaracterized" various documents and facts that were previously offered in support of the petitioner's claim that the beneficiary's foreign and proposed employment fit the definition of managerial or executive capacity.

The AAO finds that the beneficiary's assertions are not persuasive and fail to overcome the director's denial. All of the petitioner's submissions have been reviewed. All relevant documentation that pertains directly to the key issue in this matter will be fully addressed in the discussion below.

Section 203(b) of the Act states in pertinent part:

---

[1] Effective March 4, 2010, the regulation at 8 C.F.R. § 292.4(a) requires that a "new [Form G-28] must be filed with an appeal filed with the [AAO]." Title 8 C.F.R. § 292.4(a) further requires that the Form G-28 "must be properly completed and signed by the petitioner, applicant, or respondent to authorize representation in order for the appearance to be recognized by DHS." The record in the present matter does not contain a new, properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. Therefore, the AAO cannot consider prior counsel, who assisted the petitioner in the filing of the Form I-140, as the petitioner's attorney of record.

> (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 issues to be addressed in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad and 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 examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will also consider other relevant factors, such as the organizational hierarchy of the entity in question, the beneficiary's position therein, and the employing entity's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks of the business. Although an entity's size alone will not determine whether the employment in question qualifies as employment in a managerial or executive capacity, this factor is relevant and is often an indicator of an entity's ability to relieve the beneficiary from having to primarily perform non-qualifying operational tasks on a daily basis.

In reviewing evidence that pertains to the beneficiary's employment abroad, the AAO agrees with the director's finding that the petitioner provided a deficient job description that failed to convey a detailed account of the specific tasks the beneficiary performed on a daily basis. Published case law clearly supports the pivotal role of a clearly defined job description, as 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 the petitioner's original support statement emphasized the beneficiary's discretionary decision-making, claiming that the beneficiary managed the foreign entity's daily operations and was responsible for hiring and firing personnel, this general information does not establish that the actual tasks the beneficiary performed on a daily basis were primarily at a managerial or executive level.

Despite the RFE response statement dated March 28, 2010, which contains supplemental information about the beneficiary's employment abroad, the petitioner failed to list the beneficiary's specific daily tasks with the requested time allocations. As the director properly pointed out in the denial, merely stating that 75% of the beneficiary's time was allocated to supervising subordinate employees in their respective positions does not clarify what specific supervisory duties were performed. Additionally, the AAO finds that certain job duties that were involved in project management and coordination, including trade show participation, creation of

sales and marketing programs, and business development, are indicative of operational tasks required to provide services that were offered by the foreign entity. 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 light of the petitioner's failure to provide sufficient information establishing what specific tasks occupied 75% of the beneficiary's time, the AAO cannot conclude that the beneficiary allocated the primary portion of his time to qualifying tasks. An affirmative conclusion as to the nature of the beneficiary's foreign employment would necessarily require a specific account of the job duties performed—information which the petitioner did not provide. The beneficiary's submission of third-party statements, which repeat the claims the petitioner originally made, is self-serving and is not sufficient to overcome the director's decision, which properly focused on the petitioner's failure to submit necessary information about the beneficiary's employment abroad. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The declaration of [redacted] in which she claims that she has a baccalaureate degree, is inconsistent with the statement the petitioner provided in the RFE response, where the petitioner indicated that [redacted] has a high school diploma, not a baccalaureate degree as claimed on appeal. 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). Moreover, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Turning to the proposed employment offered by the U.S. petitioner, the AAO similarly finds that the petitioner failed to provide specific information about the actual job duties to be performed. As with the petitioner's description of the beneficiary's foreign employment, the proposed employment was described using vague statements claiming that the beneficiary would allocate most of his time—70%—to managing subordinate personnel. Not only did the petitioner fail to specifically identify any actual supervisory tasks the beneficiary would perform, but it is unclear that the petitioner's staffing, which is comprised of both part-time and full-time employees in order to meet the petitioner's "seasonal" needs, has not been shown to be sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks.

While the AAO agrees with the beneficiary's assertion that the director failed to consider the part-time status of certain employees when calculating their hourly wages, the petitioner must nevertheless establish that its staffing at the time of filing the petition was sufficient to relieve the beneficiary from having to primarily perform the petitioner's daily operational tasks. In light of the beneficiary's claim that the petitioner's needs would vary depending on seasonal demand, it is not clear how the beneficiary's job duties would be affected by a considerably diminished staff during seasons of less demand. The fact that the beneficiary would manage a small business does not necessarily establish that he would be employed in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. Regardless of the economic climate or the petitioner's specific needs, in order to establish that the proposed employment would be in a managerial

or executive capacity, the petitioner must show that the primary portion of the beneficiary's time would be allocated to performing qualifying managerial- or executive-level job duties.

Notwithstanding the beneficiary's discretionary authority and his placement within the petitioner's organizational hierarchy, the petitioner has not established that the job duties to be performed in the scope of the petitioner's retail-based business would be primarily of a qualifying nature.

The petitioner's reliance on previously approved L-1A petitions is misplaced. 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. If previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval(s) would constitute material and gross error on the part of the director. As the director previously indicated, 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).

The AAO cannot conclude that the beneficiary's employment abroad and his proposed employment with the U.S. entity either involved or would involve, respectively, the performance of primarily managerial or executive tasks. Therefore, the instant petition may not be approved.

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.