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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

U.S. Citizenship and Immigration Services

[redacted]

B4

DATE: MAY 3 1 2012

OFFICE: TEXAS 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:

[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. Do not file any motion directly with the AAO. 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 Texas 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.

In support of the Form I-140 the petitioner submitted supporting evidence, including the petitioner's financial and corporate documents as well as documents pertaining to the petitioner's foreign affiliate.

The director reviewed the petitioner's submissions and determined that the petitioner did not submit sufficient evidence to establish eligibility. The director therefore issued a request for evidence (RFE) dated June 29, 2006 informing the petitioner of various documentary deficiencies. The director instructed the petitioner to provide a definitive statement describing the beneficiary's foreign and proposed employment, listing the beneficiary's direct subordinates as well as their respective job titles, descriptions of duties, and educational backgrounds. The petitioner was also asked to provide evidence establishing that the beneficiary would oversee the work of managerial or professional employees. The director therefore asked the petitioner to provide organizational charts depicting the foreign and U.S. entities' respective organizational hierarchies and to include the names and job titles of the employees within each organization.

The petitioner's response included a statement dated September 19, 2006 in which the petitioner focused on the beneficiary's proposed employment, providing information about the beneficiary's U.S. job duties and responsibilities as well as information about the beneficiary's subordinates, such as their names, job titles, job duties, and educational credentials.

With regard to the foreign employment, the only information provided was the date the foreign entity was established—1972. The petitioner did not describe the beneficiary's employment abroad in terms of the duties performed or the employees supervised. The petitioner did, however, provide the foreign entity's organizational chart listing the beneficiary at the top of the organizational hierarchy, subordinate only to the board of directors. The chart indicated that the beneficiary's only subordinate was the company's vice president, who managed a finance director and an operations manager. While the latter position was not depicted as having subordinates, the finance manager was depicted as supervising the site supervisor, who supervised seven unnamed contract workers.

The AAO further notes that the petitioner provided an organizational chart depicting the hierarchy of a U.S. entity named [redacted] Although the beneficiary was depicted as the company's president and [redacted] (whom the petitioner's original chart named as its vice president) was depicted as the entity's business development manager, no explanation was provided as to why the beneficiary and the individual who was previously portrayed as his direct subordinate at the petitioning entity, are being depicted in the organizational chart of an entirely separate company, whose connection to the petitioner, if any, was not explained. Although the petitioner provided a number of its tax and corporate documents, there is no indication in the record that the petitioner's own organizational chart was provided.

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. Additionally, the director relied on the common law definition of the term "employee" in concluding that the petitioner and the beneficiary do not have an employer-employee relationship. The director issued a decision dated May 10, 2010 denying the petition based on these three findings.

On appeal, counsel submits a brief addressing the grounds for denial. Counsel states that the petitioner does not have a business relationship with [redacted] and contends that the service erroneously considered documentation that the petitioner did not submit. Counsel asserts that the beneficiary will be employed in a qualifying managerial capacity and asserts that the previously provided job descriptions adequately convey the beneficiary's qualifying employment. Counsel also challenges the director's adverse finding with regard to the beneficiary's prior employment with the foreign entity, pointing out the petitioner's previously approved L-1 employment of the beneficiary and asserting that such prior approvals are an indication that the petitioner has already established the beneficiary's qualifying employment abroad.

The AAO finds that counsel's arguments are not persuasive and fail to overcome the director's denial. The petitioner's submissions have been reviewed and all relevant documents that pertain to key issues in this matter will be fully addressed in the discussion below.

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 first two issues to be addressed in this proceeding call for an analysis of the beneficiary's foreign and proposed employment. Specifically, the AAO will examine the record to determine whether sufficient

evidence was submitted to establish that 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 examining the executive or managerial capacity of the beneficiary, the AAO will look first to the job duties that comprised or will comprise the employment in question. *See* 8 C.F.R. § 204.5(j)(5). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. [redacted]

Ltd. v. Sava, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

The petitioner failed to provide a description of the beneficiary's employment abroad, despite the fact that the director expressly requested this information. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Counsel's reliance on previously approved L-1 petitions that the petitioner filed on behalf of the beneficiary is misplaced as each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must therefore 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 prior nonimmigrant approvals do 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. It is not uncommon for USCIS to deny an I-140 immigrant petition despite a prior approval of a nonimmigrant I-129 L-1 petition. *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).

Although the petitioner provided the foreign entity's organizational chart in which the beneficiary's position was depicted, this document alone, without a detailed delineation of the tasks the beneficiary carried out during his employment abroad, is not sufficient to allow the AAO to ascertain whether the beneficiary was employed in a qualifying managerial or executive capacity. Therefore, the appeal will be dismissed.

Turning to the issue of the beneficiary's proposed employment with the U.S. entity, the AAO finds that the job description offered in the RFE response was deficient, lacking sufficient relevant information about the beneficiary's actual daily job duties in the scope of the petitioner's retail operation. For instance, the petitioner stated that the beneficiary has the inside knowledge to assess the petitioner's strengths and weaknesses in order to "decide which macro environmental trends are relevant to the company." However, the petitioner did not explain what was meant by "macro environmental trends," nor is there any clarifying information to explain how the beneficiary's assessment ultimately affects the petitioner's daily operations.

The petitioner also stated that the beneficiary finalizes long-term business plans, which requires that he seek out business opportunities and set personnel policies. It is unclear how seeking out business opportunities can be deemed a qualifying task. The claim that the beneficiary assigns the task of determining feasibility of various business opportunities is also unclear, as none of the beneficiary's subordinates are specifically tasked with this job duty. The petitioner further states that the beneficiary will organize and direct by overseeing the overall organization, hiring and firing employees, and training and mentoring top-level managers. In light of the petitioner's staffing at the time the Form I-140 was filed, it is unclear how the beneficiary could have allocated a significant portion of his time to hiring, firing, and training employees. As the petitioner did not employ multiple top-level managers at the time of filing, it is unclear how the petitioner can claim that hiring and training top-level managers was a component of the proposed employment. While the petitioner may eventually evolve to a level of organizational complexity wherein hiring and firing becomes one of the key components of the beneficiary's position, it is not credible to state that this was an existing component of the proposed employment at the time of filing the petition. A petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). A petition cannot be approved at a future date after the petitioner or

beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Additionally, portions of the beneficiary's job description consist of seemingly non-qualifying operational tasks, such as attending industry events and coaching non-managerial employees. 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).

The petitioner offered a job description that did not convey a meaningful understanding of the specific tasks the beneficiary would perform on a daily basis within the scope of the organizational hierarchy that the petitioner had in place at the time the petition was filed. Based on the organizational chart that the petitioner provided initially in support of the Form I-140, the petitioner was comprised of five employees, including the beneficiary himself. The AAO notes that this information is not consistent with the claim the petitioner made at Part 5, No. 2 of the Form I-140, which indicates that the petitioner had a total of seven employees. 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). While the director expressly instructed the petitioner (via the RFE) to provide an organizational chart depicting the petitioner's organizational hierarchy at the time of filing the petition, the petitioner instead provided an organizational chart pertaining to [redacted] Despite the fact that the beneficiary and his alleged subordinate with the U.S. entity were both named in [redacted] organizational chart as president and business development manager, respectively, the relevance of this document has not been established.

While counsel claims to have reviewed the file in its entirety and asserts that there are no documents with the name of [redacted] within the record, the fact remains that [redacted] organizational chart was provided by the petitioner as part of the petitioner's RFE exhibit titled: "Evidence of Doing Business by U.S. Company." If counsel thoroughly reviewed a copy of the petitioner's record of proceeding as he claims to have done, there is no reason why this seemingly irrelevant document was not located, as both the service center and the AAO have pointed out the inclusion of this document in the petitioner's record of proceeding. Regardless, the petitioner failed to provide a copy of its own organizational chart as requested. Therefore, even if a chart for [redacted] were not an issue, there nevertheless remains the issue of the petitioner's failure to provide a relevant document for purposes of determining the petitioner's eligibility.

In summary, the AAO finds that neither the beneficiary's job description nor evidence of the petitioner's organizational hierarchy supports the claim that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

Turning now to the third finding cited in the director's decision—that the beneficiary would not be an employee of the petitioning entity, the record shows that the petitioner did not dispute the director's finding on appeal.

Therefore, by virtue of failing to address an adverse finding on appeal, the AAO concludes that the petitioner has effectively conceded that finding and the appeal will be dismissed on this basis as well.

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.