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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 02 2005
EAC 02 203 54885

IN RE: Petitioner:
Beneficiary: [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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner appears to be a New Jersey corporation engaged in the manufacture of high technology sensor and safety systems for industrial automation. It seeks to employ the beneficiary as its vice president/secretary. 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 the beneficiary has been employed abroad or would be employed in the United States in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her arguments.

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 purpose of this procedure is to determine whether the beneficiary was employed abroad and would be employed by the petitioner 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--
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
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> (iii) exercises wide latitude in discretionary decision-making; and
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> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated May 28, 2002, submitted in support of the petition, the petitioner stated that the beneficiary's position abroad included "supervision of the development, sales and manufacturing departments; personnel responsibilities for the staffs [sic] in those departments, including recruitment, hiring and firing; and planning and implementing marketing plans and policies." The petitioner also provided the following description of the beneficiary's proposed duties in the United States:

- Manage all U.S. operations, including personnel, financial, and marketing responsibilities
- Responsible for liaison and coordination with German headquarters
- Responsible for development of expanded marketing programs for the company's products in the U.S.

- Account management for U.S. customers[.]

On January 21, 2003, the director issued a request for additional evidence instructing the petitioner to submit a list of employees that the beneficiary supervised during his employment abroad, as well as a list of employees the beneficiary currently supervises in the United States. The director asked that the petitioner provide complete position descriptions of the beneficiary's subordinates, as well as hourly breakdowns of the beneficiary's past job duties abroad and proposed job duties in the United States.

The petitioner responded with a letter dated March 5, 2003, which included the following description of the beneficiary's proposed job duties:

> As [v]ice [p]sident of [the petitioner], [the beneficiary] is solely responsible for managing, supervising and controlling *all United States operations* for the company. [Te beneficiary] manages all functions of [the petitioner], including but not limited to daily operations, purchasing, finance, accounting, marketing, research and development and personnel functions. Also, as [v]ice [p]resident, he functions as a senior level executive within the organizational hierarchy. For example, he reports directly to [redacted] the [p]resident of [the petitioner], who works at the parent company's headquarters in Germany. In addition, [the beneficiary] exercises discretion over all day-to-day functions of the company's activities in the United States. . . .
>
> [The beneficiary] has sole responsibility for all hiring and firing of [the petitioner's] employees in the United States. Since the parent company has only recently opened its office in the United States, [the petitioner] has had one employee reporting to [the beneficiary]. As the company grows in the United States, and as the economy improves, [the petitioner] anticipates hiring additionally employees. [The beneficiary] will be solely responsible for all future hiring and firing in the United States. [He] has not supervised any employees overseas since assuming the position of [v]ice [p]resident of [the petitioner] in the United States.
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> * * *
>
> The [v]ice [p]resident manages all U.S. operations, including responsibility for harmonizing the operations for the US office with the company's operations in Germany. He is also responsible for management of the development of expanded marketing programs for the company's products in the US and account management for US customers. Responsibilities include, but are not limited to the following: (1) manage all US operations, including personnel, financial and marketing; (2) liaise and coordinate all operations and functions with German headquarters; (3) develop expanded marketing programs for the company's products in the US; and (4) manage accounts for US customers. Additional duties as the business evolves and grows.

The petitioner also provided the following breakdown of he beneficiary's duties: 12 hours spent managing the U.S. operations (30%); four hours spent being a liaison with the headquarters in Germany (10%); 18 hours spent developing new markets (45%); and six hours spent on account management (15%). Additionally, the petitioner provided a list of seven individuals claimed to have been the beneficiary's subordinates abroad. The list included four marketing engineers, a quality manager, an administrative assistant, and a production

employee. The petitioner did not provide job descriptions for any of these alleged subordinates. Nor did the petitioner indicate where within the foreign entity's hierarchy these positions are located.

The petitioner also provided a list of four interns claiming that these individuals reported to the beneficiary's foreign employer since 2001. However, according to the employment dates assigned to each of the four interns, only one was employed by the beneficiary's foreign employer since 2001. The three remaining individuals commenced their employment in March, July, and September of 2002, respectively. Furthermore, the record contains the beneficiary's Form I-94, which indicates that the beneficiary entered the United States in November 2001 as an L-1 non-immigrant. The petitioner provided no explanation as to how the beneficiary could have supervised employees abroad who were hired by the foreign employer after the beneficiary had arrived in the United States.

On November 28, 2003, the director denied the petition concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary has been and would be employed in a managerial or executive capacity. The director also noted that with a staff of only one employee, the beneficiary would be required to perform many of the petitioner's daily operational tasks.

On appeal, counsel refers to a letter dated February 26, 2003 from the petitioner's president, which counsel claims "clearly established" the beneficiary's senior executive position within the petitioning entity and his position as general manager within the foreign entity. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, merely claiming that the beneficiary's job duties abroad included supervision of 25 individuals does not adequately establish what the beneficiary actually did so on a daily basis. When 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). In the present matter, the petitioner failed to provide the requested description and hourly breakdown of the beneficiary's overseas job duties. Instead, the petitioner provided a confusing list of purported subordinates, which included interns, most of whom were not even employed by the foreign entity until after the beneficiary's departure to assume his current position in the United States. While counsel clearly acknowledged the director's request for a description of the beneficiary's duties abroad, the primary focus of the petitioner's response to the request for evidence was the beneficiary's proposed duties in the United States. It is noted that 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). While the director in the instant matter did not dismiss the petition based on the petitioner's failure to submit requested information, she did accurately conclude that the record lacks sufficient evidence to lead to the conclusion that the beneficiary's foreign job duties were primarily of a managerial or executive nature. Counsel neither addressed nor attempted to correct this significant deficiency on appeal.

In regard to the beneficiary's duties in the United States, counsel asserts that the director "quibbles about the percentage of day-to-day operations performed by the Beneficiary, rather than focusing on his more significant functions managing the U.S. operations of the parent company." Counsel's statement, however, is without merit. The request for a breakdown of the beneficiary's duties is meant to illicit the necessary details about the beneficiary's daily activities in order to enable Citizenship and Immigration Services (CIS) to get a comprehensive overview of what the beneficiary actually does and to determine whether the beneficiary's duties are primarily of a qualifying nature. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While counsel's reference to the director's request as trivial and unnecessary may explain her failure to provide the requested information, such reasoning does not relieve the petitioner from addressing the director's valid concerns. Thus, instead of providing a more detailed description of the beneficiary's proposed duties, counsel merely repeats the statutory definition of "managerial capacity" and insists that the petitioner has submitted sufficient evidence demonstrating the beneficiary's discretionary authority.

The AAO notes that while discretionary authority must be factored in when determining whether a beneficiary is employed in a qualifying capacity, it must be considered along with the beneficiary's actual daily tasks. In the instant matter, the petitioner has provided no evidence to establish that the petitioner employed anyone aside from the beneficiary at the time the petition was filed. While this factor alone does not establish the petitioner's ineligibility, it may and should be considered in order to determine who actually performs the petitioner's daily operational tasks. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner in this case states that it is engaged in the manufacture, and presumably the sale, of the products it or the foreign entity manufactures. Consequently, the petitioner has the burden of establishing that the beneficiary is relieved of having to perform either the essential function or any of the daily operational tasks that are a natural by-product of running a business. Merely relying on the beneficiary's position title and claiming that the beneficiary meets the definition of "managerial capacity" is insufficient. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, counsel refers to the beneficiary's approved L-1 nonimmigrant petition claiming that CIS has effectively deemed the beneficiary a manager or executive in a prior proceeding and should do the same in the instant proceeding. Counsel's assertion, however, is erroneous. The director's decision indicates that she did not review prior approvals of the beneficiary's nonimmigrant petitions. If the nonimmigrant petitions were approved based on the same unsupported and contradictory 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. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS 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).

Furthermore, the petitioner's initial L-1A petition was approved for a new office, not one that had been established and in operation for at least one year. Therefore, when it filed the initial I-129 petition, the petitioner was not required to establish that the beneficiary would perform qualifying duties immediately upon commencing his employment in the United States at a new office. The regulations for multinational managers and executives do not make a similar distinction between a new and an established business. Rather, 8 C.F.R. § 204.5(j)(3)(i)(D) requires that the petitioner establish that it has been doing business in the United States for one year prior to filing an I-140 petition. Thus, the preference visa petitioner must establish that the beneficiary would immediately perform qualifying duties under an approved petition. Showing that the beneficiary would perform qualifying duties at a future date once the petitioner is more established is not

sufficient. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed abroad or will be employed in the United States in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The petitioner must establish that the beneficiary would be relieved of having to primarily perform non-qualifying duties. In the instant matter, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will otherwise be relieved from performing nonqualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the only evidence the petitioner submitted to establish that it has a qualifying relationship with the beneficiary's overseas employer is a single stock certificate. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. In the instant matter, the petitioner has failed to submit sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer.

Additionally, as indicated above, the record lacks evidence to establish that the petitioner had been doing business for at least one year prior to filing the instant petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D). Although the record contains a number of invoices and various shipping documents to establish that the petitioner has been doing business as defined by 8 C.F.R. § 204.5(j)(2), a majority of the documents account for sales and purchases that took place months after the petition was filed. As the petition in the instant case was filed in May 2002, the time period in question is from May 2001 to May 2002. However, the only document in the record that reflects the petitioner's business transactions during that time period is a single purchase order dated January 2002. This document is not sufficient to establish that the beneficiary had been doing business over the course of a 12-month period.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds covered in the above paragraphs, this petition cannot be approved.

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.