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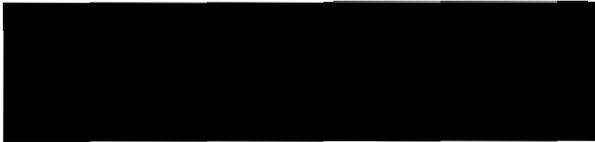
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 21 2006
SRC 05 030 51069

IN RE: Petitioner: [REDACTED]
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, 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 was established in 2001 in the state of Florida. At the time the Form I-140 was filed, the petitioner claimed that it was engaged in the import and export of men's and women's clothing and shoes. 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. On January 13, 2006, the director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary had been employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity

On appeal, counsel disputes the director's findings and provides a brief in support of his 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 two issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established at the time it filed the Form I-140 that the beneficiary would be primarily employed in a 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, counsel for the petitioner provided a letter dated November 8, 2004 stating that the beneficiary was employed abroad and would be employed by the U.S. petitioner in a managerial *and* executive capacity. Counsel also provided the following statements regarding the beneficiary's employment abroad and her prospective U.S. employment:

The [b]eneficiary . . . has been the [v]ice [p]resident and [c]ommercial [d]irector of the company in Brazil She was in charge of all the commercial activities of the company and had complete discretionary control over [the] day-to-day activities of the business. Four

subordinate managers reported to her: the [a]dministrative [d]irector, the [m]arketing [d]irector, the [c]omptroller, and the [i]nternational [a]ffair [d]irector.

The [b]eneficiary . . . will be the [p]resident and [c]hief [e]xecutive [o]fficer of [the petitioner]. Her duties will be as follows: plans, develops, and establishes policies and objectives of business organization in accordance with board directives and [the] corporation charter: [sic] [c]onfers with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity. Plans and develops industrial, labor, and public relations policies designed to improve [the] company's image and relations with customers, employees, stockholders, and [the] public. Evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives. She presides over the board of directors, and she serves as chairman of committees, such as management, executive, personnel, and sales. She hires and fires employees and independent contractors.

On April 20, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the beneficiary's employment capacity with regard to her employment abroad and in the proposed position in the United States: 1) both entities' organizational charts illustrating their respective staffing levels and the beneficiary's position within each company's hierarchy; 2) detailed breakdowns of the beneficiary's duties within each of the two entities indicating the percentage of time allotted to each of the listed duties; 3) brief job descriptions of the beneficiary's subordinates, if any; and 4) all W-2 wage and tax statements issued by the petitioner from 2001 through 2004.

With regard to the beneficiary's employment abroad, the petitioner provided a letter dated August 25, 2005, which was written and signed by the foreign entity's general director, [REDACTED] [REDACTED] stated that the beneficiary assumed the role of vice president and commercial director during her foreign employment. He further stated that the beneficiary was in charge of the company's commercial activities and claimed that she acted in an executive capacity and had discretion over the company on a daily basis. [REDACTED] stated that the beneficiary's subordinates included an administrative director, a marketing director, a comptroller, and an international director. The AAO notes that while the petitioner provided the foreign entity's organizational chart, neither of the position titles purportedly assumed by the beneficiary during her employment abroad are included anywhere in the chart. Rather, the position titles that were the claimed subordinates of the beneficiary appear to be under the direct charge of [REDACTED] in his capacity as general director. Thus, the beneficiary's role, if any, within the foreign entity's organizational hierarchy remains unknown.

With regard to the beneficiary's proposed employment in the United States, the petitioner provided a statement from the beneficiary who makes the following claims:

My duties are [to] manage [the] entire firm and all [of] its components parts. [sic], including management of the operations of the company, supervising of employees and independent contractors, scheduling of activities, plan[ing], develop[ing], and establish[ing] policies and objectives of [the] business organization for procurements [sic] of supplies and licenses and permits, accounting and general records bookkeeping, [and] clients and governmental agencies communications and relations. My current wage is \$30,000 yearly.

The management of the company represents approximately eighty percent of the time, record keeping takes about fifteen percent and the rest [sic] five percent is spent on miscellaneous activities of the day[-]to[-]day operations. Thus, 100% of the time is spending [sic] directing the entire company.

The beneficiary stated that her two direct subordinates include a marketing director and an administrative director and comptroller. Based on the submitted organizational chart, the petitioner's staffing structure includes a total of six employees—the beneficiary at the top of the hierarchy, her two direct subordinates at the next level, and three independent contractors under the supervision of the administrative director. The AAO notes that, according to the beneficiary's statement, all three of the independent contractors are delivery drivers. However, in the organizational chart, the same three individuals are listed under the heading "sales & contractor." It is unclear, therefore, who, if anyone was performing the sales duties since, according to the beneficiary's own account, the three individuals at the bottom tier of the organizational hierarchy were all delivery drivers. 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).

The AAO further notes the petitioner's submission of an additional job description, which was signed and dated August 24, 2005. As the signature on the document is entirely illegible, it is unclear who provided the statement. Regardless, the statement is a duplicate of the one previously submitted in support of the petition and does not provide any of the additional information requested in the director's RFE.

The record also contains evidence showing the petitioner's employment of the beneficiary and the two individuals claimed as her direct subordinates at the time the Form I-140 was filed. There is no documentation, however, to show that the three individuals claimed as the petitioner's contracted delivery drivers (and/or sales people) were actually employed at the time the Form I-140 was filed. While the petitioner's 2004 corporate tax return accounts for the employment of the beneficiary and her two subordinates, there is no evidence that any wages or salaries were paid outside of those three employees. 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)).

Finally, the AAO notes that the petitioner discussed a change in its business direction with new emphasis being placed on the provision of services to international tourists. However, the petitioner did not provide an explanation as to the types of services it was providing, who from its limited organizational hierarchy would actually provide its services, and when exactly the change in its business direction first took place.

On January 13, 2006, pursuant to a comprehensive review of the record, the director denied the petition concluding that the petitioner failed to establish that the beneficiary had been employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. More specifically, the director stated that the descriptions of duties that the petitioner had provided were overly broad and failed to convey an understanding of the beneficiary's specific daily tasks with regard to her position abroad and her proposed position with the U.S. entity. The director repeated both sets of job descriptions, thereby clearly indicating that both were reviewed and analyzed in light of the statutory and regulatory requirements.

On appeal, counsel provided a lengthy 24-page brief. However, more than 50% of the brief was comprised of counsel's verbatim restatements of portions of the various statutory and regulatory provisions pertaining to multinational managers and executives as well as nonimmigrant intracompany transferees. Despite the director's prior statements notifying the petitioner of the specific deficiencies with regard to the previously provided descriptions of job duties, counsel proceeded to restate, almost verbatim, those very same job descriptions without providing any further information to address the director's valid concerns. Rather, a significant portion of counsel's brief focused on convincing the AAO that the beneficiary was at the top of both companies' hierarchies and had a heightened degree of discretionary authority, factors which were not disputed by the director.

Counsel also defended the petitioner's organizational hierarchy and its apparent lack of a more significant support staff. However, 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). Accordingly, the director properly emphasized the petitioner's failure to provide detailed job descriptions of the beneficiary's position with the foreign entity and her proposed position with the U.S. petitioner. 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). In the instant matter, the petitioner has failed to adequately describe the beneficiary's job duties and has provided one organizational chart that did not illustrate the beneficiary's position within the foreign entity's hierarchy and another organizational chart that illustrates a hierarchy where the beneficiary would unlikely be relieved from having to primarily engage in non-qualifying tasks on a daily basis. Given the significant inadequacies found in the record of proceeding, a favorable finding with regard to the petitioner's eligibility is unwarranted.

Finally, counsel expressed his dismay and confusion with regard to the seemingly inconsistent decisions of the service center, i.e., the approval of the petitioner's previously filed L-1A nonimmigrant petitions and the subsequent denial of the petitioner's Form I-140 immigrant petition for a multinational manager or executive.

The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported 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 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).

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 the nonimmigrant petitions 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 AAO concludes that the petitioner has failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

Additionally, the record suggests that the petitioner is ineligible for the immigration benefit sought on grounds not addressed in the director's decision.

First, the petitioner failed to provide any documentation to establish that the foreign entity continued to do business *at the time the petitioner filed its Form I-140*. All of the documented business transactions of the foreign entity are dated at least one year prior to the filing of the petitioner's Form I-140. Such documentation does not establish that the petitioner's affiliate continued to do business and was in fact doing business at the time the Form I-140 was filed. Therefore, the AAO questions the petitioner's status as a *multinational* entity, which requires that the qualifying entity, or its affiliate, or subsidiary conduct business in two or more countries, one of which is the United States. *See* 8 C.F.R. § 204.5(j)(2) for definition of *multinational*.

Second, the petitioner failed to establish that it met the provisions of 8 C.F.R. § 204.5(j)(3)(D), which require that the petitioner provide evidence to show that it had been doing business for at least one year prior to filing its Form I-140.

The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

Although the petitioner provided a packing slip dated October 2004, this document accounts for only one month of a total 12-month period. The American Airlines invoices and the U.S. Air document provided by the petitioner do not identify the petitioner as a party to any business transactions and do not address the 12-month time period in question. While the petitioner also provided an invoice for Mesa Air Group as well as several other invoices identifying the petitioner as a party to some business transactions, none of the documents suggest that the petitioner was doing business between November 2003 and November 2004.¹

¹ Third, the Florida Department of Stated, Division of Corporations shows that the petitioner was administratively dissolved and, therefore, was inactive as of September 16, 2005. Therefore, the petitioner's continued existence as an entity is brought into question.

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)).

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 of ineligibility as discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.