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**U.S. Citizenship
and Immigration
Services**

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[Redacted]

FILE:

[Redacted]
EAC 00 044 51085

Office: VERMONT SERVICE CENTER

Date: SEP 11 2007

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, Chief
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 is a New York corporation seeking 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. The director determined that the beneficiary would not 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 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 primary issue in this proceeding is whether the petitioner would employ the beneficiary 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, the petitioner submitted a letter dated October 12, 1999, which contained the petitioner's organizational chart naming eight employees with the beneficiary illustrated as the senior-most employee within the organization. The letter also included the following description of the beneficiary's prospective employment in the United States:

- [M]anaging the overall operations of the company;
- [S]etting up corporate strategies and business goals;
- [C]ontrolling its financial affairs, making policy decisions and trading goals in connection therewith;

- [H]iring, reviewing performance of and terminating the services of employees; reviewing financial, and operational reports;
- [C]onfering with company officials including those at the parent company regarding the international operations of the corporate network of the parent company;
- [N]egotiating with business partners on behalf of the company; conferring with outside legal, accounting and other professionals;
- [R]eporting to the [b]oard of [d]irectors regarding the operations of the company; and
- [P]roviding guidance and direction to the professional staff in the international operations of the parent company and resolving any business problems that the company may encounter.

On April 3, 2000, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist the Agency in determining the beneficiary's employment capacity in the proposed U.S. position: 1) a complete hourly breakdown for each of the petitioner's employees, including one for the beneficiary; 2) the first quarterly tax return for 2000, including the page listing all of the petitioner's employees; 3) evidence of wages paid to any outside contractors that may have been hired in addition to in-house personnel; and 4) fully executed I-9s for all of the petitioner's employees in the United States.

In response, the petitioner submitted a letter dated May 10, 2000 reiterating the items requested in the above noted RFE. With regard to the beneficiary's proposed employment, the petitioner provided the following:

Approximately 30% of her working hours[,] or 12 hours each week: setting up corporate strategies and business goals for business operations of the new company; analyzing and forecasting marketing trend and demand in leather products, including men's and women's wears, bags, etc.; making policy decisions and trading goals in connection therewith; reviewing and managing financial affairs, and operational reports; formulating, planning and allocating operation budget; reporting to the parent company regarding the operation of [the U.S.] subsidiary.

Approximately 20% of her working hours, or approximately 8 hours each week[:] supervising the management and personnel structure for the new company; hiring, reviewing performance of and terminating the services of employees[.] (Please note that this area of the beneficiary's job duties could take up more time, particularly in the very early and expansion stage of the operations). Enforcing compliance of operation with [f]ederal and [s]tate regulations, disability benefits, worker's compensation, safety procedures and corporation policies.

Approximately 15% of her working hours, or approximately 6 hours each week: conferring with senior company officials including those at the parent company in China regarding the international business development and international operations and expansion of the corporate network of the parent company.

Approximately 30% of her working hours, or 12 hours each week: contracting, negotiating and/or approving major transactions with business partners on behalf of the company; handling banking transactions; conferring with outside legal, accounting and other professionals regarding the operation of the company.

Approximately 10% of her working hours, or approximately 4 hours each week: resolving any other management and business problems that the company may encounter.

On September 28, 2000, the director denied the petition, concluding that the petitioner failed to establish that it would primarily employ the beneficiary in a qualifying managerial or executive capacity. The director discussed the petitioner's organizational structure as well as the description of the beneficiary's proposed employment as provided by the petitioner.

On appeal, counsel provides a brief addressing the director's comments. With regard to the petitioner's organizational structure, counsel asserts that the director placed undue emphasis on the size of the support staff without taking into account the company's reasonable needs and stage of development. While counsel is correct in stating that the size of a company's personnel cannot be the sole consideration in determining the petitioner's eligibility, this factor is relevant and should be considered, as it allows CIS to gauge the petitioner's ability to relieve the beneficiary from having to primarily engage in the daily operational tasks that cannot be deemed as qualifying. If the petitioner fails to establish the existence of an adequate support staff, CIS can only conclude that the beneficiary would be required to assist with daily operational tasks and would not be able to focus on primarily qualifying managerial or executive tasks. Furthermore, a petitioner must establish eligibility at the time of filing; 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). In the present matter, the record does not include sufficient documentation to enable CIS to establish whom the petitioner employed as of November 22, 1999, the date the Form I-140 was filed. While the AAO acknowledges the petitioner's compliance in submitting the requested quarterly tax return for the first quarter of 2000, the Form I-140 was filed during the fourth quarter of 1999, which the petitioner has not provided.

Moreover, even the petitioner were to provide documentation corroborating its claimed staffing structure at the time it filed its Form I-140, the petitioner's description of the beneficiary's job duties is key in determining whether the beneficiary would be employed in a qualifying managerial or executive capacity. See 8 C.F.R. § 204.5(j)(5). As properly pointed out by the director, the job description provided by the petitioner in response to the RFE was too general to convey an understanding of what exactly the beneficiary would be doing on a daily basis and how much of her time would be spent performing qualifying tasks rather than those deemed non-qualifying. For instance, the description of duties indicates that the petitioner planned to allocate 30% of the beneficiary's time to developing strategies and business goals, making policy decisions, and planning the company budget. However, the petitioner does not clarify what actual duties would be performed on a daily basis. Moreover, the petitioner indicates that a portion of the 30% would also involve market analysis, which cannot be deemed qualifying. In addition, it is unclear, based on the petitioner's general breakdown, how much of the beneficiary's time would be specifically allotted to the non-qualifying duties that deal with market analysis. The petitioner also stated that the beneficiary would negotiate contracts. However, because this non-qualifying task was grouped with other general job responsibilities, it is unclear how much of the beneficiary's time would be specifically spent negotiating contracts. Additionally, the petitioner stated that 10% of the beneficiary's time would be attributed to resolving problems. However, the

petitioner did not explain whether the problem resolution responsibility would involve customer service-related duties, which would be deemed operational and therefore non-qualifying.

Finally, the petitioner stated that 20% of the beneficiary's time would be spent on personnel management. However, the petitioner's organizational chart and counsel's brief both suggest that the petitioner's manager oversees the sales staff and warehouse employee. The beneficiary's only direct subordinates include a secretary and the store manager. As such, while the petitioner has clarified the beneficiary's ultimate hiring and firing authority, there is no clarification of the actual duties the beneficiary would be expected to perform in "supervising the management and personnel structure" of the petitioning entity or how, given the petitioner's personnel structure, the beneficiary can be expected to spend any significant amount of time on personnel management-related duties. There is also no explanation for the petitioner's need to have the beneficiary involved in micromanaging a sales staff when the petitioner employs a store manager who is purportedly supervising these individuals. Precedent case law has firmly established that 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). In the present matter, the record lacks sufficient information to indicate what specific duties the beneficiary would primarily be performing. Moreover, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. In fact, counsel repeatedly refers to the beneficiary's position as "managerial/executive" without acknowledging that the two terms are not interchangeable. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. As previously discussed, the petitioner has not provided a detailed statement of the beneficiary's actual proposed list of duties. Counsel's improper reference to the beneficiary's position as "managerial/executive" only perpetuates the AAO's confusion as to the beneficiary's actual daily tasks and whether they are primarily of a managerial or executive nature.

Additionally, counsel asserts that CIS's decision to deny the immigrant petition is inconsistent with its prior approval of the petitioner's nonimmigrant petition authorizing the beneficiary's L-1 employment. Counsel's argument, however, is without merit. Given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. 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). However, 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.

In addition, 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. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS 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 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 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).

That being said, counsel properly points out the director's error in stating that the petitioner employed individuals who were not authorized to work in the United States. In reviewing the documentation submitted, the AAO deems the director's assessment to have been made in error and hereby withdraws the erroneous comment. However, notwithstanding the flawed analysis, the evidence furnished does not warrant approval of the petitioner, as it fails to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to the beneficiary's nonimmigrant entry to the United States to work for the petitioner. In the instant matter, aside from deeming the beneficiary a qualified candidate for the U.S. position by virtue of her "extensive management experience" with the foreign entity, the petitioner has not provided information to describe the beneficiary's duties abroad.¹ In fact, the petitioner has not provided evidence to establish that the beneficiary was employed by [REDACTED] as initially claimed.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. While the record contains evidence of a parent/subsidiary relationship between [REDACTED] and the U.S. petitioner, respectively, the petitioner does not claim that the beneficiary was directly employed by [REDACTED]. Rather, the petitioner claims that the beneficiary was employed by one of [REDACTED] foreign subsidiaries. As such, the petitioner must establish the existence of the affiliate relationship that is claimed to exist between the foreign and U.S. subsidiaries, which are claimed to be the beneficiary's foreign and prospective U.S. employers, respectively. While the petitioner has provided documentation determining the ownership of the U.S. petitioner, it has failed to provide evidence to establish the ownership of the beneficiary's foreign

¹ See the fourth page of the petitioner's initial support letter dated October 12, 1999.

employer. As such, the petitioner has failed to comply with the provisions cited in 8 C.F.R. § 204.5(j)(3)(i)(C).

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.

ORDER: The appeal is dismissed.