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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
SRC 07 165 53797

OFFICE: TEXAS SERVICE CENTER

Date: **AUG 01 2008**

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 is a Puerto Rico corporation that seeks to employ the beneficiary as its maintenance 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. The director denied the petition based on the determination that the petitioner failed to provide a job offer establishing that the beneficiary would be permanently employed in a managerial or executive capacity.

On appeal, counsel disputes the director's findings 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 established that it would permanently 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.

The record shows that the supporting documentation submitted by the petitioner along with its Form I-140 did not include a letter from the petitioning entity describing the beneficiary's proposed job duties. Rather, the petitioner provided a brief non-technical job description found in Part 6, No. 3 of the Form I-140 in which the petitioner stated the following: "[The beneficiary] is responsible for organizing daily maintenance jobs and equipment overhauls; coordinating tasks between mechanical, electrical and instrumentation departments' organization of the maintenance department; implementation of a preventive maintenance program; budgeting and control of maintenance expenditure." The petitioner also provided a letter from counsel dated March 9, 2006, in which counsel supplemented the petitioner's description, adding that the beneficiary "holds a key managerial position . . . and exercises discretion over the day-to-day operations of this function and operates at a senior level with respect to the function managed." Although the petitioner also provided an organizational chart, the chart is dated March 31, 2001. As such, it is unclear whether the staffing structure illustrated in the chart conveys the organizational hierarchy that was in place in 2007 when the Form I-140

was filed. Additionally, the chart does not clarify which subordinate positions are subject to the maintenance manager's supervision.

On July 30, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a definitive statement describing the beneficiary's proposed job duties and the percentage of time that would be allotted to each duty. The petitioner was also asked to discuss the number and position titles of any employees that would be subordinate to the beneficiary, as well as brief job descriptions and educational levels of these employees. Additionally, the petitioner was asked to discuss who provides the products and services of the organization.

In response, the petitioner provided a letter dated August 28, 2007 stating that the beneficiary supervises three engineers and claims that the beneficiary is at the top of the organizational hierarchy, being second in command from the top-level position. Two organizational charts were provided illustrating the hierarchies and the beneficiary's position within the petitioner's maintenance and operations departments. It is noted that the two charts are significantly different, depicting the beneficiary at two different levels within the departments and identifying two different sets of subordinate employees. While the petitioner has claimed that the beneficiary would be employed in the maintenance department, which depicts the beneficiary at the highest tier, counsel's letter does not clarify the connection between the maintenance and operations departments and what specific role the beneficiary would assume within the latter department.

In addition, the petitioner provided a letter dated October 18, 2004, which contained the following statements:

[The beneficiary] will provide managerial oversight to the development and implementation of an annual and long-range maintenance plan, as well as the development of budgets and schedules to meet the plan. He will provide direction and leadership to all staff in implementing the plan in a safe and cost-effective manner, while ensuring that all activities are carried out with full consideration for safety of all employees including developing and carrying out a safety plan. [The beneficiary] further will provide managerial leadership to the development of, and ensure the implementation of a long-range and annual maintenance plan, while continuing to manage all activities to that budget.

To accomplish these objectives, [the beneficiary] will direct and supervise the mechanical and electrical departments in complying with the maintenance plan and insuring that a preventative and contingency maintenance plan is being carried out in a safe and efficient manner. He will be charged with establishing a training and development program to maintain the skills of the workers. As [m]aintenance [m]anager, [the beneficiary] will direct the workforce in a manner that utilizes the maximum potential of each employee, insuring all maintenance activities are carried out in a prioritized and well-planned manner. Moreover, he will be charged with establishing and recommending improvements that will increase efficiency and decrease costs. Additionally, [the beneficiary] will plan and manage the annual maintenance shutdown to insure that costs and downtime are minimized. As [m]aintenance [m]anager, [he] will be charged with creating global study feasibility plan and facilitate assessment of results for site selection. He will provide global direction to the development and maintenance of the final protocol, study procedure documentation, and case report forms. As such, [he] will manage and direct the preparation of global budgeting and

financial planning including overall study cost, guidelines for site budgets and payment schedule as appropriate, and tracking and adjusting budget to meet study requirements.

Furthermore, [the beneficiary] will be charged with presenting recommendations to executive leadership. Furthermore, he will be responsible for insuring accurate budgeting of agency costs for functional maintenance activities and manage overall departmental costs. He will directly supervise six degreed professionals, which consists of four [m]aintenance [s]upervisors and two [m]aintenance [c]oordinators. [He] also will have the authority to hire and fire the employees he will supervise. Additionally, [he] will be responsible for project delegation, prioritization, and executing final approvals of all project work and will be responsible for planning their workloads, setting work goals, and assessing work performances. Moreover, [he] will make recommendations concerning promotion and salary increases based on their performances. [The beneficiary] also will exercise wide latitude of [sic] discretionary decision-making in managing an essential function for [the petitioner].

Additionally, the petitioner supplemented the beneficiary's résumé with the following percentage breakdown of time the beneficiary would spend on his various responsibilities for the U.S. petitioner:

- General and day[-]to[-]day management: 35%
- Support to senior and executive management: 20%
- Environmental and [s]afety issues: 10%
- Long[-] and [sh]ort[-] term planning for continuous operation: 20%
- Maintenance and [i]nvestment budgeting and expenses: 10%
- Miscellaneous (reporting, SAP implementation[,] etc.): 5%

On October 17, 2007, the director denied the petition, finding that the petitioner failed to provide a job offer with a current statement from an authorized official of the U.S. entity, conveying its intent to employ the beneficiary permanently in a managerial or executive capacity.

On appeal, counsel asserts that the RFE did not expressly include a request for a full-time job offer from the petitioner to the beneficiary. Counsel asserts that the petitioner complied with the RFE as it was presented. While counsel is correct in that the director did not expressly request a written job offer, the regulation at 8 C.F.R. § 204.5(j)(3) is clear in requiring "a statement from an authorized official of the petitioning United States employer," and 8 C.F.R. § 204.5(j)(5) further requires that the U.S. employer must furnish a job offer containing a clear description of the beneficiary's prospective job duties that establish that the beneficiary would be employed in a managerial or executive capacity. In the present matter, while the AAO acknowledges the October 2004 letter from the petitioner, this letter addresses the beneficiary's L-1A employment, which the petitioner sought by filing a separate nonimmigrant petition. The regulations are clear in requiring that a similar letter be submitted addressing the currently proposed permanent employment, which may be significantly different from the temporary employment previously sought, depending on any changes in the petitioner's stage of development and/or its organizational hierarchy.

Additionally, while not expressly addressed in the director's decision, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). The director indicated the significance of the beneficiary's job duties in the RFE, which instructed the petitioner to specifically identify the job duties and to assign the portion of time

the beneficiary would allot to each duty. A review of the petitioner's response to the RFE indicates that the petitioner did not comply with the director's express instructions. While the AAO acknowledges the job description provided in the October 2004 employment letter as well as the percentages assigned to the various job responsibilities that were added to the beneficiary's résumé, neither submission qualifies as an adequate response to the RFE or the regulatory requirements specified above. More specifically, the October 2004 letter provides a broad overview of the beneficiary's proposed employment, focusing primarily on job responsibilities aimed at achieving various job objectives. The purpose of the director's RFE was to elicit more specific information regarding the beneficiary's proposed employment, as it is the actual duties that 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). The director also attempted to determine how the beneficiary's time will be allocated to various job duties that comprise his daily work schedule. Although the petitioner attempted to respond to the director's request by providing a percentage breakdown, the percentages were not assigned to specific tasks, but rather to general job responsibilities that fail to clarify how the beneficiary will meet his general job responsibilities.

The AAO also reviewed the two organizational charts and the job descriptions attributed to the three individuals depicted as the beneficiary's subordinates. However, as previously noted, the petitioner has not explained the relationship between the two charts within the overall scheme of the petitioner's organizational hierarchy. Furthermore, the record lacks documentary evidence establishing that the employees claimed as the beneficiary's subordinates were actually employed by the petitioner at the time the Form I-140 was filed. 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)).

In conclusion, the petitioner has failed to meet key regulatory requirements and has not provided sufficient information addressing the various inadequacies previously pointed out in the RFE. While the petitioner may be eligible for the immigration benefit sought, a determination regarding its eligibility cannot be made without proper information and documentation in support thereof. In the present matter, the petitioner has failed to provide the necessary information regarding the beneficiary's proposed daily job duties and has not provided sufficient documentation that would establish that the petitioner employs a sufficient support staff to relieve the beneficiary from having to primarily perform job duties of a non-qualifying nature. This latter element is particularly crucial in light of relevant statutory provisions and case law, which establish 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). Thus, while the petitioner has claimed that it employs a staff subordinate to the beneficiary and has a sales staff to sell its products and/or services, these claims are not corroborated with documentary evidence. *See Matter of Soffici*, 22 I&N Dec. at 165. Accordingly, based on these adverse findings, the AAO cannot affirmatively conclude that the beneficiary would be employed in a managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the 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." In the present matter, the petitioner relies on its organizational structure and international presence as a means of establishing that it is conducting business on a "regular, systematic, and continuous" basis. *See id.* However, as previously stated, the petitioner must corroborate its assertions of fact with solid documentary evidence. In the present matter, the petitioner has indicated that it is a producer and supplier of cement. However, it has not provided evidence of business activity to corroborate its claim.

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 ground of ineligibility 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.

Lastly, counsel makes a brief reference to the petitioner's current approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by Citizenship and Immigration Services (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). 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.

In addition, 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). 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).

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.