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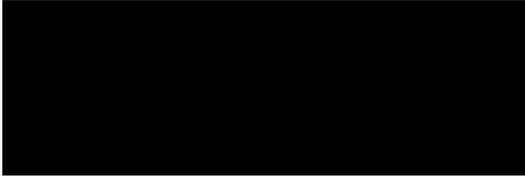
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
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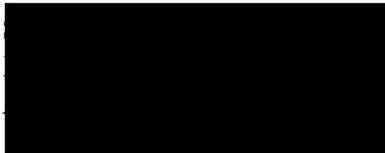
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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **APR 02 2009**  
LIN 06 245 50048

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting Chief Administrative Appeals Office

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

The petitioner is a California corporation engaged in the sale of computer, electronics, and telecommunication products and services to technology firms, which are located in the United States. It seeks to employ the beneficiary as its president and CEO. 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the denial and submits a brief in an effort to overcome the director's findings. After a thorough review of the documentation on record, the AAO finds that the first ground in the director's decision was not warranted, as the record contains sufficient evidence to establish that the beneficiary was more likely than not employed abroad in a qualifying managerial or executive capacity. Accordingly, the first ground for denial is hereby withdrawn and the remainder of this decision will focus primarily on the remaining ground for denial, i.e., whether the petitioner provided adequate documentation to establish that it would employ the beneficiary in a qualifying managerial or executive capacity in his position with the U.S. entity.

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 calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the U.S. entity, at the time the Form I-140 was filed, was capable of sustaining the beneficiary in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;

- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated August 1, 2006 in which the beneficiary was referred to as the "highest executive officer" with the authority to establish all business contracts and marketing strategies; hire computer professionals, attorneys, and other staff members; and make the budget, inventory, and purchasing decisions. The petitioner stated that the beneficiary oversees policy implementation and directs all operations with minimal supervision from the directors of the foreign entity.

On November 5, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to supplement the record with the following: 1) a statement explaining whether the beneficiary's proposed position is within a managerial or executive capacity; 2) a detailed description of the beneficiary's proposed day-to-day duties identifying the specific daily tasks that would be performed accompanied by an estimate of time that would be devoted to each task; 3) the petitioner's organizational chart illustrating the beneficiary's position with respect to others in the hierarchy, including brief job descriptions of the beneficiary's subordinates, if any; and 4) financial documentation, including all W-2 statements issued by the petitioner in 2006 and the petitioner's 2005 and 2006 tax returns.

In response, the petitioner provided a letter dated January 3, 2008 (exhibit E) in which the petitioner reiterated the job description that was initially submitted in support of the Form I-140 as well as the following percentage breakdown:

**Direct Supervision of Managerial and Professional Employees:** [The beneficiary] will continue to supervise and control the work of his directors for each division. . . . [He] will also direct the work of professional independent contractors, such as legal counsel. Although as independent contractors these individuals may not be classified as "employees," their work will be directed, supervised, and performed under the authority of [the beneficiary]. (Approximately 25% of time)

**Negotiations:** [The beneficiary] will engage in negotiations with large national corporations, and international manufacturers. These entities demand to negotiate with managers and executives with the power to enter into binding arrangements. [The beneficiary]'s reputation within the industry will serve as a tremendous asset for the company. (10% of Beneficiary's time)

**Contracts Supervision:** Coordinate all new contracts with attorneys in the U.S. and abroad. He also reviews the terms of proposed contracts and agreements drafted by the clients and counsel. (10% of time)

**Public Relations in the U.S.:** [The beneficiary] is expected to maintain a close relationship with each client, purchasing managers and decision makers to ensure and maintain the growth and development of successful business relationships, and the highest level of satisfaction. He will also forge relationships with executives of large computer corporations; and other industrial groups. He also plans on expanding the company to build a warehouse in the U.S. . . . (15% of time)

**Monthly Work Plan:** [The beneficiary] will review and approve the monthly work plans for the staff, which includes the monthly calendar of events, sales projections for the month, [and] goals [for] the month. (5% of time)

**Hold Weekly Meetings:** [The beneficiary] will hold a weekly meeting with his directors in which the week's operations are reviewed, promotions and strategies are discussed, any special projects are discussed, and the overall progress of the company is considered. These meetings also allow the staff to directly communicate with [the beneficiary]. These meetings are intended to remedy some of the problems that contributed to the company's inefficiencies during the first years of operations. (10% of the Director's time)

**Review of the Monthly Financial Statements:** [The beneficiary] will review and analyze the monthly financial statements and discuss them with his CFO. (5% of time)

**Set Policies and Long-[Term Strategies:** [The beneficiary] will regularly analyze a host of social, political and economic variables, and devise the company's broad economic policies, long-term strategies and practices, and supervise their implementation. He devises and directs the firm's marketing and business strategies. While he will advise our parent company in Taiwan regarding his decisions and keep them abreast of proposed developments, he exercises wide latitude of discretionary decision making, with minimal supervision. . . . (Approximately 20% of time)

The petitioner also provided its organizational chart, which depicts a multi-tiered hierarchy headed by the beneficiary. The interim international senior sales, marketing, and operations manager is identified as the beneficiary's direct subordinate at the next tier in the petitioner's hierarchy. It is noted, however, that this individual is shown to be an employee of the foreign entity. Notwithstanding this factor, the employees at the third tier in the hierarchy, i.e., the chief financial officer (CFO), the director and manager of engineering, an interim sales representative, a shipping and receiving clerk, and a corporate attorney, are all illustrated as the direct subordinates of the foreign employee. The next tier of employees consists of an accountant, who is supervised by the CFO, and the manager of new product development, who is supervised by the director and manager of engineering. Finally, two senior engineers are shown at the bottom tier of the hierarchy as the direct subordinates of the manager of new product development.

As previously noted, the employee shown as the beneficiary's direct subordinate was identified as an employee of the foreign entity. The petitioner did not submit any documentation showing that it remunerated this individual at the time the Form I-140 was filed. The petitioner did provide the W-2

statements it issued in 2006, numerous pay stubs for employee wages in 2007, as well as the petitioner's quarterly wage reports for 2007. The 2006 W-2 statements that were provided establish that the following employees, who were listed in the organizational chart, were employed at the time the Form I-140 was filed: the beneficiary, the CFO, the director and manager of engineering, the manager of new product development, the shipping and receiving clerk, and one other employee [REDACTED] whose salary indicates that he/she was not employed during all of 2006 and who was not identified in the petitioner's organizational chart. It is further noted that no evidence was submitted to show the petitioner ever compensated [REDACTED], who was identified on the organizational chart as the company's interim sales representative. Thus, it is unclear who, if anyone, was performing the duties of the sales representative at the time the Form I-140 was filed.

On April 2, 2008, the director denied the petition, finding that the petitioner failed to show that it was sufficiently staffed at the time the Form I-140 was filed such that it would have been able to relieve the beneficiary from having to primarily perform non-qualifying tasks. The director properly observed the lack of evidence showing the petitioner's employment of [REDACTED] and also pointed out that the individual identified in the position of senior sales, marketing, and operations manager is an employee of the foreign entity.

On appeal, counsel contends that the director's decision was erroneous, asserting that instead of exercising *de novo* review when determining the petitioner's eligibility, the director should have referred to the prior approval of the petitioner's L-1A nonimmigrant petition for the same beneficiary. Counsel further contends that U.S. Citizenship and Immigration Services (USCIS) instructional memoranda as well as prior AAO decisions support the argument that in light of a prior approval of an L-1A nonimmigrant petition USCIS may only deny a subsequently filed immigrant petition upon a determination that the nonimmigrant petition had been approved due to gross error. Counsel's arguments, however, are not corroborated by statute, regulation, or precedent case law. Contrary to counsel's assertions, USCIS memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

Furthermore, even if the AAO were to review its prior unpublished decisions, counsel has provided no evidence that any of those decisions support his assertions, as the AAO has repeatedly stated in numerous decisions that a prior approval(s) of an L-1A nonimmigrant petition in no way serves to guide USCIS in its determination of whether the same petitioner of an I-140 immigrant petition is eligible to classify the designated beneficiary as a multinational manager or executive. Moreover, notwithstanding counsel's unsupported arguments, his reliance on unpublished AAO decisions is erroneous, as only precedent decisions are binding on USCIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c).

Additionally, on page three of the appellate brief, counsel asserts, "A special definition of manager and executive applies when the transferee is coming to set up a new U.S. office . . . ." It is noted, however, that the provision referenced by counsel applies to nonimmigrant petitioners seeking L-1A intracompany transferee status for the beneficiaries on whose behalf the petitions have been filed. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(F) and (3)(v) for the definition of a new office petitioner and the

filing requirements that apply to a new office petitioner, respectively. There are no provisions in 8 C.F.R. 204.5(j) that distinguish between a new office petitioner and a petitioner that has been in operation for an extended period of time.

Next, while counsel properly points out that the RFE did not ask for a detailed description of the job duties of the beneficiary's subordinates, the AAO points out that the RFE did ask for a detailed list of the beneficiary's specific daily tasks. It is noted that in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Precedent case law reiterates the significance of a detailed job description, establishing that the actual duties themselves 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 AAO finds that the petitioner did not comply with the latter instruction and that instead another general description of broad job responsibilities was provided. For instance, the petitioner indicated that approximately 25% of the beneficiary's time would be devoted to directing the supervision of managerial and professional employees, indicating that someone other than the beneficiary would actually be supervising these individuals. The petitioner's organizational chart suggests that perhaps such supervision would be assigned to the senior sales, marketing, and operations manager. However, as previously noted, the petitioner indicated in the chart that this person is actually employed abroad by the foreign entity. As the petitioning and foreign entities are not one and the same, the mere claim that the petitioner employs the services of another entity's employee is suspect without corroborating evidence that the employee whom the petitioner claims as part of its organizational hierarchy is actually remunerated by the petitioner for his/her services. In the present matter, the petitioner did not provide such corroborating evidence.

Notwithstanding the above deficiency, the petitioner has not explained just how the beneficiary plans to direct the work of a professional staff. In other words the petitioner has failed to assign any specific tasks to elaborate on the means by which the beneficiary would fulfill his general oversight role within the petitioner's hierarchy.

Also in need of further clarification is the beneficiary's responsibility in the area of public relations, to which the beneficiary would allocate 15% of his time. Without further explanation, the mere claim that the beneficiary would personally maintain a relationship with each of the petitioner's clients appears on its face to be a non-qualifying task. Furthermore, the AAO is unclear as to how the beneficiary initially forms relationships with the petitioner's clients and the managers and decision-makers of other companies. In other words, it is unclear who solicits the client companies and their managerial personnel. Although the petitioner previously identified one individual in the role of a sales representative, as pointed out earlier, the record does not contain documentation to establish that a sales representative was in fact employed by the petitioner at the time the Form I-140 was filed. Without further elaboration and additional documentation, it appears that at least 15% of the beneficiary's time would have been spent performing non-qualifying tasks.

Lastly, the petitioner stated that 20% of the beneficiary's time would be spent analyzing a variety of factors to make policy and strategy decisions. However, the duties underlying this general responsibility are entirely unclear. Despite the director's express request for a list of specific tasks the beneficiary would perform on a daily basis, at least 60% of the beneficiary's time has been accounted for by the use of broad terminology that fails to convey a meaningful explanation of the

daily tasks the beneficiary was prepared to undertake at the time the Form I-140 was filed. While the AAO acknowledges the beneficiary's role as the decision-maker and overall top-most individual within the petitioner's organizational hierarchy, neither factor establishes that at the time the Form I-140 was filed the petitioner was capable of sustaining the beneficiary in a managerial or executive capacity wherein the primary portion of the beneficiary's time would have been devoted to tasks of a qualifying nature. Neither the supporting evidence of the petitioner's staffing nor the petitioner's deficient description of the beneficiary's job duties allows the AAO to conclude that the beneficiary would be employed primarily 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 at least one additional ground that was not previously addressed in the director's decision. More specifically, 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. In the present matter, further review of the record has led the AAO to question the director's favorable finding regarding the issue of a qualifying relationship. Namely, the AAO notes that in response to the RFE the petitioner provided a copy of its stock transfer ledger indicating that a total of 10,000 shares of stock were issued for a total of \$10,000. The record indicates that the transfer of stock took place on June 19, 2000. The record also contains the petitioner's tax returns for 2005 and 2006, each containing Schedule L where No. 22(b) shows that the petitioner received a total of \$80,000 in exchange for issuance of stock. Thus, the information contained in the stock transfer ledger and that contained in the petitioner's two most recent tax returns is inconsistent with regard to the amount of stock issue and the remuneration the petitioner received as a result thereof. 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 record as presently constituted does not resolve the considerable inconsistency discussed herein. This inconsistency leads the AAO to question whether the petitioner has fully established matters concerning its ownership and control, which are the two factors that must be examined in order to determine whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Accordingly, the AAO cannot conclude that the petitioner has provided sufficient evidence of the requisite qualifying relationship with the beneficiary's foreign employer.

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.

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.