U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
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[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: JUN 1 8 2009
LIN 08 034 52955

IN RE: Petitioner: [redacted]
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:

[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.

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 importing and distributing body jewelry. The petitioner seeks to employ the beneficiary as its 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 establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief statement addressing the beneficiary's proposed employment.

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 beneficiary would be employed in the United States 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 October 30, 2007, which includes the following description of the duties to be performed by the beneficiary under an approved petition:

> Through his managerial skills and his knowledge of the industry, [the beneficiary] has made the business decisions to maintain a product line that meets the frequent change

> in the tastes of consumers who purchase body jewelry. He tracks the changes, does market surveys, visits stores operated by competing companies, and formulates a plan to present products that consumers want to buy. He then makes the arrangements to locate, import, and distribute the jewelry in the United States.
>
> In addition to the retail outlets, wholesale sales constitute a significant part of this business. [The beneficiary] has developed alliances with over 100 marketing companies that have retail outlets throughout the United States. These alliances were developed by personal contact with the marketing companies. He presents proposed designs and makes notes on the comments made by the marketing companies' staff. He learns what changes and modifications will make our products more saleable. This personal contact has been essential to the growing list of these business relationships. . . . It is through appraising the needs of the various vendors that [the beneficiary] is able to offer jewelry that is appropriate for each vendor.
>
> One of the ways in which [the beneficiary] reaches out to find new wholesale customers is through his attendance in trade shows for jewelry and general merchandise. . . .
>
> [The beneficiary] takes his market research from his personal contacts with companies, his attendance at trade shows, and visits to competing stores, and gathers information setting out what designs will be most in demand. . . . Then samples of the new, modified designs are forwarded to [the beneficiary] and he again contacts the marketing companies to assure that the changes meet their needs.
>
> [The beneficiary] exercises management and control over the functions of development and marketing of the business. [He] has management and control responsibility for the function of development. He is in charge of the continuous successful expansion of the business. He studies market trends, and his evaluations determine where additional stores can be opened to market company products.
>
> As manager of the marketing function he creates and implements [the c]ompany's marketing plan. He attends trade shows to keep abreast of changes in the market and customer needs, review pricings and designs. He determines and establishes the [petitioner]'s product line. He has discretion to select designs to be purchased from abroad for resale to the United States vendors.
>
> He is responsible for hiring, firing, and supervising the store managers, who manage the sales at the two retail stores. He evaluates the performances of the managers. He makes judgment on performance of employees and decides on salary and wages and promotion. The store managers provide reports to him. . . . He conducts performance reviews and ensures that his staff followed rules and regulations . . . .

The petitioner also provided a copy of its organizational chart depicting the beneficiary at the top of the organizational hierarchy overseeing two managers, one at each the petitioner's two retail locations. The chart also shows that the beneficiary is solely in charge of the wholesale operation, which appears to have no one other than the beneficiary to oversee the daily activities.

On February 12, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's day-to-day tasks with time constraints establishing the percentage of time that will be devoted to each task, as well as the petitioner's detailed organizational chart including job descriptions for the beneficiary's subordinates.

In response, the petitioner provided an hourly schedule of the duties performed by the beneficiary during the span of five days. The schedule shows that the first 30 minutes of everyday would be spent performing administrative tasks, including paperwork, checking emails and online orders, and responding to customers, manufacturers, and suppliers. On Monday, the next two hours of the beneficiary's time is spent doing the following: meeting with the jewelry department manager of one of the petitioner's two retail stores to discuss sales reports, customer feedback, new products and product samples, and any new products the customers are looking for; assessing store inventory, merchandise production and approximate time of arrival; and getting the manager's feedback on new styles the beneficiary developed. The beneficiary spends the next 30 minutes reviewing all the points discussed with the manager. The hour and a half following lunch, the beneficiary searches for new jewelry designs online, designs new styles, and modifies old styles. The next hour is spent meeting with the manager of the other retail store to discuss weekly sales report, store inventory, customer complaints, customer demands, and employee-related issues. The final two hours of Monday are spent finding suppliers for new items by going through catalogues and web sites, and reviewing new samples sent by different suppliers. The beneficiary then completes the purchase of each selected item from the chosen supplier.

On Tuesday, following the first 30 minutes of office tasks, the beneficiary spends one hour calling customers to find out product demands and requirements. The next hour is spent taking photographs of new designs developed by the beneficiary, printing flyers and sending them to customers, and sending emails to different customers. The following 30 minutes is spent meeting with an accountant to discuss available funds, incoming funds, and funds payable. Following lunch, an hour and a half is spent meeting with one of the retail store managers to discuss the daily sales report, inventory levels, customer complaints, customer demands for new merchandise, new products being brought to the store, and any new employee training programs. The next hour is spent reviewing topics discussed with the store manager during the prior hours, deciding whether to bring in new products, talking with suppliers, and placing product orders. The final two hours of the day are spent going through emails and calling trade show organizers to decide which shows to attend.

On Wednesday, following 30 minutes of office tasks, the beneficiary spends one hour talking to suppliers about new products, market trends, trade shows, and products carried by competitors, and decides which products to buy from the suppliers. The next hour and a half is spent calling different malls to check for space available to open a new store, get an idea of any new stores coming to the various malls, find out other relevant information, and visit a store location. Following lunch, the remaining four hours of the day are spent visiting one of the petitioner's retail stores to meet with the manager and to check how items are being displayed, explain to the manager how to display new merchandise, demonstrate how to use the new merchandise, answer questions the employees may have, and review sales reports, inventory, proposed purchase orders, customer feedback and demand for new merchandise, and employee performances.

On Thursday, for the two and a half hours following the office tasks, the beneficiary meets with one of the store managers at the store location to talk about new products and designs, to instruct him to visit competitor stores to look for ideas of new products, and to ask him to send flyers to customers. After lunch, the beneficiary spends one hour reviewing lists of wholesale customers who stopped buying from the petitioner in order to determine why they stopped and to make a plan for getting the customer(s) back; and researching and approaching new customers. The following hour is spent reviewing bank statements for fund availability and meeting with the accountant to make financial plans for the following week. The final three hours of the day are spent visiting customers to gather their feedback and to show samples and designs of the latest trends.

On Friday, the two hours following office tasks are spent reviewing catalogues, brochures, and samples to decide on product lines. The next 30 minutes are spent talking to one of the store managers to gauge customer response to new styles and to determine which items to order. After lunch, the next hour is spent talking to the other store manager about her response to new products and asking which products to order. The following hour is spent modifying designs per customer request, contacting the customer with the changes, updating the flyers with new jewelry, and updating customer contact list. The final three hours of the day and of the week are spent visiting competitor stores and make notes about the items they carry.

Lastly, the petitioner provided the following brief percentage breakdown of the beneficiary's time allocations: 40% spent on product design and development, 45% spent on marketing and trade shows, 5% spent on human resource management, 5% spent on business expansion, and the final 5% is spent on finance and budgeting.

After reviewing the submitted evidence, the director determined that the petitioner failed to establish eligibility and therefore issued a decision dated May 22, 2008 denying the petition based on the determination that the beneficiary would primarily perform non-qualifying tasks. Although the AAO concurs with this conclusion, a portion of the director's underlying analysis does not accurately apply the relevant statutory provisions. Specifically, the director makes a finding that the two store managers are first line supervisors because the employees they oversee are not professionals. The AAO notes that there is no statutory or regulatory provision that holds the beneficiary's subordinates to the same standards that apply to the beneficiary himself.

Notwithstanding the above, an approval of the petition was not warranted, as the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. While the AAO acknowledges the petitioner's diligence in complying with the director's earlier request for a detailed description of the beneficiary's proposed job duties, the fact of the matter is that the information the petitioner provided strongly indicates that a majority of the beneficiary's time has been and would be consumed with daily operational tasks. As properly stated in the director's decision, 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). Here, the record is not ambiguous with regard to the beneficiary's daily job duties. By the petitioner's own admission, the beneficiary spends 40% of his time designing and developing the products that generate the petitioner's income and he spends another 45% percent of his time marketing these products in order to increase the petitioner's profits. By definition, designing and marketing the petitioner's products constitute operational tasks. The sample schedule that delineates the beneficiary's specific daily tasks indicates that it is these operational tasks that would consume the primary portion of the beneficiary's time.

In summary, although the job description clearly shows that a significant portion of the beneficiary's daily activities involve overseeing the two retail operations that are managed by the beneficiary's direct subordinates, these managerial tasks do not comprise the majority of the beneficiary's time. Rather, the beneficiary's primary focus is designing and marketing the jewelry that the petitioner sells at its retail and wholesale operations, as well as communicating directly with suppliers and customers. There is no evidence that the petitioner employs anyone to relieve the beneficiary from having to primarily perform these non-qualifying duties on a daily basis. Thus, even if the daily tasks associated with running the petitioner's retail operations would likely be performed by other employees, the evidence of record indicates that the beneficiary's time would be primarily spent performing daily operational tasks.

On appeal, counsel for the petitioner refers to a previously approved L-1A nonimmigrant petition, with receipt no. [redacted], on behalf of the same beneficiary. More specifically, counsel points out that while the director initially denied the petition, the AAO subsequently reviewed the matter and remanded it due to procedural error by the director. Although the director ultimately approved the petition, it must be noted that the AAO clearly determined that at the time of the appellate review, eligibility had not been established. The AAO specifically determined that the petitioner had failed to provide sufficient information about the beneficiary's job duties in order to determine how the beneficiary would spend the primary portion of his time.[1] As the director's ultimate decision had not been certified to the AAO for review, the AAO has no way of knowing whether the petitioner had provided any additional information regarding the beneficiary's proposed job duties. If the petitioner had provided additional information similar in content to the information contained in the current record of proceeding, then the director's decision to approve the petition would be deemed gross error. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS 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. at 597.

Moreover, 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. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter.

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[1] *See* page six of the AAO decision dated August 23, 2005

As the decision referenced by counsel in the present matter is not part of the current record of proceeding, the AAO has no way of gauging the basis for the director's decision to approve the petition. As such, the AAO cannot determine that the nonimmigrant petition warranted approval.

In the present matter, the AAO has determined that the description of the proposed position indicates that the beneficiary's time would be primarily consumed with non-qualifying tasks. Although counsel points out on appeal that the beneficiary has ultimate discretion over all matters concerning the business, this aspect alone is not sufficient to establish that the beneficiary's position is within a qualifying capacity. In fact, it appears that counsel is justifying the petitioner's need to have the beneficiary perform many of the non-qualifying tasks he currently performs. However, the petitioner's business needs do not override the petitioner's burden to meet statutory requirements. Here, the record indicates that the petitioner has a continued need to employ the beneficiary in a non-qualifying capacity where the primary portion of the beneficiary's time would be spent performing daily operational tasks. As stated above, 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. at 604. In light of the petitioner's failure to establish that the beneficiary would primarily perform tasks of a qualifying nature, this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.