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FILE:

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OFFICE: NEBRASKA SERVICE CENTER

Date **MAR 04 2009**

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: SELF-REPRESENTED

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 Florida corporation that is engaged in the business of selling and installing security alarm systems. The petitioner seeks to employ the beneficiary as its general 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 conclusion that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, the petitioner disputes the director's conclusion 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 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 23, 2006, which included general statements regarding the beneficiary's job responsibilities in his proposed position with the U.S. petitioner. The statement was accompanied by a number of supporting documents, including, *inter alia*, a more detailed percentage breakdown of the beneficiary's duties and responsibilities, the petitioner's organizational chart, and a number of the petitioner's quarterly wage

reports for time periods directly prior to the date the Form I-140 was filed. As the director included the job descriptions provided by the petitioner in the March 7, 2008 denial of the petition, this information need not be repeated in the present decision. With regard to the petitioner's organizational chart, the entity is depicted as having two managerial tiers and two lower levels of subordinates with one employee occupying each tier. The beneficiary is shown at the top of the petitioner's hierarchy, with an operations manager and a marketing manager as his direct subordinates. An office assistant is shown at the third level of the hierarchy and the accounting clerk is shown at the bottom level. The chart does not clearly establish who directly oversees the work of the office assistant and accounting clerk.

After reviewing the petitioner's initial submissions, the director determined that the petitioner failed to establish eligibility. Accordingly, on August 10, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, a description of the beneficiary's specific job duties and a discussion of the beneficiary's subordinates, if any. Although the RFE included instructions to provide a block diagram illustrating the petitioner's organizational hierarchy, the AAO acknowledges that such a document had been previously submitted as one of the initial supporting documents.

In response, the petitioner provided a replica of the hourly and percentage breakdown representing the beneficiary's time allocation to the various duties and responsibilities within five main categories, including general management, sales and marketing, human resources, overall financial management, and logistics management. As previously noted, this breakdown has been restated verbatim in the director's decision and therefore need not be repeated in the AAO's current decision. However, the AAO will fully address the position description in its discussion below.

The petitioner also provided an updated organizational chart listing seven positions, including two sales people that were not included in the previously submitted chart. The AAO notes, however, that the petitioner must establish its eligibility based on the facts that existed at the time the Form I-140 was filed; 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 two sales positions that were included in the more recently submitted organizational chart do not appear to have been part of the petitioner's organizational hierarchy at the time of filing, but rather appear to have been hired after the petition was filed. As such, the AAO cannot take into account either sales position when considering whether the petitioner was able to relieve the beneficiary from having to primarily perform non-qualifying tasks at the time the petition was filed. It is noted that the more recently updated organizational chart also lists technicians, whose services the petitioner claims it subcontracts. However, the petitioner did not provide further information as to who the subcontractors are, nor were any invoices provided to establish that the petitioner was paying for the services of any subcontractors at the time the Form I-140 was filed. Regardless, it appears that the organizational chart that was submitted initially in support of the Form I-140 was likely to have been a more accurate representation of the petitioner's organizational hierarchy at the time of filing and will therefore be deemed more probative in determining the petitioner's eligibility for the immigration benefit sought herein.

On March 7, 2008, the director issued a decision denying the petitioner's Form I-140. As previously stated, the director included all of the job descriptions provided by the petitioner earlier in this

proceeding. The director found that neither the job descriptions nor the supporting documentation establish that the petitioner was able to employ the beneficiary in a qualifying managerial or executive capacity as of the date the petition was filed. He further stated that portions of the job description mentioned responsibilities that could not be readily identified as being associated with qualifying tasks and further added that the beneficiary's duties and job responsibilities suggest that the beneficiary performs the tasks necessary to produce a product or to provide services, thereby indicating that the beneficiary could not be 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).

On appeal, the petitioner argues that the director's decision is erroneous, asserting that an extensive job description and corporate documents were provided to establish that the beneficiary meets the statutory definitions of executive or managerial capacity. The petitioner further states that the beneficiary's job description meets the standard description provided by the U.S. Department of Labor (USDOL). The petitioner's arguments, however, are not persuasive and do not overcome the director's adverse decision.

In examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The fact that the beneficiary's job description meets one of the standard job descriptions provided by the USDOL is of little probative value in determining whether the job duties that the beneficiary would actually perform fit the statutory definitions for managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. In the present matter, the beneficiary's job description is provided through a series of five general categories, each of which is accompanied by a list of duties and responsibilities. However, a majority of the items listed under each of the main headings consist of broad job responsibilities that fail to convey an understanding of exactly what the beneficiary would be doing on a daily basis. For instance, under the first heading of "General Management," to which the beneficiary would allot 40% of his time, the petitioner listed 12 items, a number of which are discussed using terms like manage, supervise, and ensure. However, these terms are too general and require further definition of the actual underlying tasks that would be used to enable the beneficiary to manage, supervise, and ensure the desired end result. Without more detailed insight into the beneficiary's specific job duties, the AAO cannot gauge the nature of the tasks that would be entailed in managing and enforcing service expectations; managing cost, quality, schedule, and inventory activities; supervising personnel and verifying employee business conduct (both of which sound similar, but were not qualified with distinguishing factors); using management tools; ensuring good practices; and ensuring timely performance of contracts. Thus, at least eight out of 12 of the items listed under the first heading fail to translate into specific daily job duties.

While the above analysis only addresses the first of five headings, the second category, "Sales & Marketing," to which the petitioner allotted 25% of the beneficiary's time, is also plagued with similar deficiencies. More specifically, only three out of the seven items listed to describe the beneficiary's role in sales and marketing cite any specific job duties. The remaining four items include the following: communicate, execute, and manage marketing programs; use strategies (which the petitioner did not define) to market and manage services; execute sales models and

strategies; and develop pricing strategies. None of these items denotes specific tasks the beneficiary would engage in on a daily basis to ensure that the broad job responsibilities cited herein are met. The three remaining items under the sales and marketing heading, including conducting research and analysis to target customers, negotiating contracts, and resolving customer problems and complaints, are indicative of daily operational tasks and cannot be readily deemed as qualifying job duties. In light of this analysis and the analysis of the general management category, it appears that at least 65% of the beneficiary's time would be comprised of job duties that are either undefined or ones that do not readily fit into the definition of managerial or executive capacity. This finding alone, without conducting further analysis of the three remaining categories, precludes a finding that the petitioner is eligible to classify the beneficiary as a multinational manager or executive, because, based on the information provided, the petitioner has failed to establish that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity.

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 his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the petitioner's description of the beneficiary's employment abroad is similarly lacking in sufficient detail regarding the beneficiary's specific day-to-day job duties as the description of the beneficiary's proposed employment in the United States. It is noted that merely reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. In order to enable USCIS to determine whether the beneficiary's employment fits one of the relevant statutory definitions, the petitioner must first provide an adequate description of the beneficiary's job duties. Case law precedent has firmly established 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). As the description of the beneficiary's past job duties lacks the necessary degree of specificity, the AAO cannot conclude that the beneficiary was employed abroad in a managerial or executive capacity.

Second, 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 filed its Form I-140 on November 20, 2006. While the record confirms that the petitioner is a retail operation, it does not contain sufficient evidence to establish that the petitioner was selling its products and services in the manner prescribed above during the relevant one-year period commencing November 20, 2005. In fact, while the petitioner has provided USCIS with a number of invoices showing the sale of its products, the earliest invoices in the current record of proceeding only date back to March 3, 2006. There is no indication that the petitioner was selling its products and services on a "regular, systematic, and continuous" basis from November 2005 through February 2006. The record also lacks sales invoices from September and October of 2006, which also fall within the relevant one-year time period. It is noted that 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)). Thus, due to the lack of sufficient documentation, the AAO cannot conclude that the petitioner was conducting business for the requisite time period and in the manner prescribed above.

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 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.

As a final note, with regard to the petitioner's previously approved L-1 employment of the beneficiary, the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals 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 USCIS 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).

Furthermore, 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.