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FILE:

EAC 04 122 50895

OFFICE: VERMONT SERVICE CENTER

Date: **MAR 05 2009**

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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation engaged in the business of importing, exporting, and distributing fashion jewelry. 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 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 and additional documents in an effort to overcome the director's ground for denial. A full discussion of all relevant findings and submissions is provided below.

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 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 a March 9, 2004 letter, which was submitted in support of the Form I-140, the petitioner stated that the beneficiary would continue to hold the position of president and general manager of the U.S. entity. To more fully explain the beneficiary's position with the U.S. entity, the petitioner provided the following job description:

[The beneficiary] has and will continue to supervise and oversee the daily operation of the U.S. business base of [the petitioner]. More specifically, [the beneficiary] is responsible for directing and managing the essential function of the daily operations of the [c]ompany, including conferring and strategizing with sales and marketing staff in full-filling [sic] the [c]ompany's goal of expanding the [p]arent [c]ompany's client base in the United States (**[w]eekly: 8 hours**); review daily activity reports produced by the [c]ompany's marketing and sales manager (**[w]eekly: 6 hours**). An essential part of [the beneficiary]'s responsibilities includes evaluating performance of subordinate staff for compliance with established policies and objectives of the [c]ompany and contributions in attaining objectives. His responsibilities in the areas of management, marketing and sales requires, that he act in a very pro-active and hands-on capacity to ensure that these duties are properly carried out. [The beneficiary] will direct the [c]ompany objectives by determining production and marketing policies in terms of which product lines are to be promoted, negotiating the terms and conditions of contracts and contract renewals and researching more cost effective raw materials and means of transporting products from the [p]arent [c]ompany's production facilities to the U[.]S[.] operation (**[w]eekly: 16 hours**). Working closely with the [c]ompany's [b]usiness [d]evelopment [a]nalyst and [m]arketing and [s]ales [m]anager, [the beneficiary] formulates and implements short[-] and long[-]term marketing goals and strategies for increase product sales and conduct research on client satisfaction (**[w]eekly: 2 hours**). [The beneficiary] has complete discretionary authority to hire, fire and delegate authority among his subordinates, including the authority to expand the workforce in the U.S. As such, he is responsible for planning long[-] and short-term business objectives in support of the [p]arent [c]ompany's overall objectives for the U.S. operations and for establishing responsibilities and procedures for obtaining these objectives (**[w]eekly: 6 hours**).

[The beneficiary]'s duties also includes establishing accounts for the long[-] and short-term investment of cash flow, directing regional and national market studies and reviewing and supervising the preparation of periodic overviews and reports relating to the [p]arent [c]ompany's overall operations (**[w]eekly: 8 hours**).

The petitioner also provided its organizational chart depicting the beneficiary in two separate positions as president and general manager. In the position of president, the beneficiary is shown as overseeing the foreign entity's vice-president, corporate secretary, and treasurer. In his position as general manager, the beneficiary is shown as overseeing a business development analyst, a marketing and sales manager, and an executive secretary/receptionist.

On February 28, 2005, U.S. Citizenship and Immigration Services (USCIS) issued the first of two requests for additional evidence (RFE). In light of the petitioner's claim that the three most recently

hired employees have relieved the beneficiary from having to perform non-qualifying tasks, the petitioner was asked whether the three employees named in its organizational chart were working for the U.S. entity at the time of the RFE. The petitioner was also informed that the information in its organizational chart was inconsistent with a Biographic Form G-325 belonging to [REDACTED], the beneficiary's wife. More specifically, the organizational chart named [REDACTED] as the marketing and sales manager, indicating that she was working a 40-hour week, while her Biographic Form G-325, which was dated around the time the Form I-140 was filed, identified her employment status as housewife. **The petitioner was asked to explain this apparent inconsistency.** Additionally, the petitioner was instructed to provide all W-2 Wage and Tax Statements showing wages paid to its employees in 2003 and 2004.

In response, the petitioner provided a letter dated May 24, 2005, addressing the concerns brought forth in the RFE. First, with regard to the petitioner's employees, the petitioner stated that it has employed a total of six employees during the period of January 2003 through the date of the response letter. The petitioner claimed that of those six employees, three were remaining. The petitioner provided the following dates of employment for its past and current employees:

1. [REDACTED] (Beneficiary): May 2001-Present
2. [REDACTED] May 2001-July 2004
3. [REDACTED] July 2004-October 2004
4. [REDACTED] August 2004-Present
5. [REDACTED] January 2003-April 2003
6. [REDACTED] January 2005-Present

It is noted that when comparing the information provided in the organizational chart submitted in support of the current Form I-140 and the dates of employment disclosed above, the following inconsistencies were noted: 1) while the dates of employment for [REDACTED] in No. 3 above indicate that this individual was employed at the time the Form I-140 was filed, the organizational chart submitted in support of the Form I-140 did not list this person as one of the petitioner's employees; 2) although the above dates of employment for the beneficiary's wife in No. 4 above, indicate that she did not start working for the petitioner until August 2004, she was included in the organizational chart submitted with the Form I-140, which was filed on March 14, 2004; and 3) while [REDACTED]'s dates of employment in No. 5 above indicate that she stopped working for the petitioner approximately 11 months prior to the date the Form I-140 was filed, she was nevertheless **included in the organizational chart submitted in support of the petition.** It is noted that the petitioner's reference to a high rate of staff turnovers does not resolve the inconsistency that is created with an inaccurate organizational chart, which lists employees whom the petitioner no longer employed or those whose employment had not yet commenced at the time the Form I-140 was filed.

The petitioner also reiterated that it seeks to employ the beneficiary in both a managerial and an executive capacity. With regard to the former, the petitioner claimed that the beneficiary would be responsible for the following: 1) managing the U.S. distribution operations, in an effort to achieve a level of sales that would cut out the middleman; 2) supervising and controlling the petitioner's personnel, including a business development analyst and a marketing and sales manager; 3) hiring and firing all personnel; and directing the petitioner's importing, marketing, and distribution activities. With regard to employment in an executive capacity, the petitioner focused on the

beneficiary's discretionary authority in establishing and implementing the company's goals and policies and identifying any future business opportunities.

With regard to the discrepancy concerning the petitioner's alleged employment of the beneficiary's wife, the petitioner claimed that the information provided in the Form G-325 was an unintentional error committed by counsel. Nevertheless, the petitioner maintains the argument that [REDACTED] has been a *de facto* employee since the company's inception and was simply not put on the company's payroll until August 2004. The AAO notes, however, that this explanation is not persuasive and cannot be proven without the aid of supporting documentation. Based on the petitioner's faulty reasoning, anyone can be claimed as a *de facto* employee without the burden of having to provide any documentary evidence to support such a claim. 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)). Here, the petitioner readily admits that [REDACTED] did not become a paid employee of its organization until August 2004. As such, she cannot be deemed as one of the petitioner's employees when the Form I-140 was filed. In the present matter, the petitioner has provided its quarterly tax returns for the first three quarters of 2004. It is noted that the first and second quarterly tax returns show that the petitioner had only two employees during the first two quarters of 2004. It was not until the third quarter of 2004 that the petitioner hired two additional employees. It is noted that the Form I-140 was filed during the first quarter of 2004 and that only the petitioner's staffing at that time can be considered for the purpose of determining whether the petitioner was eligible for the immigration benefit sought in the present matter. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), concluding that eligibility must be established at the time of filing.

On September 27, 2005, USCIS issued the second RFE in which the petitioner was instructed, *inter alia*, to provide a detailed hourly breakdown of the job duties to be performed by the beneficiary in his proposed U.S. employment. The petitioner was also instructed to provide additional information discussing its management and personnel structure and to provide evidence if claiming that subcontractors were used to provide the petitioner with any services.

In response, the petitioner provided a letter dated December 22, 2005. With regard to the RFE request for a detailed hourly breakdown of the beneficiary's proposed job duties, the petitioner referred the director back to the job description that had been provided as one of the supporting documents appended with the Form I-140 filing. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although the petitioner provided an organizational chart, the document is dated May 2005, thereby indicating that the staffing structure illustrated is not representative of the staff that was in place at the time the Form I-140 was filed.

On August 14, 2006, the director issued a notice denying the petitioner's Form I-140 based upon the finding that the petitioner had failed to establish that it was able to sustain the beneficiary in a qualifying managerial or executive capacity at the time the Form I-140 was filed. The director acknowledged that the petitioner failed to comply with the prior request for a detailed breakdown of the beneficiary's job duties, concluding that the statements previously provided identified only general managerial functions and failed to specify any bona fide managerial or executive tasks.

On appeal, counsel contends that the job description provided earlier by the petitioner in support of the Form I-140 was adequate, claiming that the director erroneously ignored this information as well as "the business realities of the petitioner's position" and the beneficiary's responsibilities regarding the petitioner's foreign affiliate. However, counsel's arguments are not persuasive.

With regard to the job description previously provided, the director expressly stated that further detail was necessary in order to establish what specific job duties the beneficiary would perform. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). While the job description provided by the petitioner adequately conveys the beneficiary's level of authority within the company, it does not specify actual tasks that the beneficiary would perform on a daily basis. 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).

In the present matter, the information offered by the petitioner falls far short of the detailed description requested in the RFE. In fact, the general list of responsibilities that the petitioner has provided can apply to top-level managers or executives in any number of industries. The job description provided by the petitioner lacks any distinguishing characteristics that are indicative of an individual who would operate at the top of a hierarchy in a company that is engaged in the jewelry distribution business. The petitioner fails to convey a meaningful understanding of what actual tasks would comprise the beneficiary's daily activity. In fact, portions of the job description are entirely inconsistent with the organizational and staffing structure that was in place at the time the Form I-140 was filed. For instance, the petitioner indicates that, on a weekly basis, approximately eight hours of the beneficiary's time would be devoted to conferring and strategizing with sales and marketing employees, another six hours would be devoted to reviewing activity reports produced by a marketing and sales manager, and 16 hours would be allotted to evaluating personnel performance and ensuring that employees properly carry out their sales and marketing-related duties. Thus, the petitioner has indicated that most of the beneficiary's time would be spent managing and supervising subordinate employees. However, as previously stated, the petitioner's staff at the time the petition was filed consisted of only one employee other than the beneficiary. It is implausible to expect that the beneficiary, with only a single subordinate, could limit his activity to mere management and oversight when the petitioner lacked a staff to carry out the essential operational tasks that are necessary for the petitioner's daily function. This lack of a support staff at the time of filing strongly indicates that the beneficiary would be primarily engaged in some or most of the petitioner's operational tasks. It must be noted 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).

Furthermore, while the AAO is mindful of the high degree of discretionary authority that has been bestowed upon the beneficiary, this phenomenon is a likely byproduct of being employed in a company whose entire staff at the time of filing consisted of two people. Moreover, the beneficiary's discretionary authority does not establish that the job duties he would perform on a daily basis would

be within a qualifying managerial and/or executive capacity. While the petitioner's staffing size is a factor in this decision, the petitioner's job description, its credibility, and the ability of the beneficiary to devote the primary portion of his time to performing qualifying duties remains the primary basis for the AAO's findings in this matter. Regardless, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). The AAO cannot overlook a deficient support staff as an important indicator of the petitioner's inability to relieve the beneficiary from having to primarily perform non-qualifying tasks.

Counsel's arguments on appeal fail to recognize any of the shortfalls described above and are therefore not persuasive. Counsel's assertion that the "streamlined approach" has enabled the petitioner to operate more efficiently does not address the more relevant issue in the present matter, which deals directly with the nature of the job duties the beneficiary would perform under an approved petition. The record suggests that the petitioner had not reached a stage of development where it either required or could sustain the beneficiary in a managerial or executive capacity. While the AAO does not rule out the possibility that the petitioner may eventually grow into an organization where the top-level manager or executive primarily performs in a managerial or executive capacity, this goal had not been attained at the time this petition was filed. Therefore, the AAO finds that the director's decision was warranted and need not be withdrawn.

As a final note, counsel makes references 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 USCIS than nonimmigrant petitions. 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. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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, because USCIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29-30 (D.D.C. 2003) (recognizing that USCIS approves some petitions in error). 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).

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. 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). If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director.

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).

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.