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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
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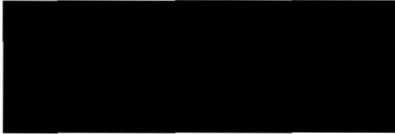


FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **JAN 14 2010**  
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IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
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 limited liability company organized in the State of Texas. 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 following independent grounds of ineligibility: 1) the petitioner failed to establish that it had the ability to pay the beneficiary's proffered wage as of the date the Form I-140 was filed; 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; 3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 4) 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 an appellate brief addressing several of the director's findings. After reviewing the documentation on record, the AAO finds that the petitioner has submitted sufficient evidence establishing its ability to pay the beneficiary's proffered wage. Therefore, the AAO hereby withdraws the first ground as a basis for denial.

Additionally, with regard to the second ground for denial—the lack of a qualifying relationship between the beneficiary's U.S. and foreign employers—the AAO finds that the director's conclusion was not warranted. The AAO notes that counsel's statement on appeal indicates that [REDACTED] owns 100% of the foreign entity. While this statement is inconsistent with the petitioner's submissions in response to the request for evidence (RFE), the AAO recognizes that counsel's misstatements, not the evidence or statements of the petitioner, are the source of the inconsistency. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As such, the AAO will not rely on counsel's unsupported statements to undermine the evidence previously submitted by the petitioner in response to the RFE. Counsel's representation is meant to further, not hinder, the petitioner's claims. The additional evidence establishes that [REDACTED] is the majority owner of the beneficiary's U.S. and foreign employers. As the petitioner has established by a preponderance of the evidence that the requisite qualifying relationship exists between the two entities, the second ground for denial is hereby withdrawn.

In light of the findings above, this discussion will focus on the two remaining grounds that served as bases for the director's denial—whether the beneficiary was employed abroad and whether he would be employed by the petitioner in a qualifying managerial or executive capacity.

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.

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

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

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

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

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

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

The petitioner did not submit a description of the beneficiary's foreign or proposed employment in support of the Form I-140. Therefore, in a notice dated July 11, 2008, the director issued an RFE instructing the petitioner to provide a detailed description of the beneficiary's past and proposed job duties, including the specific tasks the beneficiary performed and would perform as well as the percentage of time devoted to the individual tasks in each job description. The petitioner was also asked to discuss the beneficiary's subordinate staff, including their respective job descriptions and educational levels. Lastly, the petitioner was asked to provide an organizational chart representing each entity's staffing hierarchy in order to establish the beneficiary's position with respect to others within each organization.

In response, the petitioner provided the following submission entitled "Executive Capacity" describing the beneficiary's proposed employment:

The responsibilities of [the beneficiary] include direction and manage[ment] of daily operations for the business, establishing department goals and policies while exercising wide latitude of discretionary decision making. He is the primary individual to set company policy while at the same time understanding and ensur[ing] that the company complies with the regulations of the Mexican government relative to the importation and exportation of goods. Under his direction, management and supervision are [s]ales, [h]uman [r]esources/[t]raffic, [d]rivers, [m]aintenance, [s]ecurity, and [a]ccounting departments. While the [p]resident/[g]eneral [d]irector is responsible for overseeing the daily operations of each department, he set[s] policy and make[s] sure all departments, [sic] comply with set policies, procedures and goals he have [sic] set for the company.

He is ultimately responsible for the company's daily operations and for establishing organizational goals and policies. He exercises wide latitude of discretionary decision making authority while maintaining quality control. [REDACTED] has the ultimate decision-making authority, and has no one other than shareholders to whom he is responsible.<sup>1</sup> He has discretionary authority over day-to-day decisions on the operation of the company.

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<sup>1</sup> The petitioner's reference to [REDACTED] is unclear, as the only individual in the organizational chart with the last name [REDACTED] is a female, whose position of traffic coordinator appears at the bottom rather than at the top of the petitioner's organization. Such a position does not fit the degree of discretionary authority described above. As such, it appears that the petitioner's reference to a [REDACTED] appears to have been a typographical error and the underlying description was apparently meant to be applied to the beneficiary's proposed position with the petitioning entity.

Currently, [the beneficiary] functions at a senior level within the organizational hierarchy of [the petitioner].

The petitioner also provided an organizational chart, illustrating the foreign entity's organizational hierarchy to the right and the petitioner's organizational hierarchy to the left. The left hand portion of the chart depicts the petitioner as a three-tiered hierarchy headed by the beneficiary in the position of president; the manager of import and export at the second tier of the hierarchy as the beneficiary's subordinate; and a traffic coordinator and warehouse supervisor at the bottom of the hierarchy as the import/export manager's direct subordinates.

The right hand portion of the chart describes the foreign entity's organizational hierarchy. However, the petitioner listed the foreign entity's position titles in Spanish and failed to provide an English translation clarifying the positions that comprised the foreign entity at the time of the beneficiary's employment. Thus, due to the petitioner's failure to submit a certified translation of the relevant document, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Furthermore, the AAO notes that the beneficiary's name does not appear anywhere in the foreign entity's organizational chart, thereby indicating that the petitioner failed to comply with the director's express request to provide an organizational chart depicting the beneficiary's position during his employment abroad. Therefore, even if a certified translation were to have been provided, the chart has little relevance in this proceeding. For this additional reason the AAO will not accord evidentiary weight to the right hand portion of the chart.

The petitioner also provided its IRS Form 941, quarterly tax return, for the 2007 second quarter. The document encompasses the time period during which the petition was filed and shows that the petitioner had no more than two employees during each of the three months that comprised the second quarter.

It is noted that despite the director's express request for a detailed description of the beneficiary's foreign employment, the petitioner failed to provide this relevant information. 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).

Accordingly, in a decision dated October 24, 2008, the director denied the petition noting that the petitioner failed to comply with the request for additional evidence regarding the beneficiary's foreign employment. The director also concluded that the petitioner failed to establish that the beneficiary's employment with the petitioning entity would be within a qualifying capacity, pointing out that the job description the petitioner provided in response to the RFE ignored the director's express instructions as to the content of the information the petitioner was asked to provide and the format in which the information was to be presented. Namely, the director stated that despite the request for a specific list of job duties accompanied by a percentage breakdown to indicate the portion of time allotted to each task, the petitioner's job description contained general information which fell far short of establishing exactly how the beneficiary would spend the primary portion of his time in his proposed position.

On appeal, counsel acknowledges that a detailed description of duties was not provided and asserts that the petitioner's early stage of development is a sufficient justification for the petitioner's failure to comply with the director's request. Counsel explains that in light of the fact that the petitioner is still a small business, the beneficiary spends his time performing a variety of duties that are "difficult to specify," but assures the AAO that the beneficiary would primarily execute tasks within an "executive/managerial capacity." However, as previously stated, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19

I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Furthermore, counsel fails to clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5). The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives, as the petitioner has done in the matter at hand, is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Case law further supports the relevance of a detailed job description, finding that the actual duties themselves will 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 petitioner has not provided the necessary information regarding the beneficiary's daily job duties. While the petitioner has depicted the beneficiary's proposed position at the top of the corporate hierarchy, thereby indicating that the beneficiary has a high degree of discretionary authority, these two factors are insufficient to establish that the beneficiary would primarily perform tasks within a qualifying capacity. As stated above, a detailed job description is among the most crucial factors for any petitioner that seeks to classify a beneficiary as a multinational manager or executive. *See* 8 C.F.R. § 204.5(j)(5).

Additionally, in order to establish that the beneficiary would primarily perform tasks within a qualifying capacity, the petitioner must establish that it had the ability to relieve the beneficiary from having to primarily perform operational tasks at the time of filing. 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). In the present matter, despite the fact that the petitioner claimed three employees in part 5, item 2 of the Form I-140, the IRS Form 941 quarterly tax return for the second quarter of 2007 indicates that the petitioner had no more than two employees at the time the Form I-140 was filed. While counsel points out that the size of the petitioning entity is not a determining factor in whether the beneficiary qualifies for immigrant classification as a multinational manager or executive, the fact remains that the petitioner must provide evidence to establish who performs its daily operational tasks such that the beneficiary would be relieved from having to do so. With only two employees at the time of filing, one of whom was likely to have been the beneficiary himself, the AAO cannot conclude that the petitioner was equipped with a sufficient support staff to ensure that the primary portion of the beneficiary's time would be spent performing job duties within a qualifying managerial or executive capacity.

Counsel also relies on the petitioner's previously approved L-1A nonimmigrant petitions with the same beneficiary as evidence that this petition merits approval. However, this argument is flawed and does not overcome the director's findings, as each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. Therefore, 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. The prior nonimmigrant approval does not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Nor does the approval of a nonimmigrant petition in any way guarantee 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).

Furthermore, 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. 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).

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 approved previous 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 summary, the petitioner failed to provide any relevant information to establish that the beneficiary was employed abroad in a qualifying capacity. Although the petitioner provided some information with regard to the beneficiary's proposed employment, the information lacked the necessary degree of detail to convey a meaningful understanding of the specific tasks the beneficiary would perform on a daily basis in his effort to oversee the organization and affect its policies. As stated above, the petitioner also failed to establish that it was adequately staffed at the time of filing to relieve the beneficiary from having to primarily perform tasks outside of the qualifying capacity. Thus, in light of these considerable deficiencies in the record, the AAO cannot conclude that the beneficiary was employed abroad or that he would be employed by the U.S. organization in a qualifying managerial or executive capacity. Based on these two independent findings, this petition cannot be approved.

Furthermore, while not addressed in the director's decision, the record indicates that there is a third ground that should serve as a basis for denying the present petition. Specifically, the record shows that the petitioner has failed to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which 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 April 20, 2007. However, the record shows that the petitioner was not formed as a limited liability company until January 8, 2007<sup>2</sup>, approximately three months prior to filing. As the petitioner cannot establish that it existed as a legal entity prior to January 8, 2007, it is unclear how it could have been doing business as of April 2006, or one year prior to the time the Form I-140 was filed.

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<sup>2</sup> In part 5, item 2 of the Form I-140, the petitioner indicated that it was established on February 6, 2007. Per the above documentation on record, it appears that the petitioner provided incorrect information as to the date of its establishment. As this error is neither significant nor material to the issue at hand, further discussion is not warranted.

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.

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.