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FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER
SRC 08 057 50157

Date:

MAR 04 2010

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:

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

The petitioner is a Connecticut corporation that seeks to employ the beneficiary as its support engineer/operations 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition on that basis. On appeal, counsel submits an appellate brief asserting that the beneficiary has the role of a function manager.

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 petitioner submitted sufficient evidence to establish that it would employ the beneficiary 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 December 4, 2007, which included the following description of the beneficiary's proposed employment:

The position requires [the beneficiary] to actively engage with clients in a sales capacity, as well as to provide installation and technical support for existing and new clients. This position requires travel throughout the United States to attend trade exhibitions and to meet with the Company's agents throughout the Country. [The beneficiary] must also travel to clients' businesses to install equipment, and then return to provide technical assistance.

[The petitioner] continues to anticipate that it will require [the beneficiary]'s services to further organize and build this aspect of its operations in the United States and that his continued utilization to grow and manage what he develops is essential. . . . The position is also responsible for purchasing, ordering, delivery receipting, packaging and dispatching the

products, and interfacing with clients to ensure that invoicing and cash collection are properly performed.

The petitioner expressly stated that the beneficiary would be "responsible for both the sales and servicing of the Company's products." The petitioner also added that when its sales and support functions become fully developed, the beneficiary would then become instrumental in a different capacity that would include training and managing others who will perform these functions.

In addition to the above, the petitioner provided an official company job description, which stated that the beneficiary's responsibilities would be concentrated in four main categories—technical support, customer care, service repair, and training. With regard to technical support, the petitioner stated that the beneficiary provides round-the-clock support to software and hardware users in the United States and South America; communicates with software engineers to address problems proactively; provides updated software and implementation tools to existing users; attends field installations and trains users after installation; and advises and recommends compatibility with operating system upgrades. Providing customer care would include courtesy follow-ups and lead qualifications as well as providing training and support programs for company personnel and third party agents to further their knowledge of the petitioner's product. With regard to service repairs, the beneficiary would be responsible for training and developing service engineers, developing procedures for quick repair/replacement of products, addressing customer concerns/questions, and leading the customer service team by example, i.e., by making sales and service calls and attending trade shows and exhibitions. Lastly, the training responsibility would require the beneficiary to provide users and agents with training courses, on-site training, and training via telephone conferences.

In a decision dated January 14, 2009, the director denied the petition, finding that the petitioner failed to establish that a support staff would relieve the beneficiary from having to primarily perform non-qualifying tasks and that the beneficiary would not be employed in a qualifying managerial or executive capacity.

On appeal, counsel submits a brief disputing the director's conclusion. Counsel contends that the director's decision erroneously indicates that a request for additional evidence (RFE) was issued when, in fact, such a request was not issued. Counsel's interpretation of the director's statements, however, is incorrect. The director expressly discussed the changes in Title 8 of the Code of Federal Regulations, pointing out that the changes in the regulations empowered U.S. Citizenship and Immigration Services (USCIS) with the discretionary authority to determine the need for an RFE and to deny the petition without having to issue an RFE. The director expressly stated that the decision to deny was based on the petitioner's original application and supporting evidence. Nowhere in the decision did the director indicate that an RFE had been issued or that any of the evidence that was considered prior to issuing the decision was part of a response to an RFE.

Counsel also contends that the beneficiary's role with the U.S. entity will be that of a function manager and further asserts that the beneficiary's duties qualify him for classification as a multinational executive. In sum, the basic premise of counsel's claim is that the beneficiary would not serve as a personnel manager. To establish the beneficiary's eligibility for classification as a function manager, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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 reviewing the petitioner's supporting documentation, the AAO finds that the petitioner did not provide sufficient evidence to establish that it meets the above criteria. First, and most basic, the petitioner's description of the proposed employment contains significant elements of personnel management, a concept that is entirely different from the concept of a function manager. Second, neither the description of the beneficiary's proposed employment nor the petitioner's organizational composition at the time of filing supports the claim that the primary portion of the beneficiary's time would be spent performing tasks of a qualifying nature. While counsel properly points out that a petitioner's size is not the determining factor in examining a beneficiary's prospective employment in a qualifying managerial or executive capacity, it is nevertheless a factor that can and should be considered, as it assists USCIS in gauging the petitioner's capability to relieve the beneficiary from having to primarily perform non-qualifying tasks. *See 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).

In the present matter, counsel asserts that the beneficiary functions at the top of the petitioner's organizational hierarchy, recommends personnel actions with regard to the employees whose work he manages, exercises discretion over daily operations, and sets the goals and policies of the functions managed. Counsel also supplements the beneficiary's official description of duties with a percentage breakdown in an apparent attempt to establish that only a small portion of the beneficiary's time would be spent on non-qualifying tasks. However, the added percentage breakdown that has been provided on appeal is not consistent with the job description that was initially submitted in support of the petition. As quoted above, the petitioner's initial support letter expressly stated that the beneficiary would be expected to "actively engage with clients in a sales capacity" and later added that the beneficiary would also be required to travel to clients' businesses to install equipment and then to provide technical assistance. While the petitioner stated in the same support letter that it anticipates being able to achieve a stage of development that would allow for hiring a more substantial sales and support staff, the essence of the beneficiary's job description lists primarily non-qualifying tasks, therefore indicating that the petitioner had not yet reached the stage of development that would enable it to employ the beneficiary in a primarily managerial or executive capacity. It is noted that a petitioner must establish eligibility at the time of filing the petition; 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). As the job description indicates that the petitioner was not able to employ the beneficiary in a qualifying capacity at the time of filing, the director made the proper determination in finding the petitioner ineligible for the benefit sought.

Additionally, while the AAO acknowledges the supplemental percentage breakdown that has been added to the official company job description that listed the beneficiary's key job duties, it cannot overlook the fact that this unsupported and somewhat contradictory information has been submitted in response to an adverse decision in an apparent attempt to cure the deficiencies that were specified in the denial. Despite the fact that the percentage breakdown provided on appeal assigns a seemingly insignificant portion of the beneficiary's time to sales and customer service related job duties, the AAO must give due deference to the job description that the petitioner initially provided, where the petitioner clearly and expressly focused on the beneficiary's key role in engaging directly with clients in both the sales and technical capacities, both of which would

require travel, installation of equipment, and further technical assistance once the product has been sold and installed at the client's site. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO further notes that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). Thus, while counsel claims that the beneficiary would spend an insignificant percentage of time performing non-qualifying tasks, her statements, without further supporting evidence, are not sufficient to shift the significant weight being placed on the petitioner's initial job description.

Moreover, even if the AAO were to place greater evidentiary weight on the percentage breakdown provided in support of the appeal, it is not readily apparent that the breakdown attributes the primary portion of the beneficiary's time to qualifying tasks. More specifically, the breakdown indicates that 30% of the beneficiary's time would be attributed to technical support and 15% would be attributed to training, both of which are categories that primarily encompasses non-qualifying tasks. Additionally, the beneficiary would perform other non-qualifying tasks involved in service repair, including training service engineers, answering customer concerns, and serving as a role model by carrying out such non-qualifying tasks as making sales and service calls and attending trade shows and exhibitions in addition to several other non-qualifying tasks that are associated with providing customer care, including courtesy follow-ups and running training and support programs.

In summary, the record does not establish that the petitioner was ready to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing. While the AAO can make no determination as to the petitioner's growth potential or even its status at the time of the appeal, as previously stated, eligibility must be established at the time of filing the petition. *See Matter of Katigbak*, 14 I&N Dec. 49. In the present matter, the petitioner's description of the beneficiary's proposed employment indicates that the staffing hierarchy that was in place at the time of filing was not sufficient to relieve the beneficiary from having to focus the primary portion of his time on non-qualifying tasks. Therefore, on the basis of this determination, the AAO affirms the director's finding that approval of the petition was not warranted.

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 initial support letter dated December 4, 2007 stated that the beneficiary's responsibilities abroad included management of equipment rigging, interfacing with studio technicians and production staff, booking engagements, training staff, both studio and location installation of teleprompting equipment, on-site and remote technical support, and software development and updating. As stated earlier in this discussion, 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. The petitioner's brief though telling description of the beneficiary's employment with the foreign entity indicates that the

beneficiary's primary tasks were those that were necessary to provide services. Therefore, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. While the petitioner claims to be a subsidiary of the beneficiary's foreign employer, there is little evidence to support this claim. 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)). Despite documents establishing the petitioner's incorporation in the State of Connecticut as well as tax returns in which the petitioner named the beneficiary's foreign employer as its parent entity, the record contains no independent documentation establishing who owns the U.S. petitioner. As common ownership is a key element in establishing the existence of a qualifying relationship and given the petitioner's failure to establish that it and the beneficiary's foreign employer are commonly owned and controlled, the AAO concludes that the petitioner has failed to satisfy the provisions described in 8 C.F.R. § 204.5(j)(3)(i)(C).

Third, 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." Although the petitioner provided two of its tax returns and an unaudited financial statement, neither document shows the frequency of the petitioner's sales transactions. As such, these documents cannot be relied upon to determine whether the petitioner has been conducting business on a "regular, systematic, and continuous" basis. *See id.*

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.

As a final note, with regard to counsel's brief reference to the petitioner's current approved L-1 employment of the beneficiary, the AAO notes that 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. The prior nonimmigrant approvals do 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). Similarly, 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).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval 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 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).

Accordingly, 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.