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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date:
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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:



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 Washington corporation that owns and operates furniture stores at numerous locations. The petitioner seeks to employ the beneficiary as the store manager at one of its furniture store locations. 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) 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 presenting her arguments.

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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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, which includes the following percentage breakdown that describes the beneficiary's proposed employment with the U.S. entity:

- 60% Oversee activities directly related to making of products and providing services. Determine the goods to be sold, set prices and credit terms based on customer demands. Oversee all advertising activity from determining contents and layout of ads to placement of ads in media. Direct, coordinate and implement marketing strategies. Ensure that inventory is ordered in a timely manner. Ensure that warehouse is properly stocked with merchandise. Manage the movement of goods into and out of production facilities including scheduling delivery of merchandise to

and from the warehouse. Direct and coordinate the activities of business or departments concerned with production, pricing, sales, and distribution of products. Open and close [the] business at the beginning and end of each business day.

- 20% Monitor business to ensure it stays within budgetary limits. Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievements, as well as to determine areas needing cost reduction and improvement. Prepare reports regarding performance and productivity, and submit these reports to the [p]resident of the company. Review and analyze [the] organization's financial and budget activities to fund operations, maximize investments, and increase efficiency. Direct and coordinate the organization's financial and budget activities. Prepare budget proposals and submit these to the [p]resident of the company.
- 15% Determine staffing requirements. Interview, hire, and train employees or oversee those personnel processes. Manage staff, prepare work schedules, and assign specific duties. Oversee [a] staff of 15-17 employees.
- 5% Establish and implement policies, goals, objectives, and procedures, conferring with [b]oard members, officer, and staff members, as necessary. Communicate with others in the organization to determine areas requiring policies, goals, and objectives and implementing same.

The petitioner provided a similar breakdown describing the beneficiary's employment abroad. However, the description of the beneficiary's employment abroad did not include the last component to which 5% of the beneficiary's time in his proposed position would be attributed. Instead, the 5% was added to the second component to show that 25% of the beneficiary's time was attributed to monitoring budgets, reviewing financial statements and sales and financial reports, etc. It is further noted that the beneficiary oversaw the work of 8-10 employees in his position abroad as opposed to the 15-17 employees he would oversee in his proposed position. The subordinate positions abroad, however, are virtually identical to those listed in connection with the beneficiary's proposed position with the U.S. entity. In light of the similarities in the two job descriptions, the AAO will not restate the beneficiary's job description with the foreign entity.

The petitioner also provided a copy of its organizational chart for 2007, the year during which the petition was filed, showing that the beneficiary is one of five store managers all of whom are subordinate to the company president. The chart indicates that each store employs a sales and warehouse staff, but does not clarify how many employees work for each store. Rather, the chart identifies six sales associates and three warehouse employees without any further clarification as to who works for which store or whether any of the named employees work for multiple store locations. The chart also identifies one office assistant, but does not indicate whether this individual works for any store in particular or whether she performs administrative duties for all five store locations.

On August 22, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the specific day-to-day job duties the beneficiary performed during his employment abroad and those he would perform during his proposed position with the U.S. entity. The director expressly asked the petitioner to provide actual tasks rather than general statements. The petitioner

was also instructed to provide the number of staff supervised both abroad and in the United States, including a brief job description of each employee's job duties and his/her educational degrees.

In response, the petitioner submitted a letter dated November 12, 2008 with the additional information about the beneficiary's foreign and proposed employment appended in a separate document. The petitioner indicated that the beneficiary was employed abroad and would be employed in the United States in a managerial capacity. In further describing the beneficiary's employment with each entity, the petitioner restated the four prongs that define the term "managerial capacity" and discussed how the beneficiary's two positions fit each prong.

The petitioner first addressed the beneficiary's foreign employment and subsequently provided a similar description of the beneficiary's proposed employment. With regard to section 101(a)(44)(A)(i) of the Act—managing the organization, or department, subdivision, function, or component of the organization—the petitioner indicated that the beneficiary managed the Vancouver, B.C. location, which included determining which furniture would be sold, setting prices and credit terms based on customer demands, planning marketing activity and marketing strategies, managing the movement of furniture into and out of the warehousing facilities, training and motivating sales staff, managing relationships with vendors, and improving customer service and sales volumes.

When addressing the beneficiary's proposed employment, the petitioner repeated the above description, with the exception of expressly stating that the beneficiary would motivate sales staff, manage vendor relationships, and improve customer services. Instead, the petitioner stated that the beneficiary is completely responsible for managing the store seven days per week, which implies that the proposed position may include motivating staff, managing vendor relationships, and improving customer service.

With regard to section 101(a)(44)(A)(ii) of the Act—supervising and controlling the work of supervisory, professional, or managerial employees, or managing an essential function, department, or subdivision within an organization—the petitioner stated that the beneficiary was responsible for overseeing a staff of nine professionals, including the sales associates and delivery warehouse, shipping, and receiving employees. It is noted that in describing each individual's educational background, the petitioner indicated that none of the beneficiary's subordinates possessed at least a bachelor's degree.¹

When discussing the beneficiary's proposed position, the petitioner indicated that the beneficiary would oversee a staff of 13 professional employees, including a management analyst, six sales associates, three delivery warehouse and shipping and receiving employees, one visual merchandiser, one furniture technician, and one office assistant. In describing each employee's educational background, the petitioner indicated that only the management analyst has a bachelor's degree. The remainder of the staff was shown as having no educational degrees that would indicate that these employees are professional, as the petitioner claims. *See FN 1.*

¹ Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only the occupations listed in section 101(a)(32) of the Act but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Next, with regard to section 101(a)(44)(A)(iii) of the Act, the petitioner stated that the beneficiary had the authority to hire and fire all employees that were directly under his supervision. The petitioner also stated that the beneficiary interviewed, hired, and trained employees, prepared work schedules, and assigned their specific job duties. The petitioner listed those same responsibilities with regard to the beneficiary's proposed employment with the U.S. entity.

Lastly, with regard to section 101(a)(44)(A)(iv) of the Act—exercising discretion over the daily operations of the activity or function—the petitioner similarly described the beneficiary's foreign and proposed employment, stating that both positions involve monitoring budgetary limits, and reviewing financial statements, sales and activity reports and other data to measure productivity, increase efficiency, achieve company goals, and reduce costs where necessary. The petitioner also stated that the beneficiary prepared and would prepare reports regarding the store's performance and productivity and that the reports are then submitted to the companies' president.

The petitioner submitted the foreign entity's organizational chart showing that the beneficiary supervised five sales people and three warehouse employees in 2001 and five sales people and two warehouse employees in 2002. The petitioner also provided its own organizational chart, illustrating the organizational hierarchy that was previously discussed.

Additionally, the petitioner provided a sample weekly schedule for the beneficiary, showing a six-day work week. Each of the six days would involve overseeing all store operations. In addition, Monday's schedule would include opening and closing the store, reviewing weekend sales, checking the warehouse for stock and sold orders, meeting with sales associates and advertising agents as needed, preparing weekly employee work schedules, and reviewing sales associates' quotas. Tuesday is shown as the beneficiary's day off. The beneficiary's schedule for Wednesday includes meeting with furniture manufacturing representatives to review new and existing products and with the warehouse manager to review receiving and shipping reports. The Thursday schedule would include reviewing daily schedules, communicating with the parent and other stores regarding trends and other management issues, and planning advertising. Friday's schedule includes meeting with vendors and reviewing sales associates' quotas. The schedules for Saturday and Sunday indicate that the beneficiary would only perform those tasks involved in store operation.

In a decision dated December 10, 2008, the director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. The director observed that based on the documentation submitted in response to the RFE, only one of the beneficiary's subordinates has a degree, noting that U.S. Citizenship and Immigration Services cannot determine that the beneficiary's foreign or proposed employment involves overseeing the work of supervisory, professional, or managerial employees.

On appeal, counsel asserts that the director's analysis focused on only a portion of section 101(a)(44)(A)(ii) of the Act, which provides not only for a manager who supervises and controls the work of supervisory, professional, or managerial employees, but also for a non-personnel manager who manages an essential function, department, or subdivision within an organization. Counsel asserts that the beneficiary managed and would manage an essential function within a subdivision of the petitioning entity and therefore fits the latter description, which applies to managers who do not supervise subordinate personnel.

Counsel's argument, however, is not persuasive, as the job descriptions provided for the beneficiary's foreign and proposed employment clearly indicate that a significant portion of the beneficiary's employment as store manager at the foreign and U.S. store locations involved and would involve overseeing a staff of sales people, warehouse employees, and other staff members. Thus, not only does the petitioner lack evidence to support counsel's assertion, but there are statements from the petitioner that contradict the assertion that the beneficiary's role within the U.S. and foreign entities is limited to managing an essential function.

Moreover, when claiming that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., 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 this matter, the petitioner has not established the essential function of the beneficiary's foreign or proposed employment. Rather, the record indicates that the beneficiary's primary responsibility with regard to the foreign and proposed positions is managing the daily operations of a furniture store, including managing a staff, which, with the possible exception of a single employee at the petitioning entity, is not comprised of supervisory, professional, or managerial employees.

Additionally, the descriptions of the beneficiary's respective positions indicate that, aside from managing each store's non-supervisory, non-professional, and non-managerial staff, the beneficiary performed and would perform other daily operational tasks, including making budgetary plans, contacting vendors, addressing customer service issues, addressing the companies' advertising needs, and preparing various reports to be submitted and reviewed by the company's president.

The AAO finds that the petitioner has failed to establish that the beneficiary has managed and would manage an essential function or that the beneficiary's foreign and proposed positions have involved and would involve, respectively, the performance of primarily managerial or executive job duties. Based on these two independent bases for ineligibility, this petition cannot be approved.

As a final note, counsel makes a brief reference to the petitioner's current approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, 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 petition was 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.