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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 09 038 51238

Date:

MAY 12 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 California corporation that seeks to employ the beneficiary as its president. 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 asserts that the petitioner's prior counsel provided faulty and unreliable information, which lead to an erroneous denial. Accordingly, counsel challenges both grounds cited for denial and submits an appellate brief that will be addressed in a full discussion 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 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 dated November 18, 2008, which provided the following description of the beneficiary's employment abroad:

[The beneficiary] has continuously been working with [REDACTED] since 1986 as a [d]irector. In this capacity, [he] manages and directs the daily activities of our senior professional management team, including three chartered surveyors, five chartered accountants and various development managers to implement business unit targets for key markets in the United Kingdom. He is also responsible for sustaining the company's earning growth by devising strategies and formulating policies to ensure business objectives are met.

[The beneficiary] develops performance appraisals for internal management systems and implements initiatives geared towards newly developed projects using strategic integration of management requirements and profitability methodologies. [He] manages and directs the overall development of integrated qualitative/quantitative performance management concepts to improve business operations.

[The beneficiary] makes daily strategic decisions regarding complex business policies and operation issues and problems. He identifies critical performance deficiencies and proposes solution efforts for new modifications. [He] additionally directs expenditures to support operation and development projects.

The support letter also addressed the beneficiary's proposed employment, stating that the beneficiary would be "serving as an executive and a function manager in the U.S." The petitioner referred to itself as a sister entity to [REDACTED], which, along with the petitioner, buys, develops, and resells real estate properties in the United States. The petitioner stated that each project requires brokers to negotiate contracts and close on the purchased properties, contractors to remodel some of the purchased properties, and accountants and lawyers. The petitioner also provided a list of business transactions for which the beneficiary has been responsible since his arrival in the United States in 2003. No further information was provided to elaborate on the beneficiary's proposed job duties with the U.S. entity.

On April 15, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide supplemental information about the beneficiary's prior employment with the foreign entity and his proposed employment with the U.S. entity. Specifically, the petitioner was instructed to list the beneficiary's specific job duties with each entity and to assign a percentage of time to each job duty to indicate how the beneficiary's time was and would be allocated with the foreign and U.S. entities, respectively. The petitioner was also asked to provide organizational charts for the beneficiary's past and prospective employers depicting the beneficiary's position with each entity.

In response, the petitioner provided two sets of job duties, listing the beneficiary's job duties with the foreign and U.S. employers.¹ The petitioner also provided a list of its five real estate investments and indicated the approximate percentage of time the beneficiary would allocate and the job duties he would perform with respect to each investment.² Specifically, the petitioner stated that the beneficiary would allocate 30% of his time to [REDACTED] which would include performing due diligence on notes and acquire new notes, negotiating with borrowers to arrange terms for repayment of notes, and dealing with attorneys, accounts, and brokers; 25% of the beneficiary's time would be allocated to [REDACTED] investment, which would require that the beneficiary be the lead negotiator in arranging borrowers' payoffs to avoid foreclosure; 10% of the beneficiary's time would be allocated to [REDACTED] which would require negotiating sales, dealing with brokers, managing agents and the general contractor responsible for remodeling the purchased properties, and traveling to the properties; and 20% of the beneficiary's time would be allocated to Universal

¹ As the director included both lists of job duties in the April 15, 2009 decision, the AAO need not restate this information in the current decision.

² Although the petitioner indicated that 15% of the beneficiary's time would be allocated to the foreign entity, this would not be time spent in the beneficiary's capacity as an employee of the U.S. petitioner. Therefore, any tasks performed to advance the business interests of the foreign entity would not assist the AAO in determining the beneficiary's managerial or executive capacity in his proposed employment with the petitioning entity.

██████████, which would require working with website designers, patent attorneys, marketing consultants, and development advisers. The petitioner also submitted a supplement that provides a list of sample activities in which the beneficiary has engaged in the recent past, including names of people with whom the beneficiary meets regularly in an effort to purchase new properties and maintain existing properties and the specific places the beneficiary visited to determine their potential as future real estate purchases.

The petitioner also provided resumés for the accountant, whom the petitioner claims to have hired in November 2007, and vice president of diligence, whom the petitioner claims to have hired in March 2009, and a separate work history statement for ██████████ who is described as a consultant in the information technology industry. It is noted that the separate IRS Form W-4 submitted by ██████████ the company's account manager, indicates that the date of hire was November 1, 2008, not November 2007 as ██████████ indicated in his resumé. The petitioner's organizational chart depicts the beneficiary at the top of the hierarchy as the company's president and three subordinates, including the vice president of diligence and development, an account manager, and ██████████ as the marketing manager.

With regard to the beneficiary's employment abroad, the petitioner submitted an organizational chart depicting the beneficiary's position of acquisitions director as one of four top-level positions within the foreign entity's organizational hierarchy. The chart identifies a senior surveyor and a financial controller as the beneficiary's two subordinates, each with four subordinates of his own.

In a decision dated September 25, 2009, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and that he would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. The director restated the lists of job duties the petitioner provided to describe the beneficiary's foreign and U.S. employment and concluded that, rather than managing an essential function, the beneficiary's job descriptions are indicative of someone who performs the duties associated with an essential function. With regard to the proposed position, the director noted that operating a small business and maintaining an executive or managerial position title do not establish that the proposed employment would be within a managerial or executive capacity.

In summary, the director concluded that the beneficiary's former and proposed employment primarily involve directly providing the services of the employing entity. Although the director also found that the record contains insufficient evidence of the beneficiary's senior level within the petitioner's organizational hierarchy, the AAO does not concur with that finding, given the beneficiary's discretionary authority with regard to the petitioner's key business decisions. As such, the director's finding specifically pertaining to the beneficiary's senior level within the organization is hereby withdrawn. However, the remainder of the director's finding as well as the two grounds cited as the bases for denial will not be disturbed.

On appeal, the petitioner's new counsel submits a brief, asserting that the petitioner's former counsel, ██████████, was negligent in her representation of the petitioner. Specifically, counsel contends that ██████████ response to the RFE "was poorly drafted, confusing to read and blatantly mischaracterized evidence presented to support the case" ³ Counsel further contends that ██████████ presented outdated and irrelevant evidence and failed to point out that the beneficiary serves the petitioner in both a managerial and an

³ See counsel's appellate brief, p.1.

executive capacity. Counsel claims that the petitioner's submissions had been prepared by a non-attorney staff member and that her actions are "tantamount to the unauthorized practice of law."⁴

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In the present matter, current counsel fails to establish that the above criteria have been met. In fact, despite counsel's assertion that [REDACTED] may have violated the California Business and Professions Code, there is no evidence that the petitioner has taken any punitive or remedial measures to address the serious accusations that have been raised before the AAO. Therefore, the AAO will consider all of the petitioner's submissions, including those that were previously provided by the petitioner while under the representation of former counsel.

Counsel indicates that RFE response Exhibits E and F were misleading in that they suggest that the beneficiary worked a percentage of time for a company that is actually among the petitioner's subsidiaries. After careful review of the exhibits in question, the AAO finds counsel's interpretation of the submission to be inaccurate. While the phrase "working for this company" was admittedly used in Exhibit E, careful review of this information in the context of the document's title, [REDACTED]—Portfolio Investments and Duties of [REDACTED] indicates that the percentages that were included are a representation of the amount of time the beneficiary generally allocates to the various companies that are part of the petitioner's investment portfolio. Contrary to counsel's interpretation, [REDACTED] statements in no way lead the AAO to believe that the beneficiary has been or would be actually employed by any of the entities in which the U.S. petitioner holds an ownership interest.

Additionally, counsel seemingly claims that the beneficiary is both a function manager and a manager of a subordinate staff. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Thus, the very purpose of utilizing the term "function manager" is to distinguish a beneficiary who acts as a personnel manager, whose primary tasks involve the management of others, from a beneficiary who does not manage others, but instead oversees or manages the execution of an essential function. Any petitioner claiming to employ a beneficiary who will manage an essential function 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).

⁴ See counsel's appellate brief, p.2, paragraph 2.

In the present matter, the petitioner's response to the RFE included primarily tasks required to actually perform an essential function—the function of maintaining existing investments and acquiring new ones. The documentation is clear in stating that the beneficiary regularly negotiates with borrowers to ensure that they pay their respective debts to the entities that are part of the petitioner's investment portfolio. The record also indicates that the beneficiary deals directly with independently contracted parties, such as real estate brokers and general contractors, in order to purchase and remodel properties. However, it is also noted that any time spent supervising, directing, or overseeing the work of the petitioner's contractors cannot be considered as being a qualifying managerial or executive duty. Whether or not these specific tasks would normally be deemed managerial or executive if performed in relation to the internal staff of the petitioner, they would be deemed in this instance to be tasks necessary to provide a service, albeit a management service, being provided by the petitioner as a general contracting company and thus, would be non-qualifying. As stated earlier, 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. *Id.*

In light of the considerable weight placed on the job descriptions provided by former counsel in response to the RFE, it is important to note that while counsel now asserts that the beneficiary "distances himself from the performance of day[-]to[-]day tasks," the job descriptions provided earlier in this proceeding do not support counsel's assertion. As stated earlier, the AAO cannot merely disregard the statements made on the petitioner's behalf by its former counsel merely on the basis of statements currently being made by new counsel. That being said, the AAO must also take into consideration the inconsistencies between the statements made on appeal and statements that were made earlier with regard to the beneficiary's job duties. 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 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). That being said, the AAO further notes that counsel's current claim that the beneficiary has four subordinates reporting directly to him is not supported by the evidence of record. While it is possible that the petitioner may have hired additional employees since the petition was filed, the record shows that the petitioner had no more than two employees at the time of filing.

Furthermore, the AAO notes that counsel's claim that "the evidence presented clearly established that [the beneficiary] is responsible to set the goals and policies" indicates counsel's reliance on the submissions of prior counsel whom current counsel discredits as having submitted deficient and unreliable information.⁵ In a similar manner, counsel refers to "[e]vidence provided with the original petition and the response to the RFE" as adequate documentation of the beneficiary's employment in an executive capacity.⁶ The fact that counsel relies on information whose source he deems to be unreliable is in itself contradictory and gives the AAO reason to doubt the validity of current counsel's criticism of [redacted] representation. Regardless, as noted earlier, the AAO cannot disregard documents that were previously submitted into evidence by the petitioner's former counsel merely based on the inconsistent assertions of current counsel. Thus, given the inconsistencies between the job description provided on appeal and those provided in response to the RFE, the actual tasks the beneficiary would perform in his proposed position remain unclear. While the beneficiary's discretionary authority appears to be consistently conveyed in both the current and prior job

⁵ See counsel's appellate brief, p.11, paragraph 3.

⁶ See counsel's appellate brief, p.14, paragraph 3.

descriptions, this element alone is not sufficient to establish the petitioner's eligibility. As indicated throughout this discussion, a clear description of the beneficiary's proposed job duties is a key element in establishing whether or not he would be employed in a qualifying managerial or executive capacity. See 8 C.F.R. § 204.5(j)(5). Case law further emphasizes the importance of a detailed job description, finding that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the present matter, the job description provided in response to the RFE lists numerous operational tasks, as indicated above. As the petitioner failed to comply with specific RFE instructions asking the petitioner to allocate a percentage of time to each of the beneficiary's job duties, both foreign and proposed, the AAO cannot ascertain with any degree of certainty just how much of the beneficiary's time had been and would be spent performing the non-qualifying tasks.

Additionally, with regard to the beneficiary's employment with the foreign entity, the record is equally lacking in evidence to support the claim that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Despite the beneficiary's executive or managerial position title and placement within the foreign entity's organization, as previously noted, a detailed job description is essential to determine whether the beneficiary was employed abroad in a qualifying managerial or executive capacity. Here, the beneficiary's job description with the foreign entity is insufficient to establish what precise job duties he was performing and whether the beneficiary allocated the primary portion of his time to managerial or executive level tasks. As discussed earlier, the petitioner failed to comply with the director's request for specific time allocations to the specific tasks the beneficiary performed during his employment abroad. 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).

In summary, counsel's objections on appeal to former counsel's submissions are not persuasive in establishing that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Despite numerous references to the beneficiary's elevated placement within each entity's organizational hierarchy as well as his discretionary authority with regard to business matters concerning each entity's acquisitions of investment properties, the AAO is unable to conclude that the primary portion of the beneficiary's time abroad and with the U.S. entity had been and would be spent performing tasks within a qualifying managerial or executive capacity. Therefore, on the basis of these two independent grounds, this petition cannot be approved.

As a final note, counsel makes a brief reference to the petitioner's current and prior approved L-1 employment of the beneficiary. Although both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity, the AAO notes that each petition is a separate record of proceeding with a separate burden of proof. 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). 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 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).

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.