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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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[REDACTED]

FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER

Date: OCT 05 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:

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

The petitioner is a Florida corporation engaged in the sales of electronic equipment. It 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 the conclusion that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusion and questions the director's decision to not issue a request for evidence (RFE).

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 the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

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

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

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

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

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

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

In support of the Form I-140, the petitioner submitted a letter dated September 2, 2008, which includes the following description of the beneficiary's proposed employment:

Approximately thirty percent (30%) of [the beneficiary]'s work week involves establishing and develop[ing] new markets for the sale of our products throughout South America together with establishing our annual sales objectives[;] approximately twenty percent (20%) of his work week involves analyzing our monthly budget and customer billing reports in order to maximize our profit to cost ratio and determine[ing] price level to our products in order to offer our customers our products at the highest competitive price so we can maximize our profit to cost ratio[;] approximately thirty percent (30%) of [the beneficiary's] work week involves supervising and evaluating the work performance of our General Manager and

Administrator together with hiring and firing employees and setting salaries. The remaining twenty percent (20%) of his work week involves administrative activities.

The petitioner also included its organizational chart, which depicts the beneficiary as head of the organization, followed by a general manager and an administrator, both shown as the beneficiary's direct subordinates, each of whom serves as a supervisor to a sales person. It is noted that the sales person who is depicted under the supervision of the administrator is shown as occupying the dual position of sales person/secretary.

The director denied the petition in a decision dated April 7, 2009 concluding that the petitioner failed to establish that the beneficiary would allocate the primary portion of his time to performing tasks within a qualifying managerial or executive capacity. The director reflected back on the petitioner's prior Form I-140, which was denied after the Director, Nebraska Service Center, reviewed supplemental information that the petitioner submitted in response to a June 18, 2008 RFE. The director in the present matter noted that no new information has been submitted in support of the instant petition and determined that neither the beneficiary's job description nor the size of the petitioner's operation establish that the beneficiary would be employed within a qualifying managerial or executive capacity.

On appeal, counsel submits a brief dated May 7, 2009, pointing out that neither an RFE nor a notice of intent to deny (NOID) preceded the director's decision. Counsel refers to a 2005 service memorandum to support the assertion that because the petitioner was not clearly ineligible, an RFE should have been issued to allow the petitioner to establish eligibility. However, counsel's analysis of 8 C.F.R. § 103.2(b)(8) is inaccurate, as it does not reflect the changes that were implemented and that have been in effect since prior to the date the instant Form I-140 was filed. Specifically, the current provisions at 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii) clearly indicate that the director has full discretionary authority to decide whether or not to issue an RFE or a NOID prior to issuing an adverse decision. Thus, there is not statutory or regulatory burden requiring the director to establish that there is clear evidence of ineligibility in order to deny a petition without issuing an RFE or a NOID. As the memorandum cited by counsel predates the updated provisions, it is irrelevant to the matter at hand. Moreover, USCIS memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

Furthermore, although counsel contends that the petitioner meets basic statutory and regulatory requirements, the record has not been supplemented with any additional statements regarding the specific tasks that would comprise the beneficiary's proposed employment or a further explanation clarifying how the petitioner's current organizational structure is sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform daily operational tasks. In the present matter, the petitioner's description of the beneficiary's proposed employment lacks a comprehensive description of the beneficiary's day-to-day tasks and does not provide up-to-date documentation to establish the availability of support personnel who would perform the petitioner's daily operational tasks.

First, with regard to the petitioner's description of the beneficiary's proposed employment, the petitioner's statements are overly broad and therefore fail to convey a meaningful understanding of the beneficiary's actual daily tasks, which are essential to determining the beneficiary's employment capacity. *See 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). For instance, the petitioner indicates that the beneficiary would spend approximately 30% of his time establishing and developing new markets in which to sell the petitioner's products. However, there is no mention of market research or some other means that would be used to determine what the new markets would be or what specific daily tasks would be required to "develop" the new markets. Additionally, while the petitioner indicates that a portion of the beneficiary's time would be allocated to hiring and firing employees and setting their salaries, the fact that the petitioner allegedly employed five people, including the beneficiary, renders the petitioner's claim dubious at best, as the record lacks corroborating evidence to establish a trend of hiring and firing employees. 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)). Additionally, the petitioner failed to establish the specific types of administrative activities the beneficiary would perform during 20% of his time.

Second, with regard to the petitioner's personnel structure, the only evidence the petitioner submitted to establish who was employed at the time the petition was filed includes an organizational chart, which the petitioner has created for the purpose of supporting the facts claimed. Although the petitioner provided several quarterly wage reports listing employee names and their quarterly wages, the most recent quarterly wage report accounted for the petitioner's employees during the quarter that preceded the date of the filing of the instant Form I-140. Thus, the record does not contain documentary evidence establishing whom the petitioner employed at the time of filing.

As stated above, a detailed job description is one of several components that must be reviewed in determining whether the beneficiary is likely to be employed in a managerial or executive capacity. A review of the petitioner's organizational hierarchy and its overall staffing are equally as important, as these factors allow the AAO to gauge a petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. It is noted that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). The AAO further notes 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 instant matter, a review of the record indicates that the petitioner failed to provide an adequate description of the beneficiary's proposed employment or corroborating documentary evidence to establish whether the petitioner was adequately staffed to support an employee within a primarily managerial or executive capacity. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties and for this reason the instant petition must be denied.

Furthermore, while not previously addressed in the director's decision, the AAO finds that the petitioner failed to establish that it met the requirements specified at 8 C.F.R. § 204.5(j)(3)(i)(B), which 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. Similar to the job description offered for the beneficiary's proposed employment, the record contains an equally vague description of the beneficiary's past employment with the foreign entity. The petitioner offered a job description that cited no specific job duties and therefore failed to establish that the primary portion of the beneficiary's time in his position with the foreign entity was spent performing tasks within a qualifying managerial or executive capacity.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (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.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted 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. 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, 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.