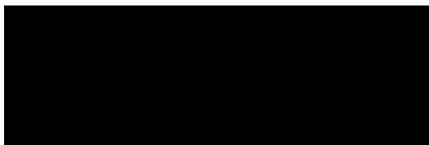


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



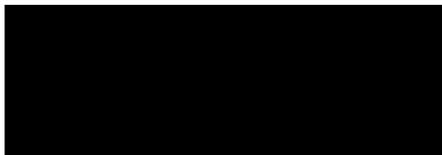
B4

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: FEB 11 2011

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 \$630. 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 limited liability company organized in the State of Oregon. The petitioner seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on 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 submits a brief along with additional evidence in an effort to overcome the director's adverse findings.

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, [REDACTED] of the petitioning entity, submitted a letter dated February 11, 2008 on behalf of the petitioner. [REDACTED] provided the following description of the beneficiary's employment with the foreign entity:

- Responsible for daily corporate financial operations;
- Overseeing the [m]arketing [d]epartment activities including supervision of day[-]to[-]day functions;

- Responsible for purchasing and development planning;
- Hiring, firing and evaluation of [the m]arketing [d]epartment employees; and
- Directing and coordinating new business opportunities.

Supporting evidence also included the foreign entity's organizational chart, which shows the board of directors at the top of the hierarchy with a director of finance and management, a general manager, and the beneficiary's position of deputy general manager as the three positions directly subordinate to the board. The chart indicates that the beneficiary's subordinates included a manager and three staff members in the purchasing department and a manager and five staff members in the overseas development department.

With regard to the beneficiary's proposed position in the United States, [REDACTED] provided the following list of responsibilities:

- Overseeing and managing the company's overall operations in the U.S. (30%);
- Designing and enforcing a workable business plan for the [c]ompany (5%);
- Establishing management organization and guidelines (5%);
- Overseeing the company's financial and long term planning matters (20%);
- Hiring, firing and evaluating company employees as necessary to ensure proper balancing of productive and effective manpower (15%);
- Directing the day[-]to[-]day operations of the company in its endeavors to develop a[nd] maintain a strong customer base in the U.S. (20%); and
- Serving as a liaison between the parent company and the U.S. operations (5%).

Supporting evidence also included the petitioner's organizational chart which showed that the hierarchy was comprised of a president in the top-most position followed by the beneficiary in his proposed position as general manager, an assistant to the general manager, the company secretary, a "general office" position, a financial department, a "tran-shipment" department, and a purchasing department as the positions subordinate to the beneficiary. The chart shows that the petitioner's position of president and the foreign entity's position of general manager are both occupied by the same individual. Additionally, the beneficiary is shown as occupying two positions—that of general manager as well as an employee within the financial department. Similarly, [REDACTED] is shown as occupying a position within the purchasing department as well as the "tran-shipment" department and [REDACTED] is shown as occupying the positions of company secretary and "general office." Lastly, the AAO observes that the position of assistant to general manager appears to have been vacant at the time of filing, as no employee was specifically named in that position.

On February 2, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide more detailed descriptions of the beneficiary's foreign and proposed employment. More specifically, the petitioner was instructed to list the beneficiary's specific job duties within each position as well as the

approximate percentage of time that was and would be assigned to each task listed in connection with the beneficiary's foreign and proposed U.S. employment.

In response, the petitioner provided supplemental descriptions of both of the beneficiary's positions. As the director included these job descriptions in the denial, the AAO need not restate this information in the current decision. The petitioner also provided a letter dated April 7, 2009 from [REDACTED], the assistant general manager in charge of the business development department, who urged U.S. Citizenship and Immigration Services (USCIS) to approve the instant Form I-140 on the beneficiary's behalf. [REDACTED] indicated that the beneficiary's key role is that of a liaison between the U.S. petitioner, the foreign entity, and customers in China.

In a decision dated June 3, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. The director determined that the beneficiary's subordinates cannot be deemed professional or managerial employees and further found the job descriptions offered in response to the RFE to be lacking in sufficient detail regarding the beneficiary's daily job duties.

On appeal, counsel challenges the director's findings, contending that the director dismissed the beneficiary's job descriptions because, while they were written by experts, they lacked "the exact legalese apparently sought after by this examiner." Contrary to counsel's assertion, USCIS does not look for any specific legal terminology when reviewing the beneficiary's job descriptions. Rather, the petitioner is simply urged to provide a detailed description of the beneficiary's proposed employment that most accurately depicts an account of his day-to-day tasks. Here, while the AAO disagrees with the director's determination that the job description was primarily comprised of generalized statements that he deemed to be of limited evidentiary value, the director's ultimate conclusion—that the job descriptions failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity—was warranted.

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 the daily operational tasks. In the present matter, the AAO finds that neither of the descriptions that pertain to the beneficiary's foreign and proposed employment establishes that the primary portion of the beneficiary's time was and would be allocated to managerial- or executive-level tasks.

First, the AAO notes that the petitioner failed to assign a percentage of time to the specific job duties, which were used to elaborate on the broader job responsibilities. The purpose of instructing the petitioner to assign a percentage of time was to elicit information about specific tasks in the beneficiary's respective positions and to determine how much of the beneficiary's time was and would be allocated to the qualifying tasks versus the non-qualifying ones. In the present matter, the job descriptions offered in response to the RFE contained a mix of both qualifying and non-qualifying tasks. For instance, the foreign job description indicates that the beneficiary assisted with setting up contracts for land purchase, worked with building contractors, met with clients, prepared market surveys and researched import/export laws, formed marketing plans, communicated with important customers and manufacturers, and made arrangements for customers and board members to

visit the U.S. subsidiary. The AAO finds that none of these tasks can be deemed as qualifying within a managerial or executive capacity.

Similarly, the description of the beneficiary's proposed position indicates that the beneficiary would allocate undetermined portions of his time to such non-qualifying tasks as forging relationships with suppliers, vendors, and customers; conducting research to determine market trends; working with vendors; attending trade shows and promoting the petitioner's products at public social venues; reporting progress to his superiors; working with vendors to improve product lines by arranging demonstrations of product usage; and generally maintaining contacts with vendors and arranging for the vendors to visit the foreign facility. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, the petitioner omitted critical information that would disclose specific information about the approximate percentage of time that the beneficiary spent and would continue to spend performing non-qualifying tasks. This deficiency precludes the AAO from determining that the beneficiary allocated and would allocate the primary portion of his time to job duties within a qualifying managerial or executive capacity.

Additionally, with regard to the beneficiary's proposed position, the AAO notes that the record contains inconsistent information with regard to the U.S. entity's organizational hierarchy. While part 5, item 2 of the Form I-140 indicates that the petitioner had three employees at the time of filing, the organizational chart that was submitted initially in support of Form I-140 lists a total of eight positions and names four, rather than three, employees. While the AAO accepts counsel's explanation for the change in the petitioner's more recent organizational chart, which was provided in response to the RFE, the discrepancy that the AAO points to is between the Form I-140 and a contemporaneously submitted document that was meant to serve as supporting evidence. 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). Further, the organizational chart indicates that three of the four employees, including the beneficiary, occupy multiple positions within the hierarchy. The beneficiary is depicted in the proffered position of general manager and another position in the financial department. It is noted, however, that the petitioner did not provide information to elaborate the beneficiary's specific position in the financial department, a precise position title in this department, or the approximate percentage of time that the beneficiary would spend performing job duties in his capacity as a financial department employee. All of these matters are relevant, as they most-likely impact the beneficiary's job duties and time he would have available to allocate to the proffered position of general manager.

In summary, the petitioner has not provided sufficient information to establish that either the beneficiary's foreign or proposed employment consisted and would consist of tasks that are primarily within a qualifying managerial or executive capacity. The petitioner also provided inadequate and inconsistent information regarding the beneficiary's placement within the U.S. entity's organizational hierarchy, which raises questions about the petitioner's ability to relieve the beneficiary from having to primarily perform non-

qualifying tasks. Therefore, the petitioner has failed to establish eligibility for the immigration benefit sought and the petition cannot be approved.

As a final note, counsel refers to the petitioner's current and previously approved L-1 employment of the beneficiary, implying that USCIS has already found the beneficiary to be eligible for immigrant classification as a multinational manager or executive. The AAO notes, however, that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. As such, 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 AAO further notes that the approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. It is not uncommon for USCIS to deny an I-140 immigrant petition 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).

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.