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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

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[REDACTED]

B4

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

JAN 19 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:

[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 \$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, Texas 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 Florida. 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 determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity and denied the petition on that basis. On appeal, counsel disputes the director's decision and submits a brief statement asserting that the beneficiary's proposed employment would be within an executive capacity.

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 sufficient evidence was submitted to establish that the petitioner would employ the beneficiary in the United States in a qualifying managerial or executive capacity.

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

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

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

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

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

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

In support of the Form I-140, [REDACTED] the petitioner's sales manager, submitted a letter dated April 23, 2008, on the petitioner's behalf. He stated that the beneficiary is the petitioner's top ranking official within the petitioning entity and further asserted that the beneficiary is empowered with the authority to oversee, hire, promote, and fire all staff; control operating expenses; schedule and coordinate work loads; approve purchases and marketing strategies; and establish and enforce the company's technical standards. In a separate supporting document titled "Job Description," the beneficiary's proposed position was also said to include studying and analyzing market patterns of the supply and demand for the petitioner's products and services; negotiating contracts; and managing the company's list of suppliers and service providers.

The supporting documents also included the petitioner's organizational chart, which depicts the beneficiary in the top-most position as the company's general manager. The chart depicts a sales manager and an administrative manager as the beneficiary's two direct subordinates followed by an accounts payable and

receivable assistant as the administrative manager's subordinate, and a logistics supervisor followed by a warehouse clerk as the two employees under the supervision of the sales manager.

On September 23, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to establish that the beneficiary's proposed position fits the four criteria listed under the statutory definition for managerial capacity or executive capacity. The director informed the petitioner that the information provided initially in support of the Form I-140 was insufficient to determine that the beneficiary would be employed in the United States in a managerial or executive capacity.

In response to the above request, [REDACTED] provided a letter on the petitioner's behalf supplementing the record with an additional description of the beneficiary's proposed employment. Mr. [REDACTED] repeated various portions of the previously provided job description, focusing on the beneficiary's discretionary authority in making policies and setting goals, controlling the petitioner's budget and all matters dealing with finances, and making decisions regarding the petitioner's employees and independent contractors. As the director included the supplemental job description in its entirety in the adverse decision, it is not necessary to repeat this information in the current discussion.

In a decision dated March 9, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity. The director noted that the petitioner provided a vague job description that lacked specific information about the beneficiary's actual day-to-day job duties and thus failed to establish that the beneficiary would not attribute the primary portion of his time to performing daily operational tasks. Although the director also found that the petitioner failed to establish that the beneficiary would supervise managerial employees or degreed professionals, the AAO finds that the organizational chart submitted in support of the petition directly contradicts the director's finding. Therefore, while the AAO will affirm the denial, the inaccurate observation is hereby withdrawn.

On appeal, counsel for the petitioner asserts that there is no statute or regulation that mandates the number of employees the beneficiary must supervise in order to merit classification as a multinational manager or executive. In support of his argument, counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all employees of U.S. Citizenship and Immigration Services (USCIS) in the administration of the Act, unpublished decisions are not similarly binding.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The primary focus of the adverse decision was the vague job description that was offered with regard to the proposed employment. The director expressly stated that the lack of specific information about the beneficiary's daily job duties precluded a favorable finding, as he was unable to determine that the beneficiary's time would primarily be allocated to managerial- or executive-level tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to 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, while the petitioner has offered several job descriptions for the proposed employment, all are equally vague and fail to specify the beneficiary's actual daily tasks sufficiently to convey a meaningful understanding of how the beneficiary meets the general job responsibilities that have been assigned to her. The AAO acknowledges that the beneficiary's placement within the petitioner's organizational hierarchy understandably empowers her with a heightened degree of discretionary authority over policy matters and other matters dealing with the petitioner's finances and personnel. However, published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5).

Additionally, while the petitioner's sales manager has been tasked with the responsibility of growing the company's sales, it is unclear whether this responsibility involves actually selling the petitioner's products and services. Thus, as no one within the petitioner's organization has been specifically tasked with sales and marketing job duties, the AAO cannot overlook the possibility that the beneficiary would be directly involved in performing these daily operational tasks, which, while clearly essential to the petitioner's financial stability and future success, are outside the realm of what is deemed to be within a qualifying managerial or executive capacity.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. Neither the beneficiary's own job descriptions nor the job descriptions of the petitioner's support personnel establish that the beneficiary would be relieved from having to allocate the primary portion of her time to performing non-qualifying job duties. While the AAO recognizes the beneficiary's level of authority and her placement with respect to others within the petitioner's organizational hierarchy, these factors, when unaccompanied by a detailed delineation of the beneficiary's proposed job duties, are not sufficient to establish that the beneficiary would be employed within a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, the AAO finds that the information provided with regard to the beneficiary's employment abroad is equally lacking adequate details describing the beneficiary's daily tasks. As such, while not addressed in the director's denial, the AAO concludes that the petitioner failed to establish that it meets the provisions of 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 her entry to the United States as a nonimmigrant to work for the same employer.

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. 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 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, any previous nonimmigrant petition that was approved based on the same unsupported assertions that are contained in the current record 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.