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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**

**PUBLIC COPY**

34

DATE: SEP 15 2011 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:  
Beneficiary:

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, 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 that was established in the State of Connecticut. It seeks to employ the beneficiary as its managing director. 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 finding that the petitioner is ineligible for the immigration benefit sought based on five independent grounds of ineligibility. Namely, the director found that the petitioner failed to establish that 1) the beneficiary would be employed in the United States in a managerial or executive capacity; 2) the beneficiary was employed abroad in a qualifying managerial or executive capacity; 3) the petitioner had been doing business for at least one year prior to filing the Form I-140; 4) the foreign entity that previously employed the beneficiary continues to do business; and 5) the beneficiary's foreign and proposed U.S. employers have a qualifying relationship.

On appeal, counsel disputes all five grounds of ineligibility and contends that the director failed to consider the petitioner's previously approved L-1 petitions that were filed on behalf of the same beneficiary. Counsel provided an appellate brief in support of his assertions.

The AAO has reviewed the record in its entirety and, while the determination has been made to affirm the director's denial of the petitioner's Form I-140, the AAO finds that sufficient documentation has been submitted to establish by a preponderance of the evidence that the petitioner meets the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D). The AAO also finds that the record contains sufficient evidence to establish that foreign entity is currently doing business. As such, the AAO hereby withdraws the third and fourth grounds as bases for denial and will address the three remaining grounds 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 first two 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 beneficiary, in his capacity as managing director of the petitioning entity, submitted a statement dated September 16, 2008 in which he stated that during his position as managing director of [REDACTED] the foreign entity where he was previously employed, he was responsible for directing expansion initiatives, developing and approving marketing strategies, directing and developing corporate sales, communicating with department managers, and creating means to ensure effective use of staff and capital resources.

With regard to his proposed position with the U.S. entity, the beneficiary listed the following nine components that would comprise his U.S. employment:

- Direct instruction of SOP's and various checks and balance systems;
- Oversee incorporation and implementation of new and cutting-edge design technologies;
- Direct market development and distribution throughout the United States and the world through defined distribution channels;
- Actively participate in consulting with high-end clients and promoting [the petitioner]'s brand of creative solutions and services;
- Ensure the company's ability to meet its corporate obligations;
- Ensure the company's ability to realize its projected annual sales figures;
- Develop and staff the U.S. enterprise;
- Direct and implement marketing initiatives; and
- Set overall budgets for the U.S. enterprise.

The director subsequently issued a notice of intent to deny (NOID) the petition, instructing the petitioner to provide additional documentation in order to overcome the deficiencies cited in the NOID. The list of deficiencies included insufficient evidence establishing that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the director requested that the petitioner provide definitive statements listing the beneficiary's job duties with the foreign entity and his proposed job duties with the U.S. entity. Each statement was to include a list of the beneficiary's job duties accompanied by a percentage breakdown indicating how much time the beneficiary allocated and would allocate to each of the listed duties. The petitioner was also asked to indicate the number of employees the beneficiary supervised and would supervise, whether such employees can be deemed managerial or supervisory, and their respective educational levels and functions within each organization. As additional supporting evidence, the petitioner was instructed to provide any IRS Form W-2 and or Form 1099 statements issued to employees in 2008.

In response, counsel provided a letter dated March 17, 2009 in which he challenged the issuance of a NOID, citing an interoffice USCIS memorandum in support of his argument. The AAO notes, however, that 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, the provisions of 8 C.F.R. § 103.2(b)(8)(ii) permit the director to use his discretion in issuing a NOID or request for evidence when a determination is made that the petitioner has not established eligibility either as a result of failure to submit required initial evidence or some other deficiency.

Although counsel restated the job description provided earlier in support of the petition with regard to the beneficiary's proposed employment, none of the requested information detailing the beneficiary's specific job duties and time allocated to those duties was provided. Instead counsel stated that the beneficiary devotes 100% of his time to expanding the petitioner's market share and directing the company's daily operations. Counsel referred to the petitioner's previously approved L-1 petitions filed on behalf of the same beneficiary as evidence that the beneficiary qualifies for the immigrant classification sought in the present matter.

Counsel declined to have the petitioner submit any employee financial records, stating that such records are confidential and asserting that there is no legal authority specifically requiring the petitioner to comply with the director's request for such documentation. As previously noted, however, the director's authority to request additional evidence is expressly stated in 8 C.F.R. § 103.2(b)(8)(ii), which allows the director ample discretion in determining which evidence to request in order to assess eligibility. Based on the provisions of 8 C.F.R. § 103.2(b)(8)(ii), the director need not be given express authority to request specific documentation. Rather, it is implied that any request is reasonable so long as it is directly relevant to the type of benefit sought. Here, the petitioner seeks to classify the beneficiary as a multinational manager or executive. Given that this classification requires the petitioner to establish that the beneficiary's job duties with the petitioning U.S. entity are primarily within a qualifying capacity, the director is justified in requesting information about the employees who would be relieving the beneficiary from having to perform non-qualifying operational tasks. Where there is no staff or where staffing is extremely limited, the petitioner's ability to employ the beneficiary in a primarily managerial or executive capacity will logically come into question. See *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 notes that the petitioner failed to provide any additional information regarding the beneficiary's job duties during his employment abroad, despite the fact that the director expressly instructed the petitioner to supplement the record with this pertinent information. 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).

The petitioner did, however, provide two organizational charts—one pertaining to the foreign entity where the beneficiary was previously employed and the other pertaining to the U.S. entity that is now seeking to employ the beneficiary. With regard to the foreign entity's hierarchy, the chart depicts the beneficiary at the top-most level with the senior creative designer and the creative director as his two direct subordinates, followed by three designers at the bottom tier of the hierarchy. The chart shows that two designers are the direct subordinates of the senior creative designer and one designer is the direct subordinate of the creative director.

The petitioner's organizational chart also depicts the beneficiary at the top of the organizational hierarchy. However, the hierarchy itself is comprised of three individuals with the design engineer depicted as the beneficiary's direct subordinate and a prepress designer is depicted as the subordinate of the design engineer. Although instructed to provide information about the educational credentials and job duties pertaining to the beneficiary's subordinates at each entity, the petitioner failed to do so.

In a decision dated September 27, 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 in the United States in a qualifying managerial or executive capacity. The director found that the petitioner provided a vague description of the beneficiary's foreign and proposed employment, citing broad job responsibilities rather than specific tasks. The director also noted that an organization that is lacking in sufficient support personnel may be unable to employ the beneficiary in a managerial or executive capacity in which the primary portion of the beneficiary's time is allocated to qualifying tasks.

On appeal, counsel challenges the director's findings, relying heavily on the previously approved L-1 petitions as indicators of the petitioner's eligibility for the immigrant preference visa sought herein. Counsel asserts that the director applied a heightened burden of proof in rendering an erroneous determination with regard to the petitioner's eligibility.

The AAO finds that counsel's arguments are not persuasive and fail to overcome the director's adverse decision. 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). Published case law also focuses on the significance 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). The AAO will then consider the beneficiary's job description in light of the employer's organizational hierarchy, the beneficiary's position therein, and the employer's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

While the petitioner provided a considerably lengthier job description regarding the beneficiary's proposed employment than the description pertaining to the foreign employment, neither job description was adequate in conveying a meaningful understanding of the beneficiary's actual job duties in either position. Both job descriptions focus on the beneficiary's discretionary authority and both organizational charts depict the beneficiary at the top-most level within the respective hierarchies. However, as noted above, these elements alone, without a detailed job description, are not sufficient to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. With regard to the foreign job description, the petitioner focused on the beneficiary's directorial and leadership roles within the hierarchy. However, as for the beneficiary's actual daily job duties, the record is devoid of any specific information, despite the fact that the director expressly requested a detailed statement of job duties in the NOID. Similarly, the petitioner focused on the beneficiary's directorial and oversight responsibilities in his proposed employment. However, little was conveyed about what tasks the beneficiary would actually be performing on a daily basis. Moreover, in light of the petitioner's limited support staff, the AAO questions how the beneficiary's role in market development and marketing initiatives can be limited to directing these functions when the organizational hierarchy at the time of filing did not include any marketing personnel. The petitioner also failed to explain what specific tasks the beneficiary would perform in order to ensure that the company is able to meet its corporate obligations and realize annual sales figures.

Lastly, the AAO observes that an unspecified portion of the beneficiary's time would be allocated to consulting with "high-end" clients and promoting the petitioner's services, which are non-qualifying operational tasks. 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). As the petitioner failed to comply with the director's request for a percentage breakdown showing how the beneficiary's time will be allocated, the AAO cannot determine with any degree of certainty that the beneficiary would allocate the primary portion of his time to performing tasks within a qualifying capacity.

In summary, the AAO finds that the petitioner failed to provide requested information that the director and the AAO both find necessary in order to approve the petition. While counsel repeatedly mentioned the petitioner's reliance on previously approved nonimmigrant petitions and further indicated that such approvals should guide USCIS's decision in the present matter, the AAO finds that counsel's assertions are not supported by any statute, regulation, or precedent case law. It must be noted 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 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 unsupported assertions that are contained in the current record, the approvals 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. at 597. 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 AAO concludes that the evidence furnished is insufficient to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Therefore, based on these two initial independent findings, the instant petition may not be approved.

The remaining issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In support of the Form I-140, the petitioner provided articles of organization in which the beneficiary was named as a manager. Although item 7b of the SS-4 Application for Employer Identification Number indicated that the beneficiary is the petitioner's principal officer, general partner, grantor, owner or trustor, no further information was provided specifying which of these titles is applicable. With regard to the foreign entity, the petitioner provided a certificate of incorporation as well as a corporate document (untitled) identifying the beneficiary as one of the company's two directors. The documentation submitted did not establish the ownership of either the foreign or U.S. entity.

Accordingly, the director denied the petition, citing the petitioner's failure to provide evidence of a qualifying relationship with the beneficiary's foreign employer as one of the grounds for denial. The director acknowledged the petitioner's submission of its articles of organization, but pointed out that this document does not establish who owns the petitioning entity. The director further noted that the foreign entity's certificate of registration establishes the identities of the company's directors, but does not establish who owns the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes

of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In general, to determine ownership, a company's corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, while the petitioner has supplemented the record on appeal with documentation that establishes the beneficiary as owner of 50% of the foreign entity, no additional evidence was provided to determine who owns the U.S. entity. In light of the claim that the petitioner is an affiliate of the foreign entity by virtue of the beneficiary's 50% ownership of the latter and 100% ownership of the former, the fact that the petitioner has failed to provide evidence establishing its ownership precludes the AAO from being able to determine whether the two entities are commonly owned. Despite counsel's numerous assertions claiming that the beneficiary is the sole owner of the U.S. entity, the only evidence on record establishes only that the beneficiary is the sole manager of that entity. The documents that the petitioner submitted are silent as to the issue of ownership. The AAO notes that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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).

In conclusion, the AAO finds that the record lacks sufficient evidence establishing the petitioner's eligibility for the immigration benefit sought. While counsel asserts that the director is obligated to provide the petitioner with an explanation to clarify why an adverse decision has been issued after the approval of several nonimmigrant petitions, there is no statutory or regulatory provision that supports this assertion.

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.