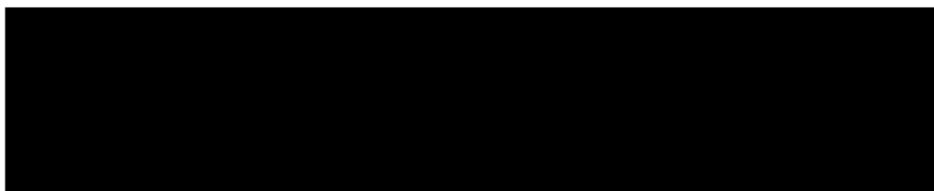


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



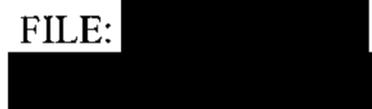
**U.S. Citizenship
and Immigration
Services**

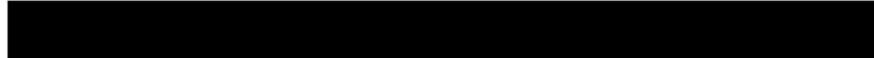


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DATE: **AUG 13 2012**

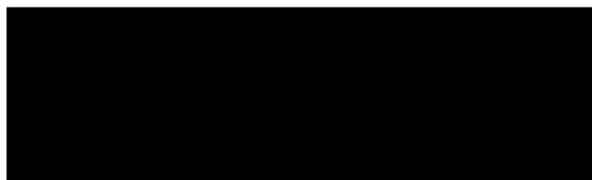
OFFICE: TEXAS SERVICE CENTER

FILE: 

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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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 Texas 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.

In support of the Form I-140 the petitioner submitted a statement dated April 24, 2008, which contained relevant information pertaining to the petitioner's eligibility, including an overview of the petitioner's business and a brief description of the beneficiary's proposed employment. The petitioner also provided supporting evidence in the form of financial and corporate documents.

The director reviewed the petitioner's submissions and determined that certain eligibility criteria had not been met. The director therefore issued a request for additional evidence (RFE) dated January 12, 2009 informing the petitioner that the record lacked evidence showing that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner provided a response statement dated February 10, 2009, which included a brief description of the beneficiary's U.S. responsibilities as well as those of the cooks and waiters whom the beneficiary would oversee as his direct subordinates. The petitioner also submitted a copy of its 2008 tax return, which showed that the petitioner paid \$27,128 in salaries and wages.

After reviewing the record, the director concluded that the job description the petitioner provided with regard to the proposed employment failed to establish that the beneficiary would be relieved from having to primarily perform non-qualifying job duties and that he therefore would not be employed in the United States in a qualifying managerial or executive capacity. In light of these findings, the director issued a decision dated August 6, 2009 denying the petition.

On appeal, the petitioner's prior counsel and his current counsel each provided an appellate brief disputing the director's decision. Both attorneys provided overviews of the beneficiary's proposed employment. Current counsel focuses on the previously approved L-1 nonimmigrant petitions that were filed on behalf of the same beneficiary, contending that the petitioner had established eligibility based on the same facts that are currently being presented in support of the instant immigrant petition. Current counsel provides a brief procedural history of the approvals of the previously filed nonimmigrant petitions. Counsel also seeks "equitable relief" in the form of U.S. Citizenship and Immigration Services' (USCIS) acceptance of the beneficiary's "untimely filing of [the] Form I-485, Application to Adjust Status."

The AAO finds that neither counsel's brief is persuasive in overcoming the basis for denial. The discussion below will provide an analysis of the relevant documentation and will explain the underlying reasoning for the AAO's decision.

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.

Before addressing the basis for denial, it is noted that the AAO has no jurisdiction to consider any matters concerning the filing of the beneficiary's Form I-485. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO only has jurisdiction over adjustment applications "when denied solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in section 245(e) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(JJ) (as in effect on February 28, 2003). The adjudication of the beneficiary's adjustment application does not fall within the jurisdiction of the AAO and thus will not be addressed in this decision.

Proceeding now to the basis for denial, the AAO will address the primary issue in this matter, which is to determine whether the petitioner provided sufficient evidence to establish that it 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 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 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).

The job descriptions provided in this matter strongly indicate that the primary portion of the beneficiary's time would be allocated to overseeing a non-managerial and non-professional restaurant staff, which, pursuant to the provisions of section 101(a)(44)(A)(ii) of the Act, would be deemed to be non-qualifying job duties, and to the performance of the petitioner's administrative and operational tasks, which would also be classified as non-qualifying. 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 the 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). Not only does the petitioner's organizational chart show that the beneficiary's subordinates are the petitioner's non-managerial and non-

professional restaurant staff, but the various job descriptions further indicate that the beneficiary would also conduct the petitioner's market research.

While the petitioner broadly indicates that the beneficiary would review and approve the petitioner's marketing strategy and establish sales and marketing goals, the petitioner's organizational chart shows that the petitioner does not have a marketing or sales staff to actually market and sell the petitioner's products and services. It is therefore logical to conclude that the beneficiary himself would assume the non-qualifying marketing tasks that would help promote the petitioner's restaurant business to potential customers.

Despite the likelihood that the beneficiary would assume a heightened degree of discretionary authority as a result of his position within the petitioner's organizational hierarchy, the AAO cannot overlook the non-qualifying nature of the job duties that would occupy the primary portion of the beneficiary's time. While the petitioner claims that the restaurant related tasks would be performed by the cooks and waiters, this assertion does not establish that the petitioner's non-qualifying tasks are limited exclusively to cooking the food and waiting on customers. As noted above, the record strongly indicates that there are various administrative and operational tasks that would ultimately be performed by the beneficiary, as there is no one within the organizational hierarchy other than the beneficiary to perform them.

The record is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The fact that an individual oversees non-professional employees within the scope of a small business does not necessarily establish that the beneficiary merits classification as a multinational manager or executive within the meaning of section 101(a)(44) of the Act. As noted above, the record does not establish that the beneficiary would allocate his time primarily to managing professional or managerial staff or to directing the management of the organization. Rather, the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, while not previously addressed in the director's decision, the AAO finds that the petitioner also failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

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.

Lastly, with regard to counsel's reliance on the petitioner's previously approved L-1A petitions as evidence of eligibility in the present matter, the AAO notes that each nonimmigrant and immigrant petition is a separate

record of proceeding with a separate burden of proof and 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. 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).

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.