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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

B4

[redacted]

DATE: FEB 0 9 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 that was organized in the State of Georgia. It seeks to employ the beneficiary as its managing member/CEO. 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 number of supporting documents, including the U.S. entity's organizational chart, tax and payroll documents, bank statements, and evidence of the petitioner's U.S. business operation. The petitioner also provided an undated supporting statement from counsel. The statement included a percentage breakdown of the beneficiary's proposed position and brief job descriptions for the petitioner's other employees.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a notice of intent to deny (NOID) dated June 10, 2009 informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary would be employed in the United States within a qualifying managerial or executive capacity.

The petitioner provided a response, which included a statement dated July 1, 2009. The statement reiterated the previously provided percentage breakdown of the beneficiary's proposed position with the U.S. entity and provided information about the petitioner's other employees, including their roles with the U.S. entity and their educational credentials.

After reviewing the record, the director concluded that the petitioner failed to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director therefore issued a decision dated August 10, 2009 denying the petition. The director found that the beneficiary would be primarily responsible for conducting market research, acquiring new suppliers, negotiating prices, researching new business opportunities, and for performing other non-managerial and non-executive functions. The director also found that the beneficiary would not oversee the work of managerial, professional, or supervisory employees.

On appeal, counsel submits a brief in which she disputes the denial, urging the AAO to take into account the petitioner's reasonable needs and to consider its early stage of development. Counsel also reiterates the previously provided percentage breakdown discussing the beneficiary's proposed duties and responsibilities and contends that U.S. Citizenship and Immigration Services (USCIS) has already accepted the beneficiary's managerial and executive capacity based on its prior approvals of the petitioner's nonimmigrant petitions filed on behalf of the same beneficiary. Lastly, counsel provides information about two of the petitioner's latest hires, including their job descriptions, yearly salaries, and educational credentials.

The AAO notes that all of the petitioner's submissions have been reviewed. All relevant documentation that pertains directly to the key issue in this matter will be fully addressed in the 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 primary issue to be addressed in this proceeding is the beneficiary's employment capacity in his proposed position with the petitioning U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted 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.

As a preliminary matter, the AAO notes that the instant petition must be evaluated on the basis of evidence that existed at the time of filing. 8 C.F.R. § 103.2(b)(1). A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As such, any employees the petitioner hired after the instant petition was filed will not be considered for the purpose of determining the petitioner's ability to employ the beneficiary in a qualifying capacity at the time the petition was filed.

Next, with regard to counsel's assertion that consideration of staffing levels would allow USCIS to approve a petition filed by a start-up entity, the AAO notes that the regulations that govern the filing of an immigrant petition are not the same as those that govern the filing of an L-1A nonimmigrant petition. Specifically, while the regulations that pertain to the filing of an L-1A nonimmigrant petition include provisions for a new office petitioner that has been operating for less than one year, the regulations that pertain to the filing of a Form I-140 immigrant petition do not have similar provisions. *See* 8 C.F.R. § 214.2(l)(ii)(F). To the contrary, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) expressly states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. Thus, while the petitioner's reasonable needs are certainly taken into account when its staffing levels are evaluated, the petitioner's stage of development will not serve as a basis to excuse the petitioner from having to meet certain key filing requirements. In other words, if the petitioner's stage of development is such that would preclude the beneficiary from allocating the primary portion of his time to the performance of qualifying tasks within a managerial or executive capacity, such a petitioner would not warrant approval of an immigrant petition that seeks to classify the beneficiary as a multinational manager or executive. That being said, the AAO must also note that a small staffing structure alone will not serve as a basis for denying the petition, unless the staffing structure is such that it prevents the beneficiary from being able to allocate the primary portion of his time to performing tasks within a qualifying capacity.

Additionally, 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). 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 the beneficiary's proposed employment is comprised of both qualifying and non-qualifying job duties. As such, the job description in this instance is a crucial tool for determining just how much of the beneficiary's time would be allocated to the performance of qualifying tasks versus those that would be deemed as non-qualifying.

The record shows that the director attempted to elicit pertinent information to establish how much time the beneficiary plans to spend performing qualifying managerial- or executive- level tasks. Specifically, the director instructed the petitioner to list the beneficiary's proposed job duties and to assign a percentage of time to each item on the list. However, a review of the petitioner's response shows that the job description that was originally submitted in support of the Form I-140 was again resubmitted in response to the NOID. The job description broadly stated that 45% of the beneficiary's time would be allocated to supplier development and business strategy, which would include the following: cultivating business relationships with new and existing vendors and suppliers, conducting market research, seeking out new business opportunities, negotiating contracts, and implementing programs to ensure beneficial distribution agreements. Aside from the latter job duty, it is unclear how any of these job duties can be deemed as qualifying managerial or executive tasks. The fact that the petitioner failed to assign a percentage of time to each individual job duty precludes the AAO from being able to determine the specific time allocations.

The AAO also finds that the petitioner has not provided sufficient information about the beneficiary's role in the management of non-managerial, non-professional, or non-supervisory employees. While the petitioner claimed that 20% of the beneficiary's time would include directing and coordinating the sales and purchasing team, the record fails to indicate that this team is comprised of managerial, professional or supervisory employees, thus indicating that the time spent working with the sales and purchasing team cannot be deemed as time spent performing tasks at a qualifying managerial or executive level. 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).

Lastly, the AAO finds that counsel improperly relies on the petitioner's previously approved L-1 employment of the beneficiary. 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 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. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as a multinational manager or executive. As stated above, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, nor has the petitioner demonstrated that it has reached 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. In summary, the record does not establish that the primary portion of the beneficiary's time will be allocated to managerial- or executive-level tasks. On the basis of this conclusion, the instant petition may not be approved.

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.