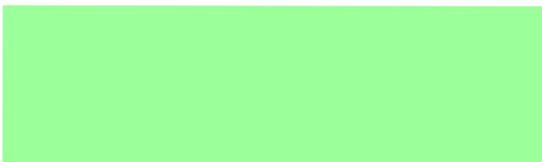


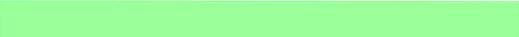


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **DEC 19 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

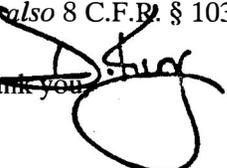
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:  


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you 

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Nebraska Service Center Director denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, 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 petitioner, a California corporation, is engaged in real estate project management, and claims to be a subsidiary of [REDACTED] the beneficiary's former employer in Russia. The petitioner seeks to employ the beneficiary in the position of Head of Concepts Development Division and Business Development.

The director denied the petition on May 5, 2014, concluding that the petitioner failed to establish the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, counsel submits a brief disputing the director's adverse findings.

## I. THE LAW

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.

Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been doing business for at least one year. In turn, 8 C.F.R. § 204.5(j)(2) provides that "[d]oing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

## II. THE ISSUE ON APPEAL

### A. U.S. Employment in a Managerial or Executive Capacity

The issue to be addressed is whether the petitioner established that it will employ the beneficiary 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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

## 1. Facts

The petitioner has offered the beneficiary the position of Head of Concepts Development Division and Business Development. In a letter dated June 25, 2014, the petitioner described the beneficiary's proposed duties as a functional manager who will "manage an essential Concepts

Development and Business Development function of [the petitioner]." The petitioner provided further details of the proffered position as follows:

**Directing and overseeing development and delivery of the product – 55%:**

- Manages the multi-functional project teams providing Clients of [the petitioner] with professional project management services and specific project solutions by developing project programs, professional expertise, land use planning, architecture and landscape design, interior design, financial modeling, mechanical and civil engineering, sales and marketing planning support within designated phases of the projects;
- Directs project teams formation and coordinates team structures;
- Assigns tasks to the project team members and provides them with strategic guidance;
- Coordinates and provides strategic guidance for work flow and processes;
- Delineates responsibilities to the Project teams and its leaders;
- Directs and approves project concepts, approach, budgets and schedules;
- Manages project design;
- Coordinates project-related processes and procedures for major real estate projects;
- Reviews and approves major change recommendations by the project teams leaders;
- Controls interim and final project deliverables;
- Controls project teams accountability for following schedules and staying within the budget;
- Supervises design and delivery of presentations for major accounts;
- Manages all Client relationships, including contracts review and approval;
- Coordinates project workshops (charettes) [sic] with Client's teams and professional teams ensuring delivery of comprehensive solutions to project needs.

**Directing and coordinating talent development in line with strategic development needs and project requirements – 25%:**

- Determines staffing needs and notifies executive management of [the petitioner] about new hires (employees, subcontractors, and third party service providers);
- Directs and coordinates market research for potential hires;
- Oversees and periodically assesses project teams performance;
- Coordinates and manages analysis of the area of subcontractors' expertise based on her professional opinion with the purpose of determination of their capability to satisfy project requirements;
- Hires and terminates senior and junior staff members;
- Hires and terminates subcontractors;
- Controls new principals and potential successors' identification process and provides them with strategic guidance.

**Leading and managing business development tasks and processes – 20%**

- Directs marketing intelligence and market research, both in-house and with external subcontractors;

- Manages all providers of marketing services to the Company (media and research agencies, independent providers, branding agencies, design agencies, and etc.);
- Coordinates brand architecture development for [the petitioner], supervises development of communication strategy, directs and approves all branding efforts;
- Oversees design and maintenance of [the petitioner's] web site;
- Directs development of company presentations;
- Controls development of presentation and marketing material for [the petitioner] and [redacted] coordinates and approves targeting and distribution;
- Oversees new project development and implementation strategy for the project management services and concepts design development;
- Develops and implements pricing policies;
- Coordinates discounts and special promotional pricing for products or services;
- Directs contract approval procedure, ensures protection of company interests;
- Directs participation in competitive bids for new projects, approves marketing and presentation material for bids.

On January 24, 2014, the director sent a request for evidence ("RFE"). In part, the director requested a detailed job description of the beneficiary's specific tasks on a normal business day including the percentage of time spent on each task. In addition, the director requested a list of employees including the names of all employees, employees' titles, a clear description of their job duties, educational level, and whether they worked part-time or full-time. The director also requested a description of the foreign entity's products and services, including the exact production and administrative tasks necessary to produce the product and services, and who performs those tasks, and tasks related to goal-setting, policy-making, and discretionary decision-making. Further, the director requested an organizational chart and Form W-2 and/or 1099 MISC for all employees employed by the petitioner in 2013.

In response, the petitioner resubmitted the beneficiary's job duties for the proffered position. The petitioner also submitted the beneficiary's detailed work schedule. The petitioner also submitted an organizational chart of the petitioner, and a more specific chart of the petitioner's "Intra-Company Concepts Development Division and Business Development 2014." In this chart, the petitioner is the Vice President and Head of Concepts Development Decision and Business Development who in turn supervises the following: Director, Business Development, IT Administrator (Russia office); Marketing (contract); Designer (contract); Director, Planning (1099); [redacted] Junior Architect (1099); two Senior Project Managers; two Project Managers; Senior Project Manager ([redacted]) and manager. The organizational chart also lists six project teams that work with the petitioner. As noted in the RFE response, the petitioner stated that the beneficiary "supervises project teams of major U.S. architectural companies retained by [the petitioner] for the clients of [the petitioner]." The petitioner also stated that it does "not pay salary directly to the project team contractors" but instead "bills clients for the work done and transfers money to the architectural firms whose project teams performed the work." The petitioner also provided Forms W-2 and 1099 for individuals employed by the petitioner in 2013.

The director denied the petition concluding the petitioner failed to establish that the beneficiary would be employed by the petitioner in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary will primarily do on a day-to-day basis.

## 2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's proposed job duties. See 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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 this information in light of other relevant factors, including job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary would allocate his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's proposed duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner stated vague duties such as the beneficiary will "direct project teams formation and coordinates team structures;" "coordinates and provides strategic guidance for work flow and processes;" "delineates responsibilities to the Project teams and its leaders;" "coordinates project-related processes and procedures for major real estate projects;" and, "oversees new project development and implementation strategy for the project management services and concepts design development. The petitioner did not, however, define the petitioner's vision, mission, goals and policies, or clarify the strategy plan and the financial and operations responsibilities of the organization. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will "manage project design;" "coordinates project-related processes and procedures for major real estate projects;" "controls interim and final project deliverables;" "manages all Client relationships, including contracts review and approval;" "directs and coordinates market research for potential hires;" "manages all providers of marketing services to the Company (media and research agencies, independent providers, branding agencies, design agencies, and etc.);" "develops and implements pricing policies;" and, "directs participation in competitive bids for new projects, approves marketing and presentation material for bids." It appears that the beneficiary will be in charge of market research, marketing, negotiations and financial operations rather than directing such activities through subordinate employees. 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 Intn'l.*, 19 I&N Dec. at 604.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary will perform are only incidental to the position in question. 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'r 1988).

The petitioner states that the beneficiary is a function manager since she will manage the essential function of the Concepts Development and Business Development for the petitioner. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function for the petitioner.

In addition, the information regarding the staff of the petitioner is not consistent. The petitioner submitted an organizational chart titled, "Intra-Company Concepts Development Division and Business Development 2014." In this chart, the petitioner is the Vice President and Head of Concepts Development Decision and Business Development who in turn supervises the following: Director, Business Development, IT Administrator (Russia office); Marketing (contract); Designer (contract); Director, Planning (1099); [REDACTED] Junior Architect (1099); two Senior Project Managers; two Project Managers; Senior Project Manager ([REDACTED]) and manager. The organizational chart also lists six project teams that work with the petitioner. However, upon review of the Forms W-2 and Forms 1099 for 2013, several of the employees listed on the organizational chart do not appear to be employees or contract workers for the petitioner. For example, the petitioner submitted five Forms 1099 for 2013; however, the organizational chart of the Concepts Development Division and Business Development department indicated 11 contract employees or contracted companies working with the petitioner. In addition, all five Forms 1099 for 2013 were for amounts under \$7,000. Thus, it does not appear that any of the contract workers were full-time positions. In addition, the organizational chart indicated that some of the employees are based on Russia but the petitioner did not provide any evidence to establish that these employees from the parent company are in fact working for the petitioner.

In addition, the petitioner submitted two Forms W-2 for 2013 for the beneficiary and [REDACTED] who is the Regional Director, East Coast and not a subordinate of the beneficiary. Thus, it is not clear which employees, if any, are the beneficiary's subordinates who would relieve her from performing the tasks necessary to provide a service. 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).

Although the petitioner states that the petitioner has contractual employees, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary performed abroad. While the petitioner has provided a breakdown of the percentage of time the beneficiary spent on her duties, the petitioner has not articulated whether each duty was managerial or executive.

On appeal, the petitioner contends that the beneficiary has already met regulatory and evidentiary criteria with U.S. Citizenship and Immigration Services ("USCIS") previous granted L-1A classification to the beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *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). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. We are 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'r 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).

Furthermore, our 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, we 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).

### III. CONCLUSION

The petition will be denied and the appeal dismissed 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.