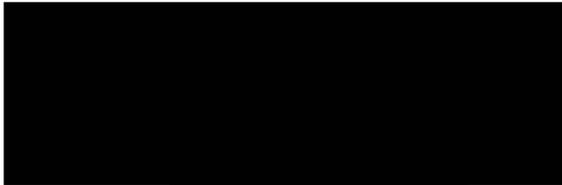




U.S. Citizenship  
and Immigration  
Services

B4



FILE: [REDACTED]  
LIN 07 230 53120

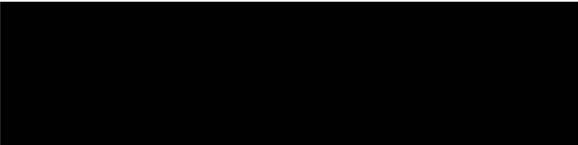
OFFICE: NEBRASKA SERVICE CENTER

Date: DEC 01 2009

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation that seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief, arguing that the director failed to give due deference to U.S. Citizenship and Immigration Service's (USCIS) prior approval of the nonimmigrant Form I-129 petition filed on behalf of the same beneficiary.

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 two primary 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 petitioner submitted a letter dated July 12, 2007, which included descriptions of the beneficiary's employment abroad as well as his proposed employment in the United States.

As the director has included the petitioner's statements in the denial, the AAO need not repeat this information in the present decision. The petitioner also provided an audited financial statement for 2006 and a copy of its 2005 annual report.

After reviewing the petitioner's initial submissions, the director determined that further documents and information would be necessary in order to determine the petitioner's eligibility to classify the beneficiary in the immigrant category of multinational manager or executive. Accordingly, on July 18, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed list of specific daily tasks the beneficiary performed in his position abroad and those he would perform in his proposed position with the U.S. entity. The petitioner was instructed to assign a percentage of time that would be allotted to each of the enumerated tasks with regard to both positions. The petitioner was also asked to provide detailed organizational charts illustrating the staffing hierarchy of each entity and depicting the beneficiary's position with respect to others within each organization. Additionally, the director asked the petitioner to provide evidence of the educational credentials of the beneficiary's subordinates in the foreign and U.S. positions.

In response, counsel provided a letter dated September 8, 2008 in which he challenged the propriety of the director's request for additional descriptions of the beneficiary's job duties. Counsel referenced a prior USCIS internal memorandum in support of the assertion that the director should have expressly discussed the deficiencies of the prior job descriptions. The referenced memorandum merely states that "[i]t can be helpful to customers to articulate how and why information already submitted is not sufficient or persuasive on a particular issue." Memorandum by William R. Yates, USCIS Associate Director, Operations, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" (February 16, 2005). The AAO notes, however, that much of the memorandum's content was superseded by regulation in 2007 when USCIS amended 8 C.F.R. §103.2(b)(8) to allow more flexibility in the RFE process. *See* 72 Fed. Reg. 19100 (April 17, 2007). Even if the memorandum is considered guidance as to what might be "helpful," the AAO notes that the director's RFE in this matter was sufficiently detailed to instruct the petitioner of the specific deficiencies and allow the petitioner to make an informed response.

Furthermore, USCIS memoranda articulate internal guidelines for service personnel, but 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)).

The binding regulation at 8 C.F.R. §103.2(b)(8) states, in part, the following with regard to the director's authority to request additional evidence:

(ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) *Other evidence.* If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for

ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

Upon review, the director's RFE complied with the requirements of 8 C.F.R. §103.2(b)(8). Even if the director's RFE had been deficient, it is not clear what remedy would be available on appeal since the petitioner again declined to submit the requested evidence in support of the appeal. Rather than questioning the propriety of the director's request, the AAO's review of this petition would have been greatly aided if counsel had simply advised the petitioner on how best to comply with the RFE instructions, as the petitioner's failure to do so was a contributing factor to the director's adverse finding.

Counsel also questioned the director's decision to issue an RFE rather than approve the petition in light of the petitioner's prior approval of an L-1A nonimmigrant petition on behalf of the same beneficiary. Thus, in deference to counsel's faulty reasoning, the petitioner has chosen not to comply with the director's express request for more detailed job descriptions and organizational charts illustrating the hierarchies of the beneficiary's foreign and U.S. employers. As properly noted by the director, the petitioner's 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).

Accordingly, in a decision dated September 24, 2008, the director denied the petition concluding that the petitioner failed to establish: 1) that the beneficiary was employed abroad in a qualifying capacity, and 2) that the beneficiary would be employed in the United States in a qualifying capacity. The director heavily focused on the petitioner's failure to comply with the request for additional evidence and information.

On appeal, counsel vehemently disputes the denial of the petition, again relying heavily on the petitioner's approval of a previously filed nonimmigrant petition. Counsel cites the district court case of *Tapis International v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000), in which the district court determined that, in denying an H-1B nonimmigrant petition, USCIS's failure to address its prior approval of the same nonimmigrant petition amounted to an abuse of discretion.

Counsel's argument, however, is not persuasive for a number of reasons. First, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, however the analysis does not have to be followed as a matter of law. *Id.* at 719.

Second, even if the AAO were to defer to the court's finding in the case cited by counsel, that case can be easily distinguished from the matter at hand. Namely, the cited case deals with a petitioner seeking virtually the same benefit presumably on the basis of the same statutory and regulatory provisions. In the present matter, the immigration benefit previously accorded the petitioner, i.e., allowing the petitioner to employ the beneficiary under the nonimmigrant visa classification of L-1A intracompany transferee, is substantially

different from the immigration benefit sought herein, i.e., the permission to employ the beneficiary in the United States permanently in the immigrant visa category of multinational manager or executive. These two classifications are different and as such, the statutory and regulatory requirements that apply to each classification are different as well.

Third, there is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant and immigrant petitions to be combined into a single record of proceeding. The petitioner's attempt to cite legal authority to the contrary is limited to 8 C.F.R. § 103.8(d), relating to "Definitions pertaining to availability of information under the Freedom of Information Act." Consistent with its title, this regulation allows petitioners to make FOIA requests. Section § 103.8(d) does not explicitly or implicitly require information relating to the petitioner's prior I-129 petition(s) to be included in the record for either a subsequent Form I-129 or for an immigrant visa petition. Instead, the FOIA regulation emphasizes that each petition filing is a separate proceeding with a separate record.

Furthermore, given the diverse filing jurisdiction for nonimmigrant petitions and other USCIS applications, the AAO notes that it would result in extreme delays in the processing of petitions and applications if USCIS required previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated. Based on current USCIS procedures, the initial nonimmigrant petition is often adjudicated at the Vermont Service Center, the second extension petition is adjudicated at the California Service Center, and the subsequent immigrant visa petition is adjudicated at either the Nebraska or Texas Service Center. Compounding the difficulties, the completed nonimmigrant files are stored at the USCIS Remote File Maintenance Facility in Harrisonburg, Virginia. Accordingly, the previous files are generally not available to an adjudicator when a subsequent petition is reviewed and it would impose great cost and delay on the agency to impose such a requirement.

Ultimately, a petitioner still has every capability to meet its burden to establish eligibility through its own documentary submissions. *See* section 291 of the Act; 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190. If a petitioner wishes to have previously filed evidence considered by USCIS in its adjudication of a subsequent petition, the petitioner is permitted to submit copies of such evidence that it either maintained itself or received in response to a FOIA request filed in accordance with 6 C.F.R. Part 5. Otherwise, as noted by the director, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

With regard to counsel's critique of USCIS and the suggestion that a higher standard is applied when reviewing immigrant petitions, counsel's comments indicate that he has taken the director's statements out of context and has given little consideration to other statements explaining the director's reasoning. In his explanation, the director makes two independent and equally significant observations. First, he distinguishes the immigrant versus the nonimmigrant petitions, citing the permanent nature of the former versus the temporary nature of the latter as one of those distinctions. Second, he notes that certain types of L-1A petitions, particularly extension petitions for petitioners that do not fall under the definition of "new office," may be approved without any supporting documentation, which may account for many of the erroneous approvals. *See* 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).

Many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant 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).

As the AAO does not have before it the record of proceeding as it concerns the petitioner's previously filed L-1A nonimmigrant petition, it cannot even begin to gauge the basis for USCIS's approval of that petition. As properly stated by the director in the denial, 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. 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. 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 CIS 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).

In the present matter, the director determined, with good cause, that the petitioner failed to provide the information that was necessary to make a finding favorable to the petitioner. On appeal, counsel continues to apply the same deficient reasoning, questioning the director's right to request the additional information that was deemed necessary for the adjudication of the petition. Instead, counsel places great emphasis on the size of the petitioning organization and the beneficiary's position title, which he feels is sufficient to enable USCIS to gauge the beneficiary's placement within the foreign and U.S. organizations. However, counsel is wrong on both counts. Just as the director would not be at liberty to deny a petition on the basis of an organization's small size, nor can the director approve a petition on the basis of an organization's large size. Furthermore, the beneficiary's position titles with either employer cannot be a consideration in determining whether a certain position is within a qualifying managerial or executive capacity. Rather, as repeatedly indicated by the director, in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

In the present matter, the director properly determined that the job descriptions offered in the petitioner's initial support letter failed to explain the specific duties that were performed by the beneficiary in his position with the foreign entity, nor did it provide a sufficient explanation of the specific job duties the beneficiary would be expected to perform in his proposed position. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient, as the actual duties themselves will 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).

Additionally, while counsel suggests that the beneficiary's executive title in the company's annual reports should be sufficient in establishing the executive nature of the beneficiary's foreign and proposed employment, the notion that "common sense would prevail" in determining that the petitioner has met its statutory and regulatory burdens is simply erroneous and entirely unsupported by any statute, regulation, or relevant precedent case law. If in fact the beneficiary has been and would be employed in an executive capacity as counsel so passionately argues, the petitioner should have had no problem describing the specific tasks the beneficiary performs; nor should the petitioner have had difficulty providing the requested

organizational charts, which may have dispelled the director's doubts as to the beneficiary's claimed executive placement within the hierarchy of either organization. Without documentary evidence to support the claims being made, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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). Thus, considering the multiple opportunities to submit the requested evidence, counsel's unsupported arguments in favor of his client do little to persuade the AAO that the petitioner is eligible for the immigration benefit sought such that approval of the petition was warranted.

In summary, the petitioner has failed to establish that the beneficiary was either employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. Therefore, based on these two independent findings, this petition cannot be approved.

Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. 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.