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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 99 150 52260 Office: CALIFORNIA SERVICE CENTER Date: 12 MAR 2002

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)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rose
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the immigrant visa petition and the Associate Commissioner for Examinations dismissed a subsequent appeal. The matter is again before the Associate Commissioner on motion to reopen or reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a Hawaii corporation that is engaged in planning, design, and construction supervision. It seeks to employ the beneficiary as its general manager and, therefore, endeavors to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition because the evidence in the record did not support a finding that the petitioner currently employs and would continue to employ the beneficiary in a primarily managerial or executive capacity. The Associate Commissioner concurred with this decision and dismissed the appeal on November 1, 2000.

On motion, counsel submits a statement¹. Counsel argues, in part, that the prior approval of an L-1 petition in the beneficiary's behalf is sufficient evidence that the proffered position is a primarily executive or managerial position.

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

¹ It is noted that in his December 5, 2000 motion, counsel requested 30 days in which to submit a written brief in support of the motion. While 8 C.F.R. 103.3(a)(2)(vii) allows a petitioner additional time to submit a brief or additional evidence in conjunction with the filing of an appeal, there is no similar provision for a motion to reopen or reconsider; the new facts or reasons for reconsideration must comprise the motion. Nevertheless, counsel's brief, which was submitted after the filing of the motion, will be considered as part of this decision.

employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Both the director and the Associate Commissioner found that the petition could not be approved because the evidence did not establish that the beneficiary was engaged, and would continue to be engaged, in primarily managerial or executive duties. On motion, counsel presents several arguments in rebuttal to the findings of the director and the Associate Commissioner.

First, counsel states that that the decision to deny the petition was arbitrary and capricious because the Service has neither reviewed the original basis for the beneficiary's L-1 classification nor explained what change caused the beneficiary's job to no longer be classifiable as either primarily executive or primarily managerial.

Second, counsel states that the beneficiary works in a primarily executive capacity because he is the "most senior executive in Hawaii, answerable only to the [p]etitioner's [o]fficers and Board of Directors, all of whom are in Japan." Counsel also notes that the beneficiary directs the management of the organization, establishes the petitioner's goals and policies, is authorized to act in behalf of the petitioner without first consulting with the Board of Directors, has responsibility for construction projects with an estimated value of \$62,000,000, and maintains authority over the daily operations of the petitioner beyond the level normally vested in a first-line supervisor.

Third and finally, counsel asserts that the beneficiary supervises professional employees, who are engineers. Counsel notes that the Service alleged that an employee who is subordinate to the beneficiary was not a professional; yet, the Service approved an I-140 petition on the subordinate employee's behalf.

Counsel does not present a persuasive argument on motion. As shall be discussed, the evidence in the record does not sufficiently establish that the beneficiary functions primarily as an executive or manager.

In order to be found eligible for this immigrant visa classification as an executive, the record must clearly show that the beneficiary primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and

- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

See. 8 C.F.R. 204.5(j)(2).

The petitioner fails to establish that the beneficiary works in a primarily executive role because it has not provided sufficient evidence of the beneficiary's actual job duties, which would provide insight into whether the beneficiary primarily directs the management of the organization or a major component or function of the organization.

In the initial petition filing, the petitioner described the duties of the proffered position as follows:

As General Manager, Mr. [REDACTED] has complete control and authority over the functions of our Honolulu subsidiary and its employees, consisting of three engineers with college degrees, including two U.S. worker licensed engineers. . . . Mr. [REDACTED] has the authority to hire, fire and supervise all professional and non-professional staff of our Honolulu subsidiary. There is no one above Mr. [REDACTED] in Honolulu. He reports directly to me in Japan. . . . There is no corporate officer in Hawaii with executive level authority. Mr. [REDACTED] makes all executive decisions involving the Hawaii subsidiary, except for executive decisions involving the Hawaii subsidiary's relationship to our headquarters company in Japan.

Here, the petitioner does not provide any detail about the actual job duties that the beneficiary must execute in order to direct the management of the petitioner. The petitioner merely presents a broad job description for the beneficiary that reiterates the criteria set forth in the definition of executive capacity. For example, the petitioner states that the beneficiary makes "all executive decisions," but does not describe what those types of decisions entail. "Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations." 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).²

The Service notes that an individual who works in an executive capacity may perform duties that would not generally be classified as executive-level tasks. However, the petitioner bears the burden of establishing that the beneficiary *primarily*

² The court in Fedin Bros. Co., Ltd. v. Sava also noted that "[t]he actual duties themselves reveal the true nature of the employment." See id. at 1108.

executes executive duties and any non-executive duties are merely incidental to the position. In this case, the petitioner has not met its burden because the beneficiary's daily activities are unknown, as the petitioner has chosen to submit only a vague job description for the beneficiary. Thus, the Service cannot conclude that the beneficiary is working in an executive capacity as that term is defined in the regulation. (Emphasis added.)

In order to be found eligible for this immigrant visa classification as a manager, the record must clearly show that the beneficiary primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

See. 8 C.F.R. 204.5(j)(2).

The petitioner also fails to show that the beneficiary functions primarily as a manager.

Again, the petitioner's submission of a broad job description for the beneficiary is not adequate evidence of the beneficiary's employment in a primarily managerial capacity. In IKEA US, Inc., v. U.S. Dept. of Justice I.N.S., 48 F. Supp. 2d 22 (D.D.C. 1999), the court upheld the Service's denial of a nonimmigrant L-1A petition because the petitioner failed to document the percentage of time the beneficiary devoted to managerial duties versus his non-managerial duties.

Additionally, although the petitioner submitted the names and job titles of the employees who are allegedly subordinate to the beneficiary, the petitioner did not submit the accompanying job descriptions of these employees. The court in Republic of Transkei

v. INS, 923 F.2d 175 (D.C. Cir. 1991) upheld the Service's denial of a nonimmigrant L-1A petition because the petitioner failed to specify the names or specific duties of persons supervised by the beneficiary. Therefore, while counsel may argue that the beneficiary supervises professionals and managers, without accompanying job descriptions, the Service cannot find that the positions are managerial, supervisory or professional, or that the individuals who hold these positions execute the day-to-day non-managerial duties. Accordingly, there is insufficient evidence to conclude that the beneficiary currently works and will continue to work primarily as a manager.

Finally, counsel states on motion that the Service must approve this I-140 petition because of prior L-1 petition approvals in the beneficiary's behalf. Counsel asserts that the denial of the instant petition is an abuse of discretion and contrary to established Service policy.

The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001). In this petition filing, adequate documentary evidence of the beneficiary's specific job duties and the job duties of the petitioner's other employees is lacking. Thus, if the prior L-1 petition approvals were based upon the same evidence and assertions that are present in this petition filing, the approval of the previous petitions would constitute a gross error on the part of the director. In Sussex Engineering, Ltd. v. Montgomery, 825 F.2d 1084 (6th Cir. 1987), the Court of Appeals held that it is absurd to suggest that the Service must treat acknowledged errors as binding precedent.

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 met that burden.

ORDER: The appeal is dismissed.

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DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center. The petitioner filed an appeal of the director's decision, and the appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is engaged in the retail sale of bridal and formal wear. It seeks to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C). The beneficiary is to be employed as the president and chief executive officer of the petitioning company at an annual salary of \$48,000. The director determined that the petitioner had not established that the beneficiary had been and will be employed in a managerial or executive capacity. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel asserts that "[t]he beneficiary met and currently meets the requirements for a multinational executive/manager." In support of this assertion, the petitioner submits additional evidence on motion.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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. However, 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.

As the statutory definition of managerial and executive capacity were quoted fully in the decisions of both the director and the Associate Commissioner, the definitions found at sections 101(a)(44)(A) and (B) of the Act will not be repeated here.

The issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

The director found that the petitioner had not established that the beneficiary had functioned or would function in a primarily managerial or executive capacity. The director noted that although the petitioner claimed to employ six subordinate employees, the petitioner's 1998 IRS Form W-3 indicated that the petitioner paid \$28,210.00 in wages. The director concluded that the petitioner had not established that it employed other supervisory, professional or managerial staff that would relieve the beneficiary from performing the non-managerial or non-executive services of the corporation.

On appeal, counsel for the petitioner referred to the beneficiary's previously approved L-1A nonimmigrant petition and asserted that the petitioner continued to employ the beneficiary in an executive position. The petitioner declared that it had submitted extensive and compelling documentary evidence in support of the petition.

In a decision dated March 28, 2000, the Associate Commissioner found that the record contained insufficient evidence to demonstrate that the beneficiary had been employed in a primarily managerial or executive capacity. The Associate Commissioner found that the description of the beneficiary's duties was too general to demonstrate that the beneficiary's actual duties will be managerial or executive in nature. Further, the Associate Commissioner found that the record did not establish that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Finally, the Associate Commissioner found that the record did not establish that the beneficiary would have a subordinate staff of professional, managerial, or supervisory personnel who would relieve her from performing non-qualifying duties. For these reasons, the Associate Commissioner dismissed the appeal.

On motion to reopen, the petitioner submits additional evidence in support of the claim that the beneficiary is performing executive duties. This evidence includes the following: a chart detailing the beneficiary's current duties; a memorandum of understanding executed by the beneficiary on April 19, 2000; the petitioner's business license renewal; an insurance policy executed by the beneficiary; letters dated April 2000 from an accountant and two sales representatives attesting to the beneficiary's role in the business; the petitioner's 1999 corporate tax returns; a brochure from a charity event in which the beneficiary participated; copies of the petitioner's current website and advertisements; photographs of the petitioner's current retail store; and copies of two magazine articles regarding the bridal wear industry.

The submitted evidence does not address the beneficiary's eligibility at the time of filing. At the time the petition was filed, the petitioner was planning to open a retail store and appeared to employ two part-time employees, in addition to the beneficiary. On motion, the petitioner now relies on the petitioner's eight employees and points to the "nature and level of sophistication of a [sic] the petitioner's business," namely the retail store which was established after the filing of the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Evidence submitted in response to a Service request must establish the petitioner's eligibility as of the time of filing. 8 C.F.R. 103.2(b)(12).

In a request for evidence dated February 10, 1999, the director requested that the petitioner "[s]ubmit a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis, both in the United States and abroad." In a response dated April 14, 1999, the petitioner vaguely stated that the beneficiary "currently spends at least 90% of her time performing executive/managerial functions at White Swan and Belaya Lebed." The petitioner did not provide a detailed account of the beneficiary's daily activities or provide any details regarding the number of hours or the percentage of her work week that would have been devoted to the claimed "executive/managerial functions." Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. 103.2(b)(14).

As plainly stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive in nature. See §§ 101(a)(44)(A) and (B) of the Act. The petitioner's vague description the beneficiary's job duties did not establish what proportion of the beneficiary's duties were executive or managerial in nature, and what proportion were actually non-managerial or non-executive. See Republic of Transkei v. INS, 923 F.2d 175, 177 (D.C.

Cir. 1991). On this basis alone, considered independently of all other grounds, the director's decision to deny the petition was proper.

On motion, the petitioner now submits a list of the beneficiary's job duties with a breakdown of the time spent on executive or managerial duties. Although this evidence was specifically requested by the director in 1999, the petitioner did not submit any information that could be considered responsive. This evidence was not submitted on appeal, but more than a year after the director originally requested the evidence and after the Associate Commissioner rendered an appellate decision.

8 C.F.R. 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. See WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (defining "new," in part, as "[j]ust discovered, found, or learned <new evidence>" (emphasis in original)).

Furthermore, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Service will not consider evidence submitted on appeal or on motion for any purpose. Rather, the Service will adjudicate the appeal based on the record of proceedings before the director. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. 103.5(a)(2). The evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. It is further noted that the petitioner has submitted evidence with this motion that was originally requested by the director in the 1999 request for additional evidence. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

The evidence and arguments submitted on motion are not sufficient to overcome the findings of the director and the Associate Commissioner.

In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. In the initial petition, the

petitioner submitted a broad position description which vaguely paraphrased portions of the statutory definition of managerial and executive capacity, without describing the actual duties of the beneficiary with respect to the daily operations. In the expanded description of the beneficiary's duties, submitted in response to the director's request for evidence, the petitioner ambiguously stated that the beneficiary is responsible for such duties as "conducting business development," "makes all the decisions regarding the personnel," and "sets the budget for purchasing of products for resale in Russia." Again, these broad statements did not provide the Service with a description of the beneficiary's actual day-to-day duties and functions. And, as previously noted, the petitioner failed to provide a percentage-based analysis of the beneficiary's duties that would allow the Service to determine whether the beneficiary is primarily engaged in a managerial or executive position.

The petitioner has not submitted any evidence to establish that the beneficiary was actually conducting the broadly cast description of her duties at the time of filing. Furthermore, the beneficiary appears to direct the daily functions of the non-managerial and non-professional subordinate staff. Although the petitioner claims on motion to employ a professional staff subordinate to the beneficiary, the petitioner has not submitted evidence to establish this claim. The petitioner merely asserts that it employs a part-time "Export Logistics Coordinator" who possesses a Ph.D in Economics and International Business. The petitioner did not submit a position description for this employee and does not explain why such a position should qualify as a professional. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). As stated at section 101(a)(44)(A)(iv) of the Act, "[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."

The evidence submitted does not establish that the beneficiary manages the organization or an essential function rather than performing the essential functions herself. Counsel relies on unpublished decisions to claim that a sole employee may qualify as an executive. The petitioner has not established that the facts of the instant petition are analogous to those in the unpublished cases. Furthermore, the decisions cited by counsel were not designated as precedents by the Service and are not binding on Service employees in the administration of the Act. 8 C.F.R. 103.3(c). The evidence submitted does not establish that the beneficiary was supervising subordinate professional employees, managing an essential function, or functioning at a senior level within an organizational hierarchy. For these reasons, the

petition may not be approved.

Counsel noted that the beneficiary had been previously approved as an L-1A nonimmigrant. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. The record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. 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 clear and gross error on the part of the Service. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the Service nor any other 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). The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La.).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of March 28, 2000 is affirmed. The petition is denied.