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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

[Redacted]

File: WAC 01 023 51747

Office: CALIFORNIA SERVICE CENTER

Date:

NOV 13 2002

IN RE: Petitioner:
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:

[Redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

6

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Delaware corporation engaged in the distribution, trade, and sale of personal computer peripheral products. It seeks to employ the beneficiary as its president. Accordingly, it seeks 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 determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary is an executive who has hired several professional employees. Counsel also asserts that the I-140 immigrant petition must be approved absent proof that the original L-1A petition and extensions were approved in error.

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.

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 that 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 petitioner was incorporated in the State of Delaware in 1994. The petitioner filed a certificate of qualification in 1996 in the State of California. The petitioner has also registered in California to do business as Aaronix and Pacific Memory Group. The petitioner claims it is owned in equal parts by the beneficiary and his wife and is affiliated with a Russian enterprise also owned in equal parts by the beneficiary and his wife.

The issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily 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.

The petitioner initially referenced the beneficiary's responsibilities as president as follows:

[the beneficiary] Presides [sic] over meetings, he reviews accounting documentation and reports, he hires staff, oversees strategic operations with suppliers and representatives, he negotiated credit and financial agreements on behalf of the corporation, he formulates financial programs and otherwise performs all services required by a president of a growing corporation.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1999. The IRS Form 1120 revealed gross receipts in the amount of \$1,061,033 and salaries paid in the amount of \$112,350. The petitioner also provided a 1999 IRS Form W-2, Wage and Tax Statement for the beneficiary reflecting wages in the amount of \$84,250.

It is noted that counsel for the petitioner refers to the beneficiary as the petitioner's president but the beneficiary's IRS 1040, Individual Income Tax Return, also provided with the petition, states that the beneficiary is a manager. It is not clear if the petitioner is claiming that the beneficiary is engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The director requested additional evidence to establish that the beneficiary was performing the duties of a manager or an executive with the United States company. The director specifically requested the petitioner's organizational chart and a brief job description of duties for all employees under the beneficiary's supervision. The director also requested a more detailed description of the beneficiary's duties in the United States including the percentage of time spent in each of the listed duties.

In response, the petitioner submitted its organizational chart depicting the beneficiary as president and chief executive officer, a programmer/web site designer, a sales manager, a data entry/invoicing person, and a technician/RMA engineer. The petitioner also provided a list of employees from 1998 to 2001 including the years of their employment. The individuals employed during the year 2000 consisted of the beneficiary, an office manager, a programmer, and a technician. It is not possible to tell from the list of employees provided if the programmer and technician were hired before or after the filing date of the petition in October of 2000. The petitioner also provided a summary of the number of employees reported on the petitioner's IRS Form 941. The petitioner reported that it employed three individuals for the first three quarters of 2000 and four individuals for the fourth quarter of 2000.

The petitioner's counsel also listed the day-to-day duties of the beneficiary as:

1. General Management
2. Strategic business expansions
3. Marketing
4. Finding potential clients, markets, market and industry trends
5. Risk analysis
6. Company analysis
7. Business tactics
8. Industry analysis
9. Technology position
10. HR, management
11. Strategic planning
12. Licenses, taxes and regulations
13. Financial analysis
14. Product and layout
15. Dealings with corporate customers
16. Purchasing
17. Bank credits
18. Business analysis
19. Improve effectiveness of operations
20. Business equipment and technologies
21. Sales tactics
22. Pricing policies
23. Promotion and advertisement.

The petitioner stated through counsel that the beneficiary spent 99 percent of his time performing the duties described above on a daily basis. The petitioner noted that 1 percent of the beneficiary's time was allotted to unanticipated events.

The director erroneously stated that the record revealed that the beneficiary had been serving as president of an unrelated entity. However, the director did refer to the petitioner's organizational chart, noting that the chart depicted four employees under the

supervision of the beneficiary. The director determined that these employees were not professional employees and that the organizational chart reflected that the beneficiary would be their first-line supervisor. The director concluded that the record did not establish that the beneficiary had been or would be employed in a primarily executive or managerial capacity or that the petitioning organization required an executive or managerial position.

On appeal, counsel focuses on the misstatements of the director including a reference to the beneficiary as "her" instead of "him" and incorrectly indicating that the petitioner was employed in the business of computer component manufacturing and services as well as noting the misstatement regarding the beneficiary's employer. Counsel also asserts that "[the beneficiary] is not a first-line supervisor but rather a president of a fast growing corporation." Counsel further asserts that the petitioner has hired several professional employees who are being supervised by the beneficiary. Counsel finally asserts that approval of the previous L-1A petitions require the approval of this immigrant petition absent proof of gross error by the Service in the L-1A approvals.

Counsel's focus on the misstatements of the director in the decision is noted. However, the director correctly recited the beneficiary's job duties and reviewed the organizational chart submitted by the petitioner. The director's reasoning regarding the record and conclusion that the petitioner had not established that the beneficiary was acting in a managerial or executive capacity is correct. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner provided a broad description that vaguely refers, in part, to duties such as "oversee[ing] strategic operations with suppliers and representatives," and "formulat[ing] financial programs," and "negotiat[ing] credit and financial agreements" and "perform[ing] all services required by a president of a growing corporation." The Service is unable to determine from these general statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

The petitioner's description of the beneficiary's daily duties in response to the director's request for more detail does not address the concern that the beneficiary is performing the basic operations for the petitioner rather than managing or directing the basic operations. Again the petitioner provides a general description listing duties that include strategic business expansions, business tactics, sales tactics, analysis of risks, analysis of the company, analysis of the industry, analysis of finances, analysis of business, and general management. This list of duties does not convey an understanding of what the

beneficiary is actually doing on a daily basis. The few items on the list that are more descriptive of actual activities are more indicative of an individual performing basic operations of the company. For example, the beneficiary appears to perform the services of marketing, of finding potential clients, of licensing, of dealing with corporate customers, of purchasing, of setting prices and promoting the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, the organizational chart submitted in response to the director's request for evidence shows four employees under the supervision of the beneficiary. However, two of these employees were hired sometime after the petition was filed. 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). At the time the petition was filed, the petitioner employed three to four employees. It appears from the record that one of the employees was the beneficiary and another the office manager. As noted above, it is not possible to determine when the programmer and technician were hired. Moreover, contrary to counsel's assertion that the beneficiary supervised professional employees, the petitioner did not provide evidence that any of the positions are professional positions. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). 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).

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision, or component of the company. Further, the record does not adequately demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity for the United States company.

Further, at the time filing, the petitioner was a four-year-old

company that claimed to have a gross annual income of \$1,752,616. The petitioner did not submit sufficient evidence that it employed subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. The petitioner did not submit a comprehensive description of the beneficiary's duties enabling the Service to determine that the beneficiary was employed in a primarily executive or managerial position. The record does not demonstrate that the petitioning company's reasonable needs might plausibly be met by the services of the beneficiary as president, an office manager and one or two more individuals whose duties were not defined. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel's reliance on past approvals of the petitioner's L-1A petitions is not persuasive. As established in numerous decisions, 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., *Sussex Enqq. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (BIA 1988). The record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved.¹ However, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the Service. Further, the Administrative Appeal Office's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the Administrative Appeals Office. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the rulings of service centers that are contradictory. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D.La. 2000).

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

¹ We note counsel's request that the Service review the evidence submitted in support of prior petitions, however, the Act requires that each petition submitted establish eligibility for the benefit sought. See 8 C.F.R. 103.2(b)(1).

ORDER: The appeal is dismissed.