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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

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



APR 01 2003

File: WAC 02 109 53246 Office: CALIFORNIA SERVICE CENTER Date:

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:
[Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

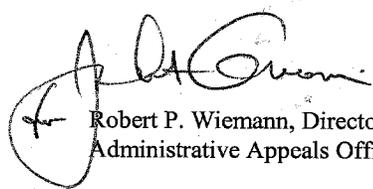
INSTRUCTIONS:

This is the decision 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 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president and general manager. The petitioner, therefore, endeavors 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 director denied the petition on the grounds that (1) the proffered position is not in an executive or managerial capacity, and (2) no qualifying relationship exists between the United States and overseas entities.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the director's denial of this petition is contradictory to the Bureau's prior approval of an L-1A nonimmigrant petition on the beneficiary's behalf.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner describes itself as a subsidiary of Subh Laxmi Corporation (SLC) of India that operates hotels and motels in the State of California and employs eight persons. The petitioner states that the beneficiary currently occupies the proffered position in L-1A nonimmigrant status, and it is offering to employ the beneficiary in the same position on a permanent basis at a salary of \$35,000 per year.

The first issue to be examined in this proceeding is whether the proffered position of president and general manager is in an executive or managerial 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.

At the time of filing the petition on November 8, 2001, the petitioner's staffing levels consisted of five employees in the positions of business manager, financial manager, sales specialist, accountant, and general manager (the proffered position). The petitioner's gross annual income was estimated at over \$1 million.

In the initial I-140 filing, the petitioner described the proffered position as follows:

[The beneficiary] will continue to manage and direct the operations of [the petitioner]. He will make all executive decisions regarding the negotiation of new contracts, hiring, investments, bank credits, expenditures, and marketing/advertising.

The petitioner did not submit job descriptions for its other four employees or provide an organizational chart attesting to its staffing levels. The director was not persuaded that the proffered position was in an executive or managerial capacity based upon evidence that had been initially submitted. Therefore, on April 9, 2002, the director requested a more detailed description of the proffered position, an organizational chart for the petitioner's operations, a detailed description of its staffing levels, and copies of Form DE-6, Quarterly Wage Report, for the 2000 and 2001 calendar years.

In response, the petitioner submitted an organizational chart, which listed the names, job titles and educational levels of its employees. This chart indicated that the beneficiary, as the president, supervised one vice president, who, in turn, supervised one corporate secretary and one certified public accountant (CPA).

The chart also indicated that that corporate secretary supervised one administrator, who, in turn, supervised one desk clerk and three housekeepers. The petitioner also submitted copies of the Form DE-6 that the director requested, but it failed to submit job descriptions for its employees, including a more detailed description of the proffered position.

The director denied the petition, in part, because the proffered position was not in an executive or managerial capacity. The director noted that in response to his request for additional evidence, the petitioner claimed in its organizational chart that it employed eight persons. However, copies of the Form DE-6 for the quarter in which the petition was filed showed that the petitioner only employed six persons, and the petitioner claimed on the I-40 petition that it employed five persons. The director stated that the petitioner did not explain its inconsistent evidence regarding its staffing levels.

The director also found that the proffered position was not in an executive or managerial capacity because the petitioner did not have a reasonable need for such a position in light of its size and type of business. The director further noted that none of the employees who were subordinate to the beneficiary could be considered professional, supervisory or managerial given their job titles. Finally, the director stated that the prior approval of an L-1A nonimmigrant petition on the beneficiary's behalf was not a sufficient reason to approve the immigrant petition.

On appeal, counsel states that the director erred in not considering that the beneficiary would supervise seven employees based upon information in the Forms DE-6 that were submitted. Counsel states that even if the petitioner does not have the CPA and three housekeepers on its payroll, the beneficiary, nevertheless, supervises these employees. Counsel asserts that the CPA, the corporate secretary and the administrator are all professional employees because each person who occupies these positions possesses a bachelor's degree. Counsel further states that the director improperly focused on the size of the petitioner's operations in determining that the petitioner could not support a primarily executive or managerial position. Finally, counsel states that the director's refusal to consider the approval of an L-1A nonimmigrant petition on the beneficiary's behalf is an abuse of discretion and is a violation of the principle of collateral estoppel.

Counsel correctly asserts on appeal that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, the duties of the proffered position must be the critical factor.

Section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The proffered position does not merit classification as an executive or managerial position because the petitioner has not provided a sufficiently detailed job description for the beneficiary. The petitioner states only that the beneficiary would "make all executive decisions regarding the negotiation of new contracts, hiring, investments, bank credits, expenditures, and marketing/advertising." It is not possible to determine from reviewing the record whether the beneficiary would perform managerial or executive duties with respect to the duties generally described above or would be actually performing the duties. 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).

Additionally, the petitioner does not describe the job duties of the individuals who occupy positions subordinate to the beneficiary. Counsel claims that the beneficiary would supervise professional employees because four of the petitioner's employees possess bachelor's degrees. However, when determining whether a position is professional, the Bureau looks at whether the position requires the attainment of a baccalaureate or higher degree, not the qualifications of the individual occupying the position. Absent job descriptions for these employees, the petitioner has not established that the beneficiary would serve as more than a first line supervisor as required by the regulations. See *Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991). For these reasons, the petitioner has not established that the proffered position is in an executive or managerial capacity.

The second issue in this proceeding is whether a qualifying relationship exists between the petitioner and the overseas entity. As previously stated, the petitioner claims that it is a subsidiary of Subh Laxmi Corporation (SLC) of India.

Pursuant to 8 C.F.R. § 204.3(j)(2):

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

With the filing of the I-140 petition, the petitioner submitted evidence to establish that its outstanding shares of stock were

purchased in June 2000 by the overseas entity. This evidence included the petitioner's Articles of Incorporation, and stock certificate #1. The petitioner's articles of incorporation indicated that it was authorized to issue 1,000 shares of stock; stock certificate #1 indicated that SLC owned all 1,000 shares.

On April 4, 2002, the director requested additional evidence relating to the relationship between the United States and overseas entities. Specifically, the director requested documentary evidence that the overseas entity actually paid for 1,000 shares of the petitioner's stock. According to the director, this evidence should include a legible copy of the original wire transfer from the overseas entity to the petitioner, and copies of any canceled checks or deposit receipts that detailed the amount of money paid for the shares of stock. The director also requested the petitioner's bank statement as verification that the money was transferred from the overseas entity to the petitioner.

In response, the petitioner submitted a copy of the wire transfer, which indicated that on March 8, 2001, a company called HFS International Ltd. transferred \$17,500 into account number 0373702469 at Bank of America. This account was in the names of the corporate secretary and the administrator; the petitioner's name was not listed on the account.

The director stated in the denial letter that the evidence failed to show that SLC paid for the petitioner's shares of stock. The director noted that the originator of the wire transfer, HFS International Ltd., was not the overseas entity, SLC. The director also noted that the money from HFS International Ltd. was deposited in account number 0373702469, not account number 15349180 that was in the name of the petitioner. Based upon this evidence, the director concluded that the overseas entity did not actually purchase the petitioner's shares of stock.

On appeal, counsel states that HFS International Ltd. is a well-established service that provides fund administration and shareholder services to offshore companies. According to counsel, the overseas entity transferred funds to HFS International Ltd., which, in turn, transferred funds to the corporate secretary. Counsel maintains that the wire transfer is a "qualifying wire transfer" under international law. Counsel submits a printout from HFS International Ltd.'s website.

The regulation at 8 C.F.R. § 204.5(j)(3)(ii) specifically allows the director to request additional evidence in appropriate cases, as the Bureau may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. The copy of the wire transfer does not persuasively show that the overseas entity actually paid for the petitioner's shares of stock. The wire transfer is not accompanied by any

supporting documentation, such as affidavits from authorized representatives of the overseas entity and HFS International Ltd. as well as other documentary evidence, that would establish the funds actually came from SLC. 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). Additionally, copies of bank statements in the record show that the petitioner has its own account established at Bank of America with the account number of 15349180. The petitioner does explain why the alleged funds from the overseas entity were not transferred to the petitioner's own account, but were instead transferred to an account in the name of the corporate secretary and the administrator. Finally, although not raised by the director, the wire transfer reveals that the funds from HFS International Ltd. were transferred to the United States on March 18, 2001. Stock certificate #1, however, was issued on June 8, 2000, approximately nine months prior to the petitioner's alleged purchase of the stock shares. The petitioner does not explain why it issued a stock certificate to the overseas entity when the overseas entity had not yet paid for the shares of stock. As the record is presently constituted, no credible evidence of a qualifying relationship between the United States and overseas entities has been submitted.

According to counsel, this immigrant petition must be approved because the facts here are identical to facts in a previously approved L-1A nonimmigrant petition. Counsel notes that collateral estoppel bars the relitigation of an issue that has already been ruled upon in a previous litigation proceeding.

The Supreme Court has never upheld a claim that a government agency may be estopped from deciding a case before it in accordance with the law. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 422 (1990). Each petition filing is a separate proceeding with a separate record. See 8 C.F.R. 103.8(d). In making a determination of statutory eligibility, the Bureau is limited to the information contained in the record of proceeding. See 8 C.F.R. 103.2(b)(16)(ii). This record of proceeding does not contain any of the supporting evidence submitted to the California Service Center in association with the L-1A nonimmigrant petition. Although the Administrative Appeals Office may attempt to hypothesize as to whether the prior approval was granted in error, it would be inappropriate to make such a determination without reviewing the original L-1A nonimmigrant petition filing in its entirety. However, whether or not the approval of the nonimmigrant petition was in error, the Administrative Appeals Office is never bound by a decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The petitioner must establish that the beneficiary qualifies for this immigrant

visa classification as a multinational executive or manager regardless of any nonimmigrant petitions that the Bureau may have approved on the beneficiary's behalf. As discussed in the preceding paragraphs, the petitioner has not met its burden of establishing that the proffered position is in an executive or managerial capacity or that it has a qualifying relationship with the alleged overseas entities. Despite the approval of an L-1A nonimmigrant petition on the beneficiary's behalf, the petitioner has not shown that the beneficiary merits classification for an immigrant visa as a multinational executive or manager.

Beyond the decision of the director, there is insufficient evidence that the beneficiary was employed in an executive or managerial capacity for at least one year in the three years immediately preceding his entry into the United States as a nonimmigrant. With the initial petition filing, the petitioner submitted a generalized description of the beneficiary's duties. The petitioner also indicated that it was submitting an "experience letter" that it had submitted with the L-1A nonimmigrant petition; however, this letter does not appear in the record. Based upon the evidence before the Bureau at the present time, there is no basis to find that the beneficiary had the requisite managerial or executive employment overseas. As the petitioner is being dismissed on other grounds, however, this issue will not be examined further.

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. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.