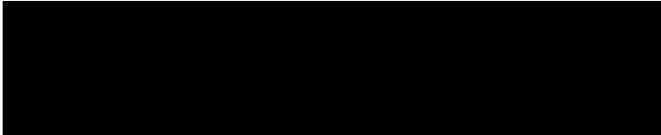


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536



JUL 03 2003

FILE: WAC 01 297 51449 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 petition 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 an Arizona corporation that seeks to employ the beneficiary as its president. 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 ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the beneficiary functions in a managerial and executive capacity even though he is the only employee within the U.S. entity.

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 avers that it: (1) is a subsidiary of the Belgian entity, Sequoyah International Restructuring, Inc. (Belgium); (2) provides solutions for organizations through telecommunications and information technology; and (3) employs the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of \$43,200 per year.

The issue to be discussed in this proceeding is whether the proffered position of president 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 with the California Service Center on September 27, 2001, the petitioner stated that the beneficiary, as its president, had initiated major projects with "substantial clientele," negotiated key service contracts with major companies, and conducted extensive public relations activities. For these reasons, the petitioner was seeking to retain the beneficiary's services permanently so that he could continue to:

- Direct all operational, commercial, and public relations activities
- Manage strategic planning and financial planning
- Direct marketing efforts
- Lobby and sell products
- Manage all products
- Develop marketing lines
- Build and expand the company
- Hire and fire personnel

The petitioner stated on the I-140 petition that it had two employees; however, the petitioner mentioned the beneficiary's position only and it did not include an organizational chart of the petitioner's operations. Therefore, on January 31, 2002, the director requested additional evidence relating to the petitioner's staffing levels and the beneficiary's job responsibilities. This evidence included, but was not limited to:

- U.S. Business Organizational Chart: The submitted organizational chart does not clearly show the structure of the beneficiary's worksite. Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's

supervision by name and job title. Also include a brief description of job duties, educational level, [and] annual salaries/wages . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission. (Emphasis in original.)

- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific. Also, indicate [the] percentage of time spent in each of the listed duties.
- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees at the beneficiary's work site for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees. . . .
- Payroll Summary: Submit copies of the U.S. company's payroll summary, W-2's and W-3's evidencing wages paid to employees.

In response, the petitioner submitted an organizational chart, which listed the beneficiary as the president of the petitioner with several individuals listed in subordinate positions. One individual, [REDACTED], who was employed in Belgium, was listed as the petitioner's treasurer who served in an administrative function only. Two other individuals, [REDACTED] and [REDACTED] were listed as the petitioner's corporate attorney and certified public accountant (CPA), respectively. The petitioner also included [REDACTED] who headed a public relations firm retained by the petitioner, and [REDACTED] an independent telecommunications project manager, who worked with the petitioner on a project-by-project basis. Finally, the organizational chart contained the name of [REDACTED], a director of telecommunications, who worked in Belgium.

The payroll records and DE-6 forms that the petitioner submitted showed that the beneficiary was the only individual on the petitioner's payroll as a salaried employee. Counsel stated that the beneficiary serves as president and corporate secretary, as well as the managing director for all daily operational, commercial and public relations activities. Counsel provided the following breakdown of the beneficiary's daily activities:

- Overseeing all daily operations of the firm (10%)
- Lobbying and sales of products (10%)
- Serving as Project Manager on a project basis (10%)
- Developing market lines (10%)
- Assisting personnel (5%)
- Building and expanding the company (20%)
- Providing leadership, coordination, and general direction regarding [the petitioner's] policies, plans, and programs and oversees [sic] their execution (10%)
- Establishing goals and objectives for [the petitioner] and ensures [sic] that such goals and objectives are met (10%)
- Providing support to administrative units, and coordinates [sic] their responsiveness (5%)
- Serving as a member of appropriate councils/committees (5%)
- Ensuring compliance with policies and procedures, county, state, and federal regulations and accreditation requirements (5%)

The director denied the petition because the proffered position is not in a managerial or executive capacity. The director found that the petitioner submitted inconsistent evidence regarding its staffing levels. Specifically, although the organizational chart indicated that the beneficiary supervised six individuals, the beneficiary was apparently the only employee of the U.S. entity. Noting that the organizational chart indicated that the beneficiary supervised two employees of the foreign parent company, the director questioned the need for the beneficiary to be employed in the United States.

The director found that the proffered position is not in a managerial capacity because the beneficiary, as the sole employee of the U.S. entity, would necessarily perform the day-to-day duties of the company. The director further found that the proffered position is not in an executive capacity because the petitioner failed to specify the goals and objectives that the beneficiary established, or explain how the beneficiary would provide leadership. In closing, the director commented that the petitioner's organizational structure "does not lend itself to the need for an executive." The director further commented: "It is against accepted business practice to have an executive in such a business structure."

On appeal, counsel states that the petitioner consists of two employees - one in the United States and one in Belgium - and obtains other services through contracted employees. Counsel states that the petitioner's lease agreement for its office space includes the services of a receptionist and other administrative services. Counsel also states that the petitioner's corporate attorney verifies and reviews new market leads, and that it hires a

project manager as needed. According to counsel, the beneficiary orchestrates projects among several companies or organizations.

Counsel states that, when considering the employees supervised, the Bureau should not limit its inquiry to the employees on the company's payroll. Counsel states that the use of outside contractors may satisfy the requirement that a beneficiary must work through other employees to either direct or manage an organization. Counsel asserts that the beneficiary plans and organizes large scale projects by first forming a consortium with a variety of private and public partners, and then works with this consortium to coordinate business proposals, establish the goals and objectives of the project, and provide leadership. Counsel states that the petitioner, through the beneficiary, plays a vital role in the local Arizona business community, and that the loss of the beneficiary's services may result in the loss of revenues within the local community.

Counsel asserts correctly on appeal that, if staffing levels are used as a basis for determining the employment of an individual in a managerial or executive capacity, the Bureau must consider the reasonable needs of the organization in light of its overall purpose and stage of development. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The Administrative Appeals Office notes that the director denied the petition, in part, because "it is against common business practice to have an executive in such a business structure." In making this comment, the director was referring to the beneficiary's status as the petitioner's only salaried employee in the United States. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. The fact that the beneficiary is the petitioner's only salaried employee does not, by itself, preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act as a manager or an executive. Instead, the duties of the proffered position must be the critical factor. See Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

The Bureau does not dispute counsel's assertion that an individual may work in a managerial or executive capacity even if he or she is the only salaried employee of a company. In this matter, however, the beneficiary is not considered to be working in a managerial or executive capacity because his role with the petitioner has not been clearly defined.

As previously stated, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R.

§ 204.5(j)(5). Counsel emphasizes that the beneficiary functions in a managerial capacity because he manages and supervises projects. According to counsel, the beneficiary retains the appropriate businesses and/or individuals to handle the projects, and oversees the projects' completions. Evidence in the record, however, reveals another aspect of the beneficiary's role with the petitioner - lobbying for and negotiating the contracts that eventually turn into the projects that the beneficiary allegedly manages. This aspect of the beneficiary's job responsibilities is not clearly defined and, therefore, the job description does not meet the requirements of 8 C.F.R. § 204.5(j)(5).

For example, in response to the director's request for evidence, counsel stated that the beneficiary spends 10 percent of his time lobbying for projects, another 20 percent of his time "building and expanding the company," and 10 percent of his time "developing market lines." The petitioner has not provided any information regarding what activities the beneficiary performs to build and expand the petitioner's company and how these activities relate to the responsibilities specified in the definitions of managerial or executive capacity. Additionally, the job duty of "developing marketing lines" is similarly vague, as the petitioner does not identify the marketing lines or describe how the beneficiary develops those lines.

Fundamental to the definitions of managerial and executive capacity found at section 101(a)(44)(A) and (B), 8 U.S.C. §§ 1101(a)(44)(A) and (B), is the term "primarily." A petitioner must establish not only that the beneficiary executes the high level responsibilities specified in one of the definitions; it must establish that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on the tasks necessary to either produce the petitioner's product or provide the petitioner's services. The beneficiary's overall job description does not shed any light on his actual responsibilities beyond those that involve project facilitation. Without more specific information regarding how and at what frequency all of the stated duties are performed, there is insufficient evidence to find that the beneficiary directs or manages the provision of the petitioner's services rather than performs the tasks necessary to provide the petitioner's services. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988).

Regarding its staffing levels and organizational structure, counsel claims that the petitioner consists of two employees, and that the beneficiary directs or manages projects through contracted employees. The evidence submitted for the record, however, does not support counsel's claims.

Regarding the employees within the petitioning entity, counsel claims that the petitioner employs the beneficiary and the company

treasurer who, although working in Belgium, is an employee of the U.S. entity. Regarding its contracted employees, counsel notes that the petitioner employs a corporate attorney, who assists with new market leads, and a project director, among other personnel. A review of these individuals' job descriptions, however, does not clarify the role that each individual plays within the organizational structure. Additionally, the petitioner fails to explain how the service each individual provides allows the beneficiary to primarily execute the responsibilities specified in the definition of managerial or executive capacity.

For example, the petitioner describes the treasurer's job as "act[ing] as European Union liaison for European based customers and partners." This broad job description could describe a range of occupations from customer service representative to sales representative. It certainly fails to illuminate the service that the treasurer provides to the petitioner's operations. The attorney's function of "verifying" and/or "reviewing" market leads is similarly vague, as the petitioner does not explain what it considers to be "market leads" and how this job duty relates to the provision of the petitioner's services. Finally, the petitioner states that the project manager "works in the domain of product sales and product partnership establishments." Like the job descriptions of other contracted personnel, the project director's duties do not shed any light on his actual responsibilities. Nowhere does the petitioner describe the "work" that the project director provides in the area of sales, or give details regarding how he establishes a "product partnership."

Counsel's assertions on appeal regarding the importance of the petitioner's existence to the local economy have no bearing on eligibility for this classification. In determining eligibility as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), the Bureau is limited to the eligibility criteria outlined in both the statute and the regulations. Neither of these two authorities allows the Bureau to consider the impact of the petitioner's operations on the local economy or job market when determining whether the proffered position is in a managerial or executive capacity. Section 101(a)(44)(A) and (B), 8 U.S.C. §§ 1101(a)(44)(A) and (B). As the record is presently constituted, there is insufficient evidence that the beneficiary primarily executes the high level responsibilities specified in the definition of managerial or executive capacity. Accordingly, the director's decision shall not be disturbed.

Beyond the decision of the director, the Administrative Appeals Office notes that the record contains correspondence between the beneficiary and Senator [REDACTED] office regarding the processing of this immigrant visa. One issue that the beneficiary raises to Senator [REDACTED] office is an apparent inconsistency

between the denial of this immigrant petition and the approval of an L-1A nonimmigrant visa petition on the beneficiary's behalf.

This record of proceeding does not contain any of the supporting evidence submitted to the California Service Center for the L-1A nonimmigrant petition. In the absence of all of the corroborating evidence contained in that record of proceeding, the Administrative Appeals Office cannot determine whether the L-1A nonimmigrant petition was approved in error.

Nevertheless, it is important to emphasize that 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). Although the Administrative Appeals Office may attempt to hypothesize as to whether the L-1A petition was granted in error, no such determination may be made without review of the original record in its entirety. If, however, the nonimmigrant petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, the approval of the nonimmigrant petition would have been erroneous. The Bureau is not required to approve 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 (Comm. 1988). Neither the Bureau 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 petitioner must establish that the beneficiary qualifies for this immigrant visa regardless of any nonimmigrant petitions that the Bureau may have approved on the beneficiary's behalf. The Administrative Appeals Office is never bound by a decision of a service center or district director. *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).

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 met that burden.

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

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