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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



MAR 19 2003

File: WAC 01 283 52105 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 employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Arizona in May 2000. It is engaged in providing consulting services for information technology projects and other related business management projects. It seeks to employ the beneficiary as its president and executive manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be performing in a managerial or executive capacity. The director also determined that the petitioner had not established that it had been doing business for one year prior to filing the petition.

On appeal, counsel for the petitioner asserts that the Bureau erred in its decision by not considering the evidence submitted and citing no case law in support of its conclusion.

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. 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. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

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 provided a Form ETA 750, Application for Alien Employment Certification that stated the beneficiary's job duties as follows:

Key Management-Executive position, responsible for management functions of the USA company, including [sic] direction of project management consultancy for organizations, nationally and globally, IT projects and managerial executive duties in the coordination of the day-to-day activities of the USA Company and supervise 2 other employees.

The director requested a more detailed description of the beneficiary's duties and a list of all employees under the beneficiary's supervision. The director also requested the petitioner's organizational chart, a copy of the petitioner's Internal Revenue Service (IRS) Forms and the petitioner's number of employees and wages reported to the applicable state government.

In response to the director's request for evidence, the petitioner indicated that the beneficiary spent approximately 50 percent of his time directing the operations and managers of the petitioner. The petitioner indicated that the remaining 50 percent of the beneficiary's time was devoted to the claimed parent company. The petitioner also provided an organizational chart for the parent company that included the staffing hierarchy of the petitioner. The petitioner identified the beneficiary as president on the organizational chart. The petitioner also listed a vice-president and project manager. The petitioner indicated that these two employees worked in Germany and were paid by the parent company. The petitioner also listed an office manager and office assistant and indicated that they were employed in the United States.

The petitioner also provided its Arizona Quarterly Withholding Tax Return for the quarters ending June 30, 2001 and December 31, 2001. The June 30, 2001 return listed the beneficiary as the only employee. The December 31, 2001 return listed the beneficiary and the employees identified as office manager and office assistant on the return. The petitioner did not provide a legible copy of its Arizona Quarterly Withholding Tax Return for the quarter in which the petition was filed.

The director determined that the petitioner had not established a reasonable need for an executive for two reasons. First, the petitioner was not an active management and consulting company. Second, the beneficiary, as the only full-time employee, would necessarily be involved in the day-to-day operational tasks for the company. The director also determined that the beneficiary would not be supervising professional employees and would not be a functional manager as the beneficiary would be performing the function rather than managing it.

On appeal, counsel asserts that the beneficiary supervises three full-time employees and one part-time employee and that the Bureau did not consider this information. Counsel asserts that previously submitted information establishes that the beneficiary is an executive for immigration purposes. Counsel further asserts that the beneficiary manages professional employees and has been paid a substantial yearly salary. Counsel appears to assert that the amount of the salary paid the beneficiary qualifies the beneficiary as an executive.

Counsel's assertions are not persuasive. 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). In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner has provided a broad description of the beneficiary's duties. The petitioner stated that the beneficiary was "responsible for management functions of the USA company, including [sic] direction of project management consultancy for organizations, nationally and globally, [and] IT projects." The petitioner did not further elaborate on the beneficiary's day-to-day duties with respect to these functions. The petitioner did provide copies of invoices signed by the beneficiary requesting that the petitioner's parent company reimburse him for performing consulting services; however, these invoices establish quite clearly that the beneficiary is providing a basic consulting service, on behalf of either the petitioner or the petitioner's parent 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).

The petitioner initially stated that the beneficiary would be supervising two employees. In response to the request for evidence, the petitioner provided an organizational chart that listed four employees under the beneficiary's supervision. The petitioner explained that two of the employees remained in Germany and were paid by the parent company. The petitioner further explained that the beneficiary spent 50 percent of his time devoted to duties for the parent company. The record is unclear regarding the beneficiary's actual supervisory duties of the

claimed foreign employees and whether this supervision is part of the beneficiary's responsibility to the petitioner or to the petitioner's parent company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Moreover, the petitioner failed to provide adequate verifiable evidence of the employment of the two overseas employees.

The beneficiary's supervision of one full-time employee and one part-time employee in the United States also has not been adequately substantiated for the time period covering the date 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 Michelin Tire*, 17 I&N Dec. 248,249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner fails to provide a legible and complete Arizona Quarterly Withholding Tax Return for the quarter in which the petition was filed. The petitioner did provide an accountant's statement indicating that the petitioner hired the full-time office manager in July 2001; however, this statement is not sufficient in light of the unexplained unavailability of corroborating evidence in the form of the petitioner's Arizona Quarterly Withholding Tax Return for this time period.

Even if the petitioner established the employment of a full-time office manager and a part-time office assistant at the time the petition was filed, the employment of these two individuals does not contribute to a finding of eligibility for the beneficiary. The petitioner has not provided descriptions of the job duties for these two individuals and the record does not support a claim that their employment relieves the beneficiary from performing non-qualifying duties. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the petitioner failed to provide adequate documentation that either of these two employees hold professional positions, thus, the beneficiary at most would be considered a first-line supervisor of non-professional employees.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties will be primarily managerial or executive. The descriptions of the beneficiary's job duties are general and are not supported by the

record. Further, the record does not sufficiently 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 Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title or is paid a high yearly wage. The petitioner has not established that the beneficiary at the time of filing the petition had been or would be employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that it has been engaged in doing business for one year prior to the filing of the petition.

The regulations at 8 C.F.R. § 204.5(j)(3)(i)(D) require evidence that "[t]he prospective United States employer has been doing business for at least one year" at the time the petition is filed.

The regulations at 8 C.F.R. § 204.5(j)(2) state in pertinent part:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

On appeal and in response to this issue, counsel asserts that the Bureau approved the beneficiary in an L-1A capacity to open a new office and later extended the approval. Counsel asserts that the original approval of the L-1A classification and its extension were approved without gross error. Counsel asserts that the documentary evidence submitted demonstrates that the petitioner maintained the regular, systematic and continuous provision of goods and services for one year prior to filing the petition.

The petition was filed in September of 2001, thus, the petitioner must establish that it had been regularly and continuously providing services since September of 2000. The petitioner was established in May 2000. The petitioner's Arizona Quarterly Withholding Tax Returns for the fourth quarter of 2000 list the beneficiary as the only employee and show that the beneficiary was employed only in the month of December 2000. The Arizona Quarterly Withholding Tax Return for the first quarter of 2001 list the beneficiary as the only employee and show that the beneficiary was employed only in the month of March 2001. The Arizona Quarterly Withholding Tax Return for the second quarter of 2001 list the beneficiary as the only employee and show that the beneficiary was employed only in the month of May 2001. The petitioner also provided copies of invoices signed by the beneficiary and submitted to the petitioner's parent company showing that the beneficiary provided consulting services for half a day in June 2000, 7.5 days July 2000, 9 days in August 2000, and 3.5 days in September 2000. Thus, it appears that the petitioner

had been providing consulting services intermittently for only 20.5 days in the year prior to the filing of the petition. The record contains no other documentation demonstrating that the petitioner was doing other types of business or was doing business on a continuous, systematic, and regular basis. The petitioner has not overcome the director's determination on this issue.

Although, counsel's assertions regarding the previous approval of the beneficiary's L-1A classification do not appear to directly relate to the issue of the petitioner's doing business, the AAO will address the assertion here. First, as established in numerous decisions, the Bureau 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). Second, contrary to counsel's assertion, if the previous nonimmigrant petition was approved based on the same unsupported assertions contained in this petition, the approval would constitute clear and gross error on the part of the Service. Third, the AAO'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 AAO. The AAO is not bound to follow the rulings of service centers that are contradictory. *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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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