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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

[REDACTED]

File:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

MAY 08 2003

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]

**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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center denied the employment-based preference and the Administrative Appeals Office dismissed a subsequent appeal. The matter is again before the Administrative Appeals Office on motion. The motion will be granted. The previous decisions of the director and the Administrative Appeals Office will be affirmed; the petition will be denied.

The petitioner is a limited liability company organized in Florida that seeks to employ the beneficiary as its manager of business development. 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 was not in an executive or managerial capacity; and (2) the beneficiary was not employed in an executive or managerial capacity for at least one year in the three years preceding her entry into the United States in a nonimmigrant status. The Administrative Appeals Office affirmed the director's determinations on these two issues.

On motion, counsel submits a statement in which he asserts, in part, that the Administrative Appeals Office failed to correctly apply the law and consider evidence in the record.

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 Jenlaura Investments, Inc. of Canada; (2) is engaged in managing real estate properties; and (3) employs four persons. The petitioner is offering to employ the beneficiary on a permanent basis at a salary of \$35,000 per year.

The first issue to be discussed is whether the proffered position of manager of business development 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 Texas Service Center on April 19, 1999, the petitioner described the beneficiary's proposed duties as: "Overall management and responsibility for U.S. real estate holdings; seek out and develop additional investment opportunities in the [United States]." The director did not find the petitioner's description of the proffered position sufficient to determine whether the beneficiary would be employed in a managerial or executive capacity. Therefore, on August 12, 1999, the director requested additional evidence from the petitioner, to include a detailed description of the beneficiary's daily duties and her area(s) of responsibility, and an organizational chart of the U.S. company.

In response, the petitioner stated that the beneficiary's daily activities would include day-to-day management of the company, reporting to shareholders, overseeing "various reporting functions," and enhancing the value of properties by marketing them to prospective buyers. The organizational chart that the petitioner submitted indicated that the petitioner employed one president, one vice president of finance, one manager of business development (the beneficiary) and one administrative assistant. According to the chart, the beneficiary would supervise the administrative assistant and report to the president.

The director denied the petition, in part, on the basis that the proffered position was not in a managerial or executive capacity because the beneficiary would perform tasks necessary for the petitioner to provide its services to clients. The Administrative Appeals Office concurred with the director's analysis of the issue, noting that the beneficiary would not have managerial control and authority over a function, department, subdivision or component of the petitioner.



On motion, counsel states that both the director and the Administrative Appeals Office relied too heavily on the phrase "day-to-day management and reporting" that the petitioner used to describe the beneficiary's job responsibilities. According to counsel, the Bureau inappropriately focused on the words "day-to-day" and ignored the use of the word "management." Counsel states that the beneficiary's job responsibility of reporting directly to shareholders on investment opportunities is clearly a management function. Counsel further states that the beneficiary would supervise outside contractors such as tax and accounting specialists and real estate attorneys, and that she would negotiate grounds maintenance contracts. Counsel states that the beneficiary would, therefore, have supervisory authority over managerial, supervisory or professional employees. Counsel believes that neither the director nor the Administrative Appeals Office considered any of the evidence of record, and asks the director of the Texas Service Center to review the record and issue a new decision.

Counsel's request for a new decision from the director of the Texas Service Center cannot be granted. The Administrative Appeals Office made the latest decision in this proceeding and, therefore, has jurisdiction over this motion. 8 C.F.R. § 103.5(a)(1)(ii). Based upon a review of the evidence available to the Bureau at the present time, the beneficiary's proposed position does not fit the definition of managerial or executive capacity found in sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The petitioner states that one of the beneficiary's job duties would be the day-to-day management of the petitioner. The petitioner, however, does not state how this job duty is performed; there is no information regarding the activities that the beneficiary would undertake on a daily basis in order to manage the petitioner. Without more information, the Bureau cannot conclude that the broad job responsibility of "day-to-day management of the petitioner" is a primarily managerial or executive job function.

Furthermore, other job duties assigned to the beneficiary, such as negotiating maintenance contracts, and enhancing and marketing properties, are neither managerial nor executive tasks, as they comprise sales and marketing duties. Again, without more evidence regarding the nature of the beneficiary's daily management of the petitioner, the Bureau cannot determine whether the beneficiary would primarily perform the tasks necessary for the petitioner to provide its services, or whether the beneficiary would manage the provision of those services. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988).

Additionally, the evidence regarding the petitioner's staffing levels fails to establish that the beneficiary would manage and

control the work of supervisory, managerial or professional employees, as counsel claims on motion. According to its organizational chart, the beneficiary would supervise one administrative assistant. Counsel further claims that the beneficiary would control the work of outside contractors such as tax accountants and attorneys. The petitioner, however, does not describe the job duties of the administrative assistant, or submit evidence that it contracts with outside personnel and that the beneficiary has control over the outside contractors' work. 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). Absent a listing of the specific duties of persons supervised by the beneficiary and evidence that these persons perform services for the petitioner, the petitioner has not shown that the beneficiary would act as more than a first-line supervisor of nonprofessional employees. See *Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991).

Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition on this basis shall not be disturbed.

The second issue in this proceeding is whether the beneficiary was employed by the Canadian entity in an executive or managerial capacity.

At the time of filing the petition, the petitioner stated that the beneficiary was employed as the manager of business development from January 1996 to September 1997, and that she had been "involved in the evaluation and analysis of various investment alternatives" for clients. The director did not find this job description sufficiently detailed and he, therefore, asked the petitioner to submit information regarding: the dates of the beneficiary's employment; the beneficiary's position title; a description of the beneficiary's daily activities; and the names, titles and educational levels of individuals supervised by the beneficiary.

In response, the petitioner stated that the beneficiary's duties included: "seeking out potential investment opportunities, preparing analyses of same, working with the President to evaluate various investment alternatives, and supervision of clerical staff." The petitioner also submitted an organizational chart, which showed that the beneficiary was one of two employees; the other employee was the president.

The director denied the petition, in part, because the Canadian entity did not employ the beneficiary in an executive or managerial capacity for the requisite period of time. Specifically, the beneficiary "performed all of the daily duties

necessary for an investment/holding company" [;] in other words, the beneficiary was performing tasks necessary for the Canadian entity to provide its services. *Matter of Church Scientology International, supra*. The Administrative Appeals Office concurred with the director regarding this conclusion.

On motion, counsel does not, however, specifically address this basis of the Bureau's findings.

The beneficiary's position with the Canadian entity was not in an executive or managerial capacity. The beneficiary's job description indicates that she assisted the president with certain responsibilities, such as evaluating investments, and that she performed marketing activities such as preparing analyses of investment opportunities. Thus, the beneficiary primarily performed the tasks that were necessary for the Canadian entity to provide its services. Nothing in the record establishes that the beneficiary either managed a subdivision or function, or directed the management of a subdivision or function. As previously stated, an employee who primarily performs the tasks necessary for the petitioner to provide its services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, id.*

Furthermore, one element of the beneficiary's job description does not comport with information on the organizational chart. According to the petitioner, the beneficiary supervised a clerical staff. However, according to the organizational chart, the Canadian entity employed only two individuals, one was the president and the other was the beneficiary. There is no evidence that the Canadian entity employed a clerical staff even on a contractual basis. The petitioner's failure to support its assertion that the beneficiary supervised a clerical staff raises questions about the reliability and sufficiency of the beneficiary's overall job description, and whether it realistically depicts the beneficiary's job responsibilities with the Canadian entity. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the record is presently constituted, the petitioner has failed to establish that the beneficiary was employed by the Canadian entity in a managerial or executive capacity for the requisite period of time. The director's decision on this issue, therefore, will also not be disturbed.

Counsel implies that the Bureau has already determined that the beneficiary's foreign position and the proffered position are in executive or managerial capacities since the Bureau approved a similar L-1A nonimmigrant visa petition on the beneficiary's behalf. This record of proceeding does not, however, contain any of the supporting evidence submitted to the Texas Service Center in the prior case. 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 prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the Administrative Appeals Office, however, the approval of the prior 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, 597 (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.

Beyond the decision of the director, there is insufficient evidence that: (1) a qualifying relationship exists between the U.S. and Canadian entities; and (2) the beneficiary met the requirements set forth in 8 C.F.R. §§ 204.5(j)(3)(1)(A) or (B) at the time of filing the petition.

First, the record contains a copy of the purchase agreement between the Canadian Company, Jenlaura Investment, Inc., and the petitioner, which indicates that on January 5, 1999, the Canadian company agreed to purchase 51 percent of membership interest in the petitioner, a limited liability company, for \$620,392. The petitioner, however, did not submit evidence that it received the agreed upon amount of \$620,392 from the Canadian company. Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (Comm. 1988); See also, *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). Without full disclosure of all relevant documents, including evidence that the Canadian entity actually paid for its percentage of ownership in the petitioner, the Bureau is unable to determine the elements of ownership and control.

Second, Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). According to the record, when the petitioner filed the I-140 petition on April 19, 1999, the petitioner no longer employed the beneficiary, as she had changed her status to an F-1 nonimmigrant student from an L-1A nonimmigrant worker. As the beneficiary was not working for the petitioner under the terms of her F-1 status at the time the petition was filed, she was not working in the United States pursuant to 8 C.F.R. § 204.5(j)(3)(i)(B), and she was not an alien described in 8 C.F.R. § 204.5(j)(3)(i)(A). As this appeal is being dismissed on other grounds, however, these two issues 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. The petitioner has not met that burden.

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