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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. Ave., 3rd Floor
425 Eye Street N.W.
Washington, D.C. 20536

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER

Date:

NOV 18 2003

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]

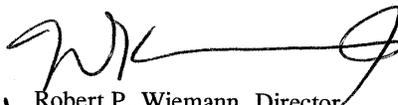
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1996 in the State of Florida and is claimed to be a subsidiary of [REDACTED] C.A., located in Venezuela. The petitioner is engaged in the business of developing, managing, and operating commercial centers. It seeks to employ the beneficiary as its president. 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 it currently employs the beneficiary and, even if the beneficiary is currently employed by the petitioner, that he is not employed in a managerial or executive capacity.

On appeal, counsel submits a statement refuting the director's findings. The petitioner did not submit any additional evidence on appeal.

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.

The first issue in this proceeding is whether the petitioner currently employs the beneficiary.

In the request for additional evidence, the director requested that the petitioner provide a statement explaining where the beneficiary is currently located. The director asked the petitioner to discuss the beneficiary's current immigration status and to explain, in particular, what the beneficiary is doing for employment if he is not in a valid nonimmigrant status.

The petitioner's response included a statement explaining that the beneficiary was granted non-immigrant status as an L-1A intracompany transferee, valid from September 1997 to September 1998. The petitioner stated that even though the petitioner's request to extend the beneficiary's status was denied the beneficiary remained in the United States. The petitioner did not, however, indicate whether the beneficiary remained in the United States continuously through the date the I-140 petition was filed in April 2001. Rather, the petitioner provided an additional statement summarizing the beneficiary's duties, in past tense, and indicated that the current immigrant petition would enable the beneficiary "to resume" those duties. The petitioner also provided its payroll records, quarterly wage statements, and employee W-2 wage statements for 2001. However, all three documents listed only two employees, neither of which was the beneficiary.

Based on the evidence submitted in response to the request for additional evidence, the director deduced that the beneficiary is currently in the United States, but concluded that the petitioner failed to submit sufficient evidence to establish that the beneficiary is currently working for the petitioning organization.

On appeal, counsel asserts that it would be illogical for the overseas entity to transfer the beneficiary to the United States and not employ him in its subsidiary organization. Essentially counsel asks CIS to infer, based on logic rather than documentation, that the beneficiary is continuing his employment with the U.S. petitioner. However, case law precedent has firmly established that 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). 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). Moreover, counsel's implication that the beneficiary is currently employed by the U.S. petitioner is contradicted by the foreign company's employment verification and the beneficiary's pay stubs for the year 2000, all of which indicate that the beneficiary was employed abroad during that entire year. 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, 591-92 (BIA 1988). In the instant case, counsel neither acknowledges an inconsistency, nor provides evidence to explain it. It is noted that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Counsel further states that the director's observation about the petitioner's recitation of the beneficiary's U.S. job duties in the past tense is inaccurate, and claims that it was the director who initially posed the question (about the beneficiary's duties) in past tense when she issued the request for additional evidence. Counsel's interpretation, however, is incorrect. A more thorough review of the request for additional evidence would have clarified counsel's confusion regarding the

director's specific request, which only used the past tense when asking for information about the beneficiary's past duties abroad. The present and future tenses were both used in phrasing questions about the beneficiary's current and future positions with the petitioning organization. The petitioner's choice in using the past tense to describe the beneficiary's duties in the United States, therefore, was unrelated to the manner in which the director phrased her questions in the request for additional evidence. It is also noted that counsel may be confused as to the type of petition that is the subject of these proceedings, as he repeatedly refers, in the appellate brief, to the petitioner's "L1A petition." The subject of the instant proceedings is an I-140 *immigrant* petition to classify the beneficiary as a multinational manager or executive. This is different from an L-1A *non-immigrant* petition (Form I-129) to classify a beneficiary as an intracompany transferee who comes to the United States, on a temporary basis, to perform qualifying duties.

On review, even if the director's assumption regarding the beneficiary's continued presence in the United States is incorrect, the petitioner has failed to submit sufficient evidence, such as pay stubs or W-2 wage statements, to establish the beneficiary's current presence in the United States and employment with the U.S. petitioning organization.

The other issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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.

In the initial filing, the petitioner described the beneficiary's prospective duties as follows:

[The beneficiary] had control over all administrative, marketing, expansion, and financial functions of the U.S. operation.

Throughout his employment at [the petitioning company], [the beneficiary] demonstrated to be a key executive employee who exercised discretionary

judgement and decision-making evidenced through his authority to recruit, hire, train, promote and terminate his staff. In addition, [he] formulated and executed business policies pertaining to expansion and standards of service. He demonstrated considerable expertise in the area of decision-making and problem solving, and is extraordinarily adept in the marketing and financial areas.

In the request for additional evidence, the director requested that the petitioner provide a specific list of the beneficiary's daily duties and the percentage of time he will spend performing those duties. The petitioner responded with the following description of the beneficiary's job duties:

[The beneficiary] directed the management and established the goals and policies of the organization. Furthermore, [he] had control over all administrative, economic and financial functions of the U.S. operation. His responsibilities entailed planning, developing and directing organizational policies and business objectives of the organization in accordance with the policies of the foreign entity. He coordinated overall corporate functions and management operations; and established responsibilities and procedures for obtaining objectives. [The beneficiary] reviewed financial statements to determine progress and status in attaining objectives, authorizing changes in the annual budget and approving funds for the acquisition of new equipment, furniture, etc. He revised objectives and plans in accordance with current company and market conditions.

In addition, [the beneficiary] directed and coordinated the formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments and to increase new productivity. Moreover, [he] developed public relations policies designed to promote the company and the relations with potential customers. Furthermore, [he] negotiated and secured loans from financial institutions.

The petitioner also provided the following percentage breakdown of the beneficiary's duties:

[The beneficiary] will spend approximately 70% of his time planning, developing and directing organizational policies and business objectives, as well as coordinating the overall corporate functions and management operations, and establishing responsibilities and procedures for obtaining goals. In addition to overseeing and evaluating the performance of subordinate managerial personnel.

[He] will spend approximately 25% of his time reviewing financial statements, authorizing changes to annual budget and approving funds for equipment acquisition, as well as directing and coordinating the formulation of financial programs.

And approximately 5% of his time will be spent developing public relations policies

The director denied the petition, stating that based on the description of duties and with only two employees, other than the beneficiary, the beneficiary was unlikely to perform duties that are primarily managerial or executive.

On appeal, counsel states that the petitioner has already established the beneficiary's eligibility for the status sought by virtue of having submitted a letter with the beneficiary's list of duties for the foreign entity. Contrary to counsel's apparent misconception, CIS cannot assume that a beneficiary will primarily perform qualifying duties in the United States even in cases where the petitioner has established that a beneficiary's work abroad was of a qualifying nature. If that were the case, as counsel seems to suggest, CIS would be able to limit its scope of investigations only to the beneficiary's job duties abroad. However, that is not the case. The law clearly requires that the petitioner address the beneficiary's prospective job duties in the United States as well as those overseas in order to establish eligibility.

Furthermore, counsel is incorrect in asserting that the petitioner previously established the beneficiary's employment in a managerial or executive capacity by virtue of having been granted the L-1A non-immigrant visa. The director's decision

does not indicate whether she reviewed the prior approval of the nonimmigrant petition referred to by counsel. The record of proceeding does not contain copies of the visa petition that is claimed to have been previously approved. If the previous nonimmigrant petition was 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 CIS. CIS is not required to approve applications or 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). It would be absurd to suggest that CIS or 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 Administrative Appeals Office is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001). Furthermore, by the petitioner's own admission, its petition to extend the beneficiary's status was denied. Counsel's argument is weakened by his attempt to focus on the petition that was granted without also discussing the petition that was denied and the director's reasons behind that denial.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the list provided of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. Moreover, the impressive list of duties does not comport with the reality of the petitioner's personnel structure, which indicates that only two other individuals are available to assist the beneficiary in the petitioner's daily operations. Furthermore, the summary of the beneficiary's duties does not mention any subordinate positions that would perform the essential functions of the petitioner's business or the beneficiary's duties.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or

supervisory personnel, or that he will be relieved from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

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 sustained that burden.

ORDER: The appeal is dismissed.