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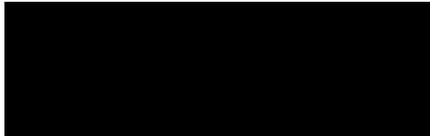
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FILE: SRC 02 181 51378 Office: TEXAS SERVICE CENTER Date:

JUN 16 2004

IN RE: Petitioner:  
Beneficiary:



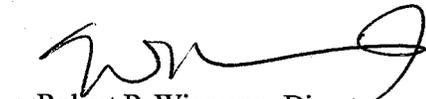
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

  
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 is a Florida business claiming to be an importer and distributor of packaged food products. 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 failed to establish that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits additional information in support of his assertions.

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 which 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 issue in this proceeding is whether the beneficiary has been and will be performing in a capacity that is managerial or executive.

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 support of the initial petition, the petitioner stated that it is currently involved in manufacturing, importing, and distributing packaged foods. The petitioner claimed to have two employees and provided a payroll document for the beneficiary and one other employee. The petitioner also provided the following description of the beneficiary's duties:

As the highest-ranking executive officer of [the petitioner], [the beneficiary] will continue to be responsible for directing the management of [the petitioner], including planning, developing and establishing policies and objectives for the company. [He] will also continue to be involved in the daily activities with the marketing and importing of the food products.

In the area of human resources management, [the beneficiary will] exercise authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions, and remuneration. [He will] conduct performance reviews and ensure that the staff follows corporate procedures.

Functioning autonomously, [the beneficiary is] responsible for managing and directing all development activities of [the petitioner] as they pertain to [the foreign entity]. This includes communicating the development direction of [the petitioner] to [the foreign entity's] board of directors on a regular basis. In addition, [the beneficiary will] review activity reports and financial statements to determine progress in attaining objectives and contribute to the revision of plans in accordance with changing conditions. [The beneficiary will be] responsible for overseeing all aspects of our operations and maximizing our company's profitability and growth.

In sum, [the beneficiary will] have autonomous control over, and exercises wide latitude and discretionary decision-making in, establishing the most advantageous courses of action for the successful management and direction of [the petitioner].

On March 21, 2003 CIS issued a request for additional evidence asking the petitioner to describe the beneficiary's daily duties and to indicate the percentage of time he will spend on each duty. The petitioner was also asked whether he will supervise any employees, and if so, the petitioner was asked to provide the employees' names, job titles, and their duties.

The petitioner responded with a statement explaining that the beneficiary has been and will continue to act as a function manager. The petitioner stated that the beneficiary manages the importation, distribution, and marketing functions and claimed that it has two employees and several independent contractors who handle the day-to-day operational tasks. The petitioner provided CIS with the names of its employees, their job duties, the list of contractors who carried out the petitioner's day-to-day operational tasks, as well as specific service each contractor provides. In regard to the beneficiary's supervisory duties the petitioner provided the following statement:

The staff . . . and all contractors working under the supervision of the President of [the petitioner] have to submit regular periodical reports to the President detailing the evolution of each particular business variable under its command and control. Based upon this reports [sic] and results [the beneficiary] would command instructions with changes and adjustments needed or he would[,] if necessary[,] decide to change personnel or contractors.

The petitioner responded with a statement, dated May 15, 2003, containing a lengthy description of the beneficiary's duties, which were divided into the following three categories: 1) directing and coordinating business activities, including the supervision of employees and independent contractors; 2) analysis, directing, and planning; and 3) "executional [sic]" duties. Although the description of duties will be considered in its entirety, the AAO will not repeat the list in this decision, as such list has been incorporated into the record. The petitioner also submitted a pie chart indicating that 58% of the beneficiary's time would be allocated to supervision of employees and independent contractors. The petitioner's organizational chart indicates that the beneficiary's three immediate subordinates include an administrative vice president, a sales and promotional vice president, and independent contractors.

On July 10, 2003 the director denied the petition noting that the beneficiary's subordinates are non-professional, non-managerial employees. The director concluded that the beneficiary spends a majority of his time performing the day-to-day operational functions required to operate the petitioner's business.

On appeal, counsel asserts that the director's decision was erroneous and relies on several unpublished AAO decisions to support his assertions. However, while 8 C.F.R. § 103.3(c) provides that CIS's precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. None of the AAO decisions introduced by counsel are published and therefore will not set precedent in the instant case.

Counsel also states that the beneficiary is a function manager whose essential task is to oversee the import and distribution of food products and claims that a majority of the beneficiary's time is spent overseeing the work of independent contractors, not the company's employees. However, counsel fails to reconcile this claim with the list of duties provided in response to the director's request for additional evidence, which indicates that seven of the 14 named supervisory tasks involve directly overseeing and working with the petitioner's employees, rather than the independent contractors. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, counsel's statements fail to adequately explain this inconsistency.

Furthermore, although the petitioner submitted a pie chart indicating that 58% of the beneficiary's time is spent supervising employees and independent contractors, it failed to quantify the exact number of hours spent performing each individual duty that was listed. This failure of documentation is important because the beneficiary's daily tasks named in the response to the request for additional evidence indicate that the beneficiary is directly involved in assisting the administrative assistant with a variety of bookkeeping tasks, including "reconciliation of the Company's bank account at [REDACTED] the revision of accounting registers, composition of reports regarding bank accounts, accounts payable and receivable, and recording "the per-container profit analysis of each import" in the Excel format. In light of the fact that the petitioner did not hire an administrative assistant until after the petition was filed, the AAO must assume that until such person was hired the beneficiary was the one actually performing the administrative tasks. The description of duties also indicates that the beneficiary was directly involved in planning "marketing activities," "[p]repar[ing] samples, and relevant marketing and technical information," and communicating with exporters regarding arrival times of the petitioner's orders. The petitioner indicated that under the category of "analysis, directing and planning" the beneficiary's job duties include conducting research to find new clients, determining price quotes for the petitioner's products, visiting supermarkets, and conducting market analysis of the competitors' products. None of these duties falls directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Furthermore, 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). Counsel states that the independent contractors, not the beneficiary, perform the daily operational tasks. However, this assertion has been indirectly contradicted by the list of the beneficiary's duties as discussed above.

Counsel also states that the director's decision is inconsistent with CIS's prior approvals of the petitioner's I-129 non-immigrant petitions filed in the years 2000 and 2001. However, the director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous.<sup>1</sup> *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 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be 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).

Finally, the petitioner has maintained thus far that it is an importer and distributor of food products. However, a review of its income tax return for the year 2000 indicates that the petitioner claimed to be a marketing and consulting firm. These two claims are entirely different. However, neither the petitioner nor counsel explains why two such distinct claims were made. The record lacks evidence to reconcile this considerable inconsistency. *See Matter of Ho, supra*.

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. 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 description provided suggests that a significant portion of the beneficiary's duties are non-managerial. 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. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because he 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. For this reason this petition cannot be approved.

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.

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<sup>1</sup> The AAO has recently dismissed an appeal filed by the petitioner seeking to extend the beneficiary's classification as an L-1A non-immigrant. The AAO determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary would be employed in a managerial or executive status.