



U.S. Citizenship
and Immigration
Services

B4

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

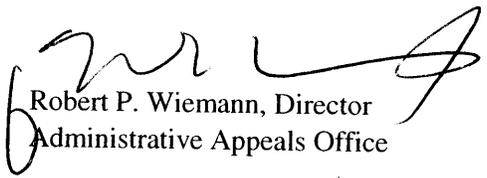
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision 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 director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California 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 because: (1) the proffered position in the United States is not in an executive or managerial capacity; and (2) there is no evidence that the petitioner and the foreign entity, Sureen Systems, share a qualifying relationship.

On appeal, counsel submits a brief and copies of documents already included 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 Sureen Systems of the United Kingdom; (2) provides system integration design services; and (3) employs three persons, including the beneficiary who is currently occupying the proffered position as an intracompany transferee (L-1A). The petitioner is seeking to employ the beneficiary permanently at a salary of \$2,500 per month.

The first issue to be discussed in this proceeding is whether the beneficiary's proposed employment with the U.S. entity is in a managerial or executive 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.

When filing the I-140 petition, the chief executive officer (CEO) of the foreign entity stated that he wanted to have the beneficiary physically present in the United States as the president of the subsidiary to "explore new markets, enter into sales contracts, servicing [sic] old and new clients, to oversee and maintain the quality control, [and] to maintain the personalized services for proper handling of our clients." The CEO continued that the beneficiary would be responsible for coordinating office activities, developing and establishing policies and objectives, and exercising authority over all personnel matters.

In addition, the CEO described the petitioner's staffing level, which consisted of the beneficiary as president, one marketing and sales manager, and one office administration manager. According to the CEO, the marketing and sales manager develops sales and marketing strategies, promotes the company's information technology (IT) services, collects orders, and coordinates with the administration manager on shipping orders. The CEO stated that the administration manager was responsible for filing, budget expenditures, shipping, and general office duties.

The director denied the petition, in part, because the proffered position is not in a managerial or executive capacity. The director noted the petitioner's staffing level and concluded that none of the individuals was a manager or professional even though each person had a managerial title. The director found that the beneficiary would not be primarily engaged in managerial or executive duties in the proffered position.

On appeal, counsel states that the beneficiary will work in a managerial capacity and in an executive capacity. Counsel states that the petitioner's gross annual receipts and net income figures establish that it has the organizational complexity to support a primarily managerial or executive position. Counsel states further that the beneficiary will perform all of the duties listed in the definition of executive capacity as well as the responsibilities of a manager. Counsel asserts that the director's denial of the petition contradicts the prior approvals of L-1 petitions on the beneficiary's behalf for the exact same position.

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. Of particular importance in the present matter is the scope of the petitioner's business operations. On the I-140 petition, the petitioner stated its type of business as "Systems Integration Design Services." In the accompanying letter from the foreign entity, the CEO stated that the petitioner "is to provide Information Technology resources to our clients." The CEO further stated the petitioner's business objectives as: "designing and implementing cost effective technology resources"; "developing recommendations and implementing plans to improve business"; "installing an efficient network structure"; providing IT staffing services"; and "taking care of client's IT systems." It is clear from the CEO's depiction of the petitioner that the petitioner is involved in the actual design and maintenance of IT systems for its clients. The AAO notes, however, that the petitioner claims to be performing its business objectives with no systems designers or engineers, or any type of IT personnel; the staffing level of the petitioner lists only a president, sales and marketing manager, and administration manager.

The petitioner's type of business does not comport with its organizational structure. None of the employees' job duties contains any IT responsibilities; yet providing IT services is the core of the petitioner's business. In his letter, the CEO mentioned a "sales staff" when describing the job duties of the marketing and sales manager; however, the petitioner did not provide any evidence of the existence of this sales staff. Even though the petitioner claims that the beneficiary directs and manages the petitioner's entire operations, it does not claim to have anyone on its staff to actually perform the IT services that it provides. Thus, either the beneficiary himself is performing these services or he is simply a first-line supervisor to the individual who actually designs the systems. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support

of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is providing the petitioner's services to its clients, the AAO notes that 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's statements regarding the weight that should be accorded to the prior approvals of L-1 petitions on the beneficiary's behalf are unpersuasive. The director's decision does not indicate whether he reviewed the prior approvals of the nonimmigrant petitions. If, however, 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 material 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. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that Citizenship and Immigration Services (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).

It is concluded that the position offered to the beneficiary is not in an executive or managerial capacity, and the director's decision to deny the petition on this basis shall not be disturbed.

The second and final issue to be discussed is whether a qualifying relationship exists between the petitioner and the foreign entity, Sureen Systems of the United Kingdom (Sureen U.K.). Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C), a petitioner must establish that it and the foreign entity share a common relationship.

When filing the petition, the petitioner submitted a copy of stock certificate number one, which indicated that on April 14, 2000, Sureen U.K. purchased 1,000 shares of the petitioner's stock. The petitioner also submitted other documents pertaining to its ownership including its Articles of Incorporation. In a November 2002 request for evidence (RFE), the director asked the petitioner to submit copies of its federal income tax return (Form 1120) for the 2001 tax year. The petitioner submitted the return, and based upon information in the Form 1120, the director denied the petition, in part, because there was no evidence of a qualifying relationship between the petitioner and Sureen U.K.

According to the director, the petitioner's income tax return contained discrepancies. The director noted that the petitioner's 2000 tax return indicated that the beneficiary owned 100 percent of the petitioner's common stock, and that Schedule K for the 2000 and 2001 tax years failed to show that a foreign person/entity owned the petitioner. The director stated that, based upon the unexplained discrepancies, the petition could not be approved.

On appeal, counsel states that the submitted evidence establishes the existence of a qualifying relationship between the petitioner and Sureen U.K. Counsel states, "The responses provided on the Corporate Tax Return . . . does [sic] not 'rule out' the claim that the petitioning company is 100% wholly owned by the parent company abroad." Counsel fails to specifically address the director's comments regarding the information on the tax returns.

The regulations at 8 C.F.R. § 204.5(j)(2) define a subsidiary, in pertinent part, as a firm, corporation, or other legal entity of which a parent owns directly or indirectly, half of the entity and controls the entity. The regulation and case law confirm that 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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the present matter, the record contains discrepant information about the petitioner's ownership. The director pointed out the problems with the evidence, but the petitioner has declined to explain the discrepancies. Again, 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*, *supra*. Counsel's assertions regarding the importance of the tax returns are misguided. The petitioner is required to submit credible evidence to prove its assertions; CIS cannot ignore documentary evidence that has been submitted to prove a fact simply because counsel states that the evidence should be overlooked in favor of other documents.

In the present matter, the petitioner fails to address the director's comments in the denial letter concerning the tax returns. Accordingly, the petitioner has not overcome the director's findings that the petitioner and Sureen Systems U.K. do not share a qualifying relationship. The director's decision on this issue shall, therefore, not be disturbed.

Beyond the decision of the director, because the petitioner failed to establish that it shares a common relationship with the beneficiary's foreign employer, the beneficiary cannot meet the requirements of the regulation at 8 C.F.R § 204.5(j)(3)(i)(B). This regulation states that the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. Although the director did not raise this issue in the denial letter, it is, nevertheless, an additional reason why the 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 met that burden.

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