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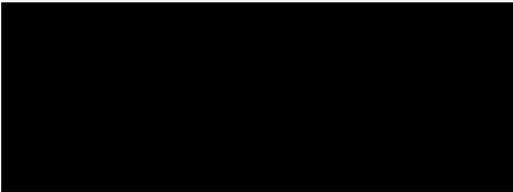
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 14 2005
SRC 04 117 52237

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:



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, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of Florida in August 2002. It provides multimedia communication services. 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 the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) has already determined that the beneficiary is employed in a managerial or executive capacity as CIS has approved the petitioner's L-1A petition on behalf of the beneficiary. Counsel contends that there is no justification for the director's assumption that with 15 employees, the beneficiary would perform most of the day-to-day operations of the business. Counsel also references a new policy memorandum, from William Yates, Associate Director for Operations, CIS, "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)" HQPRD 70/6.2.8-P (May 12, 2005), in particular the self-employment portion in relation to the portability clause of AC21.

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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 a February 26, 2004 letter appended to the petition, counsel for the petitioner indicated that:

As President, [the beneficiary] has to review activity reports and financial statements to determine progress and status in attaining objectives. Must also be able to revise objectives and plans in accordance with current market conditions. [The beneficiary] will direct and coordinate the formulation of financial programs to provide funding for new or continuing operations and maximize returns on investments, as well as to increase productivity. He will be responsible for planning and developing industrial, labor, and public relations policies to improve company's image and relations with customers, employees, stockholders, and public.

[The beneficiary] will also be responsible for evaluating the performance of all lower level employees for compliance with established policies and objectives of [the petitioner's] business program. The position will also require for [sic] him to direct all other areas of the business structure such as purchasing, advertisement, and sales.

On February 1, 2005, the director requested, among other things, additional evidence detailing the beneficiary's proposed position with the petitioner including: the position title; a list of all duties; the percentage of time spent on each duty; the names of subordinate managers/supervisors or other employees reporting directly to the beneficiary; a brief description of their job titles, and educational levels, or if the beneficiary would not supervise other employees, the essential function the beneficiary would manage; an organizational chart specifying the beneficiary's position within the organizational hierarchy; and, who provides the product sales/services or produces the petitioner's products. The director also requested evidence of the petitioner's staffing levels including IRS Forms W-2 for all employees in 2002, 2003, and 2004.

In an April 25, 2005 response, the petitioner indicated that the beneficiary would create marketing and sales strategies; establish contact with suppliers, lawyers, accountants, brokers, and insurance; check and supervise the day-to-day economic affairs such as banks, sales, and taxes; and, contract and supervise employees. The petitioner further explained that it offered two types of services, (1) graphics, web-media, photo, and retail services on a store site, and (2) direct corporate services to small and medium size business as including marketing, printing, web, multimedia and TV solutions. The petitioner indicated that at the retail store, the beneficiary supervised design jobs, service quality and results, customer commitment and satisfaction, store cleaning and maintenance, and employees' attitude and presentation. Regarding the second type of service, the petitioner indicated that the beneficiary established contact with customers, visited them, found graphic solutions, prepared quotes through administrative employees, negotiated with the client, supervised or made the production, and followed up with customer satisfaction.

The petitioner provided its Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to 15 employees for the 2004 year. The IRS Forms W-2 were issued in amounts ranging from \$600 to \$31,661.

On May 20, 2005, the director denied the petition, determining that the petitioner employed only two or three employees who worked full-time. The director assumed from the lack of full-time employees that the

beneficiary must perform most of the petitioner's day-to-day duties. The director observed that the beneficiary "evidently exercises discretion over the day-to-day operations of the activity," but also performs most of the day-to-day duties of the business. The director concluded that it is reasonable to assume that the petitioner's business does not need a full-time executive to manage two to three full-time employees and make decisions regarding the company.

On appeal, counsel for the petitioner indicates that the beneficiary has achieved several of the company objectives by establishing several trade names for the petitioner's service lines. Counsel also asserts that operation of the petitioner's machines does not require a large work force. Counsel contends that there is no justification for the director's assumption that with 15 employees, the beneficiary would perform most of the day-to-day operations of the business. Counsel submits several of the petitioner's Florida Forms UCT-6, Employer's Quarterly Report, including the Florida Form UCT-6 submitted for the first quarter of 2004, the quarter in which the petition was filed. The petitioner's 2004 first quarter Florida Form UCT-6 shows that the petitioner employed eight individuals during the time period. The salaries of the individuals listed on the Florida Form UCT-6 suggest that four of the individuals worked intermittently or part-time while the beneficiary and three other employees were full-time employees.

Counsel's assertions and evidence submitted on the issue of the beneficiary's managerial or executive capacity for the petitioner are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner, through its counsel's initial description of the beneficiary's duties, did not provide a comprehensive depiction of the beneficiary's daily duties. For example, counsel indicated that the beneficiary had to "review activity reports and financial statements to determine progress and status in attaining objectives," "[m]ust also be able to revise objectives and plans in accordance with current market conditions," "direct and coordinate the formulation of financial programs," and "be responsible for planning and developing industrial, labor, and public relations policies to improve company's image and relations with customers, employees, stockholders, and public." The petitioner, however, does not explain or otherwise clarify how these broadly stated objectives comprise managerial or executive tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, counsel did not provide sufficient detail regarding the beneficiary's oversight of lower level employees or provide evidence that other employees would perform the petitioner's purchasing, advertising, and sales services. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's response to the director's request for more information on this issue, likewise failed to establish that the beneficiary would perform primarily managerial or executive tasks, rather than the petitioner's routine operational and administrative duties. For example, the petitioner indicated that the beneficiary would supervise design jobs, service quality and results, customer commitment and satisfaction, store cleaning and maintenance, and employees' attitude and presentation at the retail store; and personally provide graphic consulting services to corporate customers. These duties depict an individual who provides

some of the petitioner's basic operational services and is a first-line supervisor of part-time retail store clerks and machine operators. 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). Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial to establish eligibility for this visa classification. *See* § 101(a)(44)(A)(ii) of the Act.

Moreover, the petitioner's Florida Form UCT-6 for the quarter in which the petition was filed, shows that the petitioner only employed three full-time employees in addition to the beneficiary. Further, the petitioner failed to respond to the director's request for the employees' job titles and duties. Instead the petitioner vaguely referred to one store manager, one administrative employee, three production employees, two designers, and three sales representatives. Clearly, the petitioner did not substantiate that it employed individuals in these positions when the petition was filed. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The record does not contain sufficient evidence to establish that the beneficiary would be relieved from performing non-qualifying duties by the employment of the full-time employee(s) and the several part-time employees when the petition was filed. Again going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Based on the current record, the AAO is unable to determine that the beneficiary's duties comprise primarily managerial or executive duties. For this reason, the petition will not be approved.

The next issue in this decision is whether the director's decision violates established CIS policy. Counsel alludes to other approved nonimmigrant L-1 petitions, which he claims were based on the same evidence as submitted in the instant matter. The petitioner did not introduce copies of the previous nonimmigrant petitions as evidence and those petitions are not part of the beneficiary's A-file, the current record of proceeding. After approval, each individual L-1 nonimmigrant petition is stored at the CIS Remote Files Maintenance Facility in Harrisonburg, Virginia, and is not readily available for review in conjunction with a subsequently filed immigrant petition. Each L-1 nonimmigrant petition is a separate record of proceeding with its own separate burden of proof; each petition must stand on its own individual merits. *See generally* Section 291 of the Act, 8 U.S.C. § 1361; *also* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

With regard to the similarity of the eligibility criteria, the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). However, although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the

United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Furthermore, CIS records reveal that the sole approved nonimmigrant L-1A petition filed on the beneficiary's behalf was granted to allow the beneficiary to open a "new office" in the United States pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). A "new office" approval is prospective in nature and only requires the petitioner to establish that the U.S. company will support a managerial or executive position within one year.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103. Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Further, the approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition. Furthermore, 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 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).

Finally, 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). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision. The AAO acknowledges counsel's complaint that the petitioner did not have notice of the "obstacles" that just "popped up" in this proceeding. However, the AAO notes, contrary to counsel's claim, that the director notified the petitioner of the deficiency of the evidence as it related to the beneficiary's managerial or executive capacity for the petitioner. The petitioner had ample opportunity to address the issue and the ultimate facts revealed that the beneficiary is not eligible for this visa classification.

Counsel also references a new policy memorandum, from William Yates, Associate Director for Operations, CIS, "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)" HQPRD 70/6.2.8-P (May 12, 2005), (Yates memo) in particular the

self-employment portion in relation to the portability clause of AC21. Counsel misunderstands the affect of the Yates memo.

The record does not contain evidence that the beneficiary has a new job and that the portability considerations of AC21 should be applied. Counsel implies that the beneficiary will port to self-employment and argues that such a change in job position is allowed under the AC21 portability provisions. However, the AAO observes that for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "remain valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added). Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. It would also be absurd to suppose that Congress enacted a statute that would encourage large numbers of ineligible aliens to file immigrant visa petitions, if the legislation was actually meant to be an impetus for CIS to reduce its backlogs. To construe section 106(c) to include unadjudicated, denied, and revoked petitions would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

In the present matter, the petition was filed on behalf of an alien who was not "entitled" to the classification and the underlying Form I-140 was not approvable. The director properly denied the Form I-140 petition on the merits of the matter as they relate to the submitted Form I-140. Section 106(c) of AC21 does not repeal or modify section 204(b), section 205, or section 245 of the Act, which all require an approved petition prior to CIS granting immigrant status or adjustment of status. Accordingly, this petition cannot be deemed "valid" or "approvable" for purposes of section 106(c) of AC21.

Beyond the decision of the director, the AAO observes that the record does not contain evidence that the petitioner had been doing business for one year prior to filing the petition on March 18, 2004. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner's initial evidence should include evidence that: "the prospective United States employer has been doing business for at least one year." The regulation at 8 C.F.R. § 204.5(j)(2) states 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." The petitioner's business plan indicates that it began commercial operations in July 2003, less than one year prior to filing the petition. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.