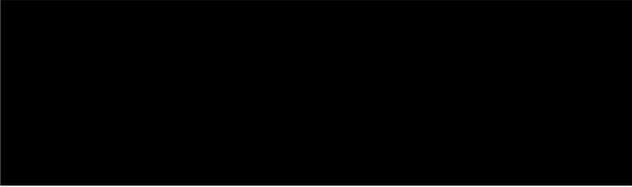


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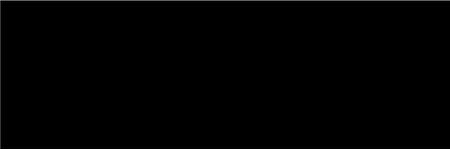
B4

FILE: WAC 02 126 50670 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2005

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 preference visa petition was denied by the Director, California Service Center. The matter then came before the Administrative Appeals Office (AAO) on appeal. The appeal was summarily dismissed based on the determination that counsel failed to specifically identify an erroneous conclusion of law or statement of fact. The matter is now before the AAO on motion to reopen and reconsider. The motion to reopen will be granted in order to consider the appellate brief. However, the AAO's prior decision dismissing the appeal will be affirmed.

The petitioner is a California corporation operating as a Filipino restaurant and cargo company. It seeks to employ the beneficiary as its vice president of operations. 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 beneficiary would not be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel disputed the director's conclusions and indicated her intent to submit further information within 30 days of the date the appeal was filed. However, as the additional information was not received by the AAO by November 20, 2003 when the case was reviewed, the AAO summarily dismissed the appeal.

On motion, counsel submits postal return receipts documenting the service center's timely receipt of the petitioner's appellate brief. However, as the brief was not forwarded to the AAO in a timely fashion, the AAO was unable to consider it while reviewing the case. The AAO will now review the brief in which counsel asserts that the director "mischaracterized" the beneficiary's job description and erred in denying the petition.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 would be employed in a capacity that qualifies as 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 Part 6 of the petition, the petitioner stated that the beneficiary “[p]lans, directs, and coordinates operations of restaurant.”

In a notice, dated May 23, 2002, the director requested that the petitioner submit additional information. The request instructed the petitioner to provide its organizational chart describing the managerial hierarchy and staffing levels. The petitioner was also instructed to clearly identify the beneficiary’s position in the chart as well as the names, job titles, and brief descriptions of the job duties of the beneficiary’s subordinate employees.

The petitioner responded with an organizational chart, which shows that the petitioner’s only subordinate is a general manager whose immediate subordinates are two cashiers. The petitioner also provided a job description for the beneficiary, but failed to provide one for the general manager. It is noted that the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will therefore be adjudicated based on the record of proceeding before the director. As the beneficiary’s full job description and list of discretionary decisions were incorporated into the director’s decision, the AAO need not repeat that information in this discussion.

On September 16, 2002 the director denied the petition noting, “[G]iven the type of business that the petitioner conducts, it is unreasonable to believe that the beneficiary, as the [v]ice [p]resident, will not be involved with the day-to-day non-supervisory duties that are common place [sic] in the industry.” Although the director properly concluded that the beneficiary would not be employed in a managerial or executive capacity, his focus on the nature of the petitioner’s business was misplaced. Therefore, the director’s comment in this regard will be withdrawn. The director did, however, properly consider the petitioner’s organizational chart upon which he based the conclusion that the petitioner lacks the organizational complexity to actually require an individual who would primarily perform managerial or executive tasks. The director further concluded, based on the organizational chart, that the beneficiary would act as a first-line supervisor whose subordinates consist of 10 non-professional employees.

On appeal, counsel referred to the petitioner’s previously granted L-1A non-immigrant petitions, claiming that the I-140 petition can only be denied upon proof that the previous approvals were the result of gross error. In support of this argument counsel cited the case of *National Hand Tool Corp. v. K.L. Pasquarel*, 889 F.2d 1472 (Dec. 15, 1989). However, a review of the cited case suggests that it does not support counsel’s assertions. To the contrary, the judge in the cited case expressly stated that CIS is not under any obligation to grant a preference I-140 visa petition where prior nonimmigrant visa petition(s) may have been granted. *See id.* In addition, the director’s decision does not indicate whether he 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 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 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).

Counsel also argued that the director failed to consider the fact that the petitioner employs a general manager who acts as the first-line supervisor and that the beneficiary is therefore relieved of having to act in that non-qualifying capacity. However, as previously stated, the petitioner failed to provide a job description of the alleged first-line supervisor, thereby making it impossible for the AAO to determine, with any degree of certainty, that the beneficiary is relieved of having to perform the duties of a first-line supervisor as claimed. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel asserted further that the director "mischaracterized" the beneficiary's job duties and explained that rather than being personally involved in the daily menu preparations, the beneficiary awaits the general manager's approval in regards to the menus for catering jobs. However, the beneficiary's job description clearly distinguishes between menus for catering jobs and menu preparation for the restaurant as they are both listed as separate duties. Although counsel apparently provided an example of the general manager's duties, it is noted that a full description of job duties was not provided. Therefore, the AAO remains unclear as to the general manager's role within the petitioner's organizational structure. Nor is there a clear indication as to how the general manager relieves the beneficiary of having to perform non-qualifying duties, particularly in light of the fact that the beneficiary's description of duties indicates that the beneficiary is still required to approve budgets on a daily basis, prepare catering proposals, meet with prospective clients of the catering service, and conduct market research. If the petitioner's general manager acts as the first-line supervisor, as suggested, there is no explanation as to why the beneficiary continues to perform the petitioner's day-to-day operational tasks. It is noted 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). Although the petitioner indicated that its intention is to expand its business and hire additional personnel, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner's future business plans are entirely irrelevant in this proceeding.

CIS will look first to the petitioner's description of the job duties in determining the beneficiary's eligibility for classification as a multinational manager or executive. *See* 8 C.F.R. § 204.5(j)(5). In the instant case the record does not suggest that the beneficiary would primarily perform managerial or executive duties. Rather, the petitioner's organizational chart, combined with the description of duties, suggest that the petitioner lacks the organizational complexity to require an individual to perform primarily managerial or executive duties. As such, the AAO cannot conclude that the beneficiary would primarily perform qualifying duties. For this reason the petition cannot be approved.

Beyond the decision of the director, further review of the record suggests that the petitioner has not established a qualifying relationship with a foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the instant case, the petitioner indicated in a letter, dated February 14, 2002, that the foreign entity owns 51% of the petitioner's issued stock. Part IV of the petitioner's Articles of Incorporation, also submitted with the petition, indicates that the petitioner authorized the issue of 10,000 shares of common stock whose par value is \$100 per share. Although a photocopy of Stock Certificate No. 2, dated August 27, 1998, indicates that the foreign entity owns 5100 shares of the petitioner's stock, this claim is not supported by the petitioner's income tax return for the year 2000. Schedule L, No. 22(b) of that tax return indicates that only \$14,000 worth of the petitioner's common stock was sold. If the petitioner issued at least 5100 shares of its common stock to the foreign entity, it would have received at least \$510,000 in return. To add to the confusion, the petitioner also submitted what appears to be a receipt, dated August 15, 1998, issued to the foreign entity showing its purchase of \$25,000 worth of stock. Although the petitioner submitted a letter, dated July 18, 2002, reaffirming its prior claim regarding the foreign entity's 51% ownership of the petitioner's issued stock, the petitioner did not reconcile the considerable inconsistencies between the petitioner's claim, its 2002 tax return, and the copy of Stock Certificate No. 2. 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 neither reconciles, nor even acknowledges the existence of the considerable inconsistencies regarding the ownership and value of the petitioner's stock.

It is noted that 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). Thus, for the additional ground discussed in this paragraph, 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 AAO affirms its prior decision dismissing the appeal.