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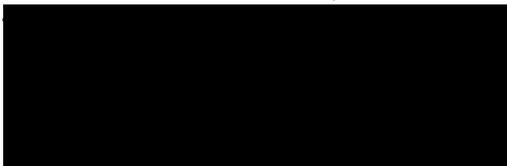
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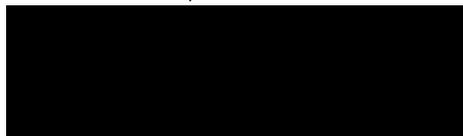
FILE: WAC 02 230 54384 OFFICE: CALIFORNIA SERVICE CENTER Date: JUN 02 2005

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in the sale of computer, electronics, and telecommunication products and services to technology firms, which are located in the United States. It seeks to employ the beneficiary as its president and CEO. 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 denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity and that the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's conclusions and submits a brief 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 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 first issue in this proceeding is whether the beneficiary would 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 petition, the petitioner submitted the following description of the duties to be performed by the beneficiary under an approved petition:

[The beneficiary] has complete executive authority for establishing all essential business contracts, marketing strategies, hiring of computer professionals and other staff members, as well as budget, inventory, and purchasing decisions. He oversees the implementation of company policies and directs the company's operations as needed. [The beneficiary] enjoys broad discretionary authority in performing these duties; he receives minimal supervision from directors of our parent company in Taiwan.

On October 19, 2002, the director issued the first of three requests for additional evidence. The petitioner was instructed to submit an organizational chart describing its managerial hierarchy and staffing levels.

Specifically, the director instructed the petitioner to list the employees under the beneficiary's supervision by name and job title and to include brief job descriptions and educational levels for each employee.

The petitioner complied with the director's request by submitting an organizational chart in which the beneficiary's name appeared at the top of the hierarchy. According to the chart, the beneficiary's direct subordinate was [REDACTED] whose title was that of director; and [REDACTED] subordinate was Shaela Nguyen whose title was that of executive manager. Subordinate to [REDACTED] were an account manager, an office clerk, and a "US account." The petitioner also indicated that it had a total of 15 agent representatives whose job is to distribute the petitioner's product.

On March 6, 2003, the director issued the second request for additional evidence instructing the petitioner to submit a detailed description of the beneficiary's duties in the United States accompanied by the percentage of time spent performing each of the listed duties. The petitioner was also instructed to submit two of its quarterly wage reports, which name the petitioner's employees during those quarters.

In a response, which was dated May 28, 2003, the petitioner stated that one of the beneficiary's responsibilities was to set up the company in the United States. The petitioner also named the technology companies with which the beneficiary has business relations and claimed that the beneficiary works with the heads and executives of these companies. The petitioner further stated that the beneficiary is entrusted with the highest degree of discretionary authority and claimed that the beneficiary works with leasing and real estate companies; deals with legal counsel and the petitioner's accountant; and handles all matters dealing with investment and expansion in the United States.

Although the director issued another request for evidence, dated October 21, 2003, the notice did not inquire further about the beneficiary's job duties, and therefore need not be addressed at this time.

On April 7, 2004, the director denied the petition noting that the employees under the beneficiary cannot be deemed professionals "because *they* are not managing professional employees." (Emphasis added in original). However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a professional employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. In the present matter, the organization is structured so that the second tier, first-line supervisor relieves the beneficiary from supervising non-professional employees. Consequently, the beneficiary may not be disqualified based on the conclusion that he does not manage professional employees where the sole basis for such reasoning is that the second tier of managers supervises the petitioner's non-professional employees. As such, this specific comment of the director is withdrawn.

The director's erroneous comment, however, was not the sole basis for the denial. The director properly concluded that the beneficiary's job description does not establish that the beneficiary would be employed in a managerial or executive capacity. He further stated that the petitioner's quarterly wage statement for the third quarter of 2003, the quarter during which the petition was filed, shows that the petitioner had a total of three employees, including the beneficiary. The director asserted that without a support staff, it would be unreasonable to assume that the beneficiary was being relieved of non-qualifying duties.

On appeal, counsel refers to the petitioner's prior non-immigrant petitions, which CIS approved, implying that the current denial of the I-140 petition is inconsistent with the prior approvals. However, the director's decision does not indicate whether he reviewed the prior approval of the non-immigrant 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 petitions were 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 Citizenship and Immigration Services (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 the AAO 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).

The AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001). As such, the prior approvals of the petitioner's L-1A non-immigrant petitions will not serve as guiding precedent in the instant case, which must be decided based upon the evidence submitted in the record of proceeding at hand.

Counsel also states that the beneficiary "has complete executive authority for establishing all essential business contracts, marketing strategies, hiring of computer professionals and other staff members, as well as budget, inventory, and purchasing decisions." While each petitioner must establish that its beneficiary has discretionary authority with regard to issues that effect the overall organization or an essential function of the organization, the fact remains that merely establishing that the beneficiary has discretionary authority without providing details about that individuals daily tasks will not adequately establish that the beneficiary is or will be employed in a qualifying capacity. 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). In the instant matter, the petitioner failed to provide the requested detailed list of the beneficiary's duties with a percentage breakdown of time spent performing each of those duties. Instead, the petitioner has recited the beneficiary's vague job responsibilities and broadly cast business objectives, which does not satisfy the regulatory requirement that the petitioner provide a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Claiming that the beneficiary "oversees the implementation of company policies and directs the company's operations" without assigning specific duties to define these broad objectives fails to convey an understanding of what exactly the beneficiary does on a day-to-day basis.

Counsel claims that the director ignored "direct statements regarding the nature of [the] [b]eneficiary's functions" and focused on statements that were meant to be used to supplement evidence and information that was provided prior to the request for evidence. However, counsel's comment is without merit. The petitioner's initial statement regarding the beneficiary's job duties provided the same broad overview of the beneficiary's responsibilities as was provided in response to the director's request for evidence. Although the petitioner submitted documentation regarding its ownership, financial status, and organizational structure, none of this documentation defines the beneficiary's daily job duties. Although the petitioner was given ample opportunity to provide this crucial evidence in response to the director's second request for evidence, it

failed to do so. The AAO cannot assume that the beneficiary's job duties are primarily managerial or executive merely because the beneficiary possesses an executive position title and assumes a position of authority within the petitioner's organizational hierarchy. Although both factors are significant, neither explains how the beneficiary carries out his responsibilities on a day-to-day basis. Furthermore, the beneficiary's authority over the petitioner's legal counsel and accountant does not suggest that the beneficiary's duties include primarily supervising professional employees. While an attorney and an accountant may both be deemed professional employees, neither is employed by the petitioner on a full-time basis and neither performs duties that are directly related to the petitioner's essential purpose—selling services and merchandise. Many business enterprises may use the services of attorneys and accountants as the mere by-product of running a business. However, maintaining discretionary authority over employees, which are not germane to the purpose of the petitioner's business, does not lead to the conclusion that the beneficiary primarily supervises professional employees.

On review, the petitioner has failed to establish that the beneficiary would be employed in a qualifying capacity. The record lacks sufficient detail regarding the beneficiary's daily job duties and, therefore, does not affirmatively establish that the beneficiary primarily performs managerial or executive duties. While the petition states that the petitioner has five employees, the petitioner's quarterly wage report for the third quarter of 2002 when the petition was filed indicates that the petitioner had four employees during that quarter. The petitioner also submitted an organizational chart showing additional support personnel and independent agents and representatives who also perform services for the petitioner. However, the petitioner failed to submit any documentary evidence that it actually employed these contractors as claimed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, 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, any employees that were not employed at the time the petition was filed cannot be considered for the purpose of determining the beneficiary's eligibility for classification as a multinational manager or executive. Overall, the record lacks sufficient evidence to establish that the beneficiary was being relieved of having to perform non-qualifying duties at the time the petition was filed. As such, the AAO cannot affirmatively conclude that the beneficiary was primarily performing duties of a managerial or executive nature. For this reason, this petition cannot be approved.

The other issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant case, the petitioner indicated in the initial petition that the beneficiary's intended salary would be \$800 weekly, which is approximately \$41,600 per year.

On appeal, the petitioner provided the beneficiary's W-2 wage and tax statement for the year 2002 showing that the beneficiary's gross salary for the year in which the petition was filed totaled \$52,878. Based on this documentation, the AAO concludes that the petitioner has overcome the director's conclusion regarding the petitioner's ability to pay the beneficiary's proffered wage. However, based on the petitioner's failure to establish that the beneficiary would primarily be performing duties of a qualifying nature, the AAO will dismiss this appeal.

Beyond the decision of the director, the record is unclear as to whether or not the petitioner has submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. While the petitioner claims that it is a subsidiary of the foreign entity, which it indicates owns 51% of its stock, certain evidence in the record raises questions as to the truth of these claims. Specifically, please note the following:

- (1) Stock certificates and corporate minutes show that the foreign entity was issued 51% of the company's stock;
- (2) In a letter dated January 9, 2003, the petitioner's accounting firm states that the 10,000 shares issued in 2000 were done so at a price of \$8 per share;
- (3) The December 10, 2003 letter from the petitioner's bank states that the foreign entity wired \$57,870 to the petitioner in 2000. No evidence of the beneficiary's share of the \$80,000 was documented. Thus, it would appear that the foreign entity bought at least 72.34% of the stock and not 51%;
- (4) The 2000 Form 5472 shows that the foreign shareholder of the petitioner is Huang Chou Hwang and not the foreign entity. At the bottom of the form, it states that the foreign entity (owned by Huang Chou Hwang) is related to the foreign shareholder and not the reporting corporation (the petitioner);
- (5) The March 21, 2003 Certification regarding the ownership of the foreign entity states that Huang Chou Hwang owns 25% of the company; and
- (6) The Proxy from a Corporation and the Minutes of Organization for the petitioner show that the foreign entity gave its control to the beneficiary to vote by proxy on its behalf.

Most of the documents submitted support the petitioner's claim that the foreign entity owns 51% of the U.S. entity. However, based on the above, there are obvious inconsistencies in the record that have not been adequately explained by the petitioner. These inconsistencies lead us to question the credibility of the assertions made. 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). Furthermore, 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. *Id.*

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). Therefore, based on the additional grounds discussed above, 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.