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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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JUN 20 2005

FILE: WAC 02 242 52279 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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.

for

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 involved in the construction business. 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 beneficiary would not be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 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.

The petitioner submitted a description of the beneficiary's proposed position duties in support of the petition. As the director has included that description in the denial, the AAO need not repeat it in this decision.

The petitioner also submitted an organizational chart showing the petitioner's hierarchical structure as of May 1, 2002. The beneficiary appears at the top of the company's hierarchy, followed by three subordinates, including an office manager, a project manager, and a project estimator. The organizational chart includes the educational levels, brief job descriptions, and salaries for the three subordinates, as well as other employees named in the chart.

On November 29, 2002, the director issued the first of two requests for additional evidence (RFEs). The petitioner was instructed to submit its quarterly wage report for the third quarter of 2002, naming all of its employees during that quarter. The petitioner was also instructed to submit a more detailed description of the beneficiary's proposed job duties.

The petitioner responded with the requested quarterly tax return, which listed a total of 35 employees. The petitioner did not provide any information indicating when each employee commenced his/her employment with the petitioning organization. Furthermore, of the 35 employees named in the wage report, only two appear on the organizational chart. The AAO cannot determine the job titles, job duties, or the educational levels of the remaining 33 employees or which employees were part of the organization on the date the petition was filed.

The petitioner also submitted the following additional description of the beneficiary's proposed job responsibilities:

> [The beneficiary] is the [p]resident of [the petitioner] and Mepco Services, Inc. both wholly owned subsidiaries of Mepco, S.A.R.L. In that capacity he is responsible for directing the overall management of the company[,] which at this time includes over fifty workers. [The] [p]etitioner is primarily involved in the building/construction field. As such, [the] [b]eneficiary directly supervises his two project managers, one who holds a degree in civil engineering and the other who holds a degree in mechanical engineering, as well as the work of his [a]dministrator who holds a [b]achelor of [a]rts degree in the business. The project managers directly supervise the assistant project manager who also holds a bachelor's degree in engineering and indirectly the various supervisors and foremen who then supervise the laborers.
>
> As [p]resident, [the beneficiary] plans, develops and establishes policies and objectives of the U.S. entity. He confers with his [p]roject [m]anagers to coordinate functions and operations between his various projects and to establish responsibilities as well as procedures for meeting contractual obligations. He has final authority on staffing levels, construction contracts, and contracts with outside businesses such as architects.

On March 4, 2003, the director issued the second RFE instructing the petitioner to submit additional documentation to establish that it is doing business and that it has the ability to pay the beneficiary's proffered wage of $60,000 per year.

The petitioner responded by submitting several copies of the beneficiary's pay checks, an employee earnings summary from January through May 2003, and the beneficiary's W-2 wage and tax statement. Although several of the check copies are difficult to read, it appears that they reflect wages that were paid in 2003. However, 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). As such, documents that show the beneficiary's compensation after the petition was filed are irrelevant for the purpose of establishing that the petitioner had the ability to pay the beneficiary's wage as of the petition's filing date. Furthermore, while certified copies of the petitioner's tax returns may have been unavailable, this does not explain the petitioner's failure to submit copies of its Form 1120's.

On August 29, 2003, the director denied the petition noting that many of the employees named in the petitioner's 2002 third quarterly wage report do not appear in the organizational chart submitted in support of

the petition. The director also stated that the beneficiary's subordinates cannot be deemed professional and concluded that the beneficiary would not primarily perform qualifying managerial or executive duties.

On appeal, counsel states that the organizational chart submitted in support of the petition did not reflect the changes in personnel that took place in July of 2002 and asserts that the director failed to consider these changes and the additions to the petitioner's staff of employees. However, counsel's interpretation of the director's analysis is incorrect. Contrary to counsel's assertion, the director did not ignore the changes in the petitioner's staffing structure; rather, the director focused part of his attention on the organizational chart the petitioner submitted in support of the petition. If the petitioner experienced changes in personnel in July, as counsel claims, it remains unclear why the petitioner did not submit an updated organizational chart to reflect those changes in support of the initial petition or in response to the request for evidence, particularly since the petition was not filed until the end of July 2002. 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)). Furthermore, the unsupported 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). In the instant matter, the petitioner waited until after an adverse decision was issued to submit an explanation for the discrepancy between the organizational chart on record and the relevant quarterly wage report.

Counsel further asserts that Citizenship and Immigration Services (CIS) denied the petitioner its due process rights by failing to allow an opportunity to "clarify the new management structure." This assertion, however, is groundless. Although the director did not specifically request an explanation of the petitioner's new management structure in either of the RFEs, the petitioner was not precluded from updating the record with an organizational chart that more accurately reflects its organizational structure, particularly since the petitioner was well aware that the organizational chart initially submitted failed to reflect any of the changes that were taking place in the petitioner's personnel structure at the time its petition was filed. The director has no way of knowing when a particular petitioner may experience changes of any kind. Therefore, it is the duty of the petitioner to come forward with any relevant information. There is no burden on CIS to actively seek new information and assist the petitioner in establishing its eligibility.

Next, counsel states that the director failed to properly apply the statutory definition of managerial capacity to the petitioner's "extensive and detailed list of daily duties to be performed by the [b]eneficiary," which ultimately led to the adverse decision. However, counsel's definition of what is an "extensive and detailed list of daily duties" does not fall within the parameters set by presiding case law. 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). While the petitioner in the instant matter provided some information generally reciting the beneficiary's vague job responsibilities, 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. *Id.* The director stressed the importance of this information in the first RFE, where the petitioner was specifically instructed to submit a more detailed description of the beneficiary's proposed job duties. However, instead of providing a description of the actual duties the beneficiary would perform on a day-to-day basis, the petitioner provided another overview of the beneficiary's responsibilities that was even more general than the overview initially provided in support of the petition.

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, this crucial information is provided in terms that are too broad to enable CIS to gauge what exactly the beneficiary would be doing on a day-to-day basis. While counsel provides more detail regarding the petitioner's revised personnel structure and the basic duties of the beneficiary's purported subordinates, the AAO cannot affirmatively determine that the beneficiary would be employed in a qualifying capacity when the beneficiary's specific duties are essentially unknown. Regardless of the duties and educational backgrounds of the beneficiary's purported employees, the petitioner has the burden of establishing that the beneficiary's job is primarily comprised of managerial or executive duties. Even if the petitioner maintains that the beneficiary would primarily manage a professional, managerial, or supervisory staff, the petitioner still has the burden of specifying the actual duties that would be involved in overseeing personnel. Merely stating that the beneficiary would manage professional and/or supervisory personnel does not automatically determine the nature of the beneficiary's proposed duties. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. While counsel is correct in stating that the beneficiary may perform some non-qualifying duties and still meet the statutory requirements of sections 101(a)(44)(A) and (B) of the Act, the petitioner must establish that the beneficiary's position is *primarily* comprised of qualifying tasks. In the instant matter, the petitioner's failure to provide a detailed description of the beneficiary's proposed day-to-day job duties precludes the AAO from determining the "true nature" of the beneficiary's proposed position. *Id.* For this reason, the petition cannot be approved.

Counsel points out that CIS approved other petitions that had been previously filed on behalf of the beneficiary. However, the director's decision does not indicate whether he reviewed the prior approvals of these 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).

Additionally, internal service records show that CIS denied another I-140 petition, which was filed on behalf of the same beneficiary and whose receipt number was WAC0202557186. Although the petitioner noted this previous filing in the more recent I-140 petition, it did not attach an explanation as required. Despite the petitioner's failure to disclose this relevant information, the record clearly shows that CIS has consistently denied the petitioner's immigrant petitions.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the petitioner had been doing business for one year prior to filing the instant petition. *See* 8 C.F.R.

§ 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states that "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." As the petition was filed on July 26, 2002, the petitioner has the burden of establishing that the petitioner was doing business since July 26, 2001. In the instant matter, the petitioner submitted a subcontractor work order dated April 2, 2002 and a subcontract agreement dated February 7, 2002. Neither of these documents suggests that the petitioner was doing business on July 26, 2001. Although the petitioner also submitted a bank statement dating back to July and August of 2001, such documentation is not an indicator of whether the petitioner was engaged in the "regular, systematic, and continuous provision of goods and/or services" during the relevant period of time. *Id.* Therefore, the record as presently constituted does not establish that the petitioner was engaged in the regular, systematic, and continuous provision of goods for the requisite period of time prior to filing the petition.

Additionally, 8 C.F.R. § 204.5(j)(3)(i)(C) requires the petitioner to establish that it has a subsidiary or affiliate relationship with the beneficiary's foreign employer. In support of the petition, the petitioner submitted a letter dated June 28, 2002 indicating that Mepco S.A.R.L., the beneficiary's foreign employer, withdrew $71,000 from its account and issued a certified bank check payable to the U.S. petitioner. However, the attestation of a bank representative is no different from any other claim. In order to be given any evidentiary weight, it requires supporting documentary evidence. *See Matter of Soffici*, 22 I&N Dec. at 165. In the instant matter, the petitioner has not submitted a copy of the certified check discussed in the bank's letter or any evidence to show that the said amount was deposited into the petitioner's bank account to be used for the purchase of stock.

Furthermore, the petitioner's claim that it issued stock to its parent company in 1997 is inconsistent with its Form 1120 tax return for the year 2000. Namely, the petitioner answered "no" to question No. 4 of Schedule K, which asks whether the petitioner is a subsidiary in an affiliated group or parent/subsidiary controlled group, and again answered "no" to question No. 7, which asks whether the petitioner has any foreign ownership.

Additionally, even though the petitioner claims that the $71,000 was a capital contribution by the foreign entity, no shares were issued to the claimed parent corporation until December of 2001. The petitioner's stock transfer ledger shows that 1,000 original shares were issued at that time to the foreign entity in exchange for $50,000. However, no evidence was submitted to show the transfer of $50,000 at that time or the issuance of any stock to the foreign entity before then. 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 matter, the petitioner has not resolved these inconsistencies and has failed to submit sufficient evidence to establish that it has had a qualifying relationship with the beneficiary's foreign employer since the filing of the petition.

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.

Notwithstanding the adverse decision in this proceeding, the AAO notes that the director made various inappropriate comments, which will hereby be withdrawn. Namely, on page five of the decision the director stated the following:

> It is unreasonable to believe that the beneficiary as "[p]resident", [sic] with the organizational structure provided, would not be assisting with the day[-]to[-]day non-supervisory duties. The performance of those menial tasks precludes the beneficiary from being considered an "executive." . . .
>
> Even if the organizational chart shows other lower-level managers, such managers cannot be considered "managers," for immigration purposes, because *they* are not managing professional employees.

The first of the two above paragraphs refers to the petitioner's organizational structure, which the director repeats, but fails to explain a relationship between the personnel hierarchy and the beneficiary's duties. Rather, the director refers to the beneficiary's "menial tasks" without an actual analysis of which tasks in particular he deems menial and why. Contrary to the director's comment, the AAO was entirely unable to make any determination as to the nature of the beneficiary's proposed position, mainly because the petitioner failed to provide a detailed description of the beneficiary's daily job duties. Thus, the director's comment that the beneficiary would perform menial tasks appears to be inaccurate and is not corroborated by the evidence of record.

The director also concluded that the employees under the beneficiary's supervision cannot be deemed managers "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. The director's comment, however, reflects an inaccurate interpretation of the law and, therefore, will be withdrawn.

Nevertheless, 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.