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MAY 06 2005

FILE: WAC 03 137 54251 Office: CALIFORNIA SERVICE CENTER Date:

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:

SELF-REPRESENTED

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

The petitioner is a corporation organized in the State of Nevada in June 2001. It manufactures off-road single seat vehicles. 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 entity.

On appeal, counsel for the petitioner contends that as the beneficiary has already been approved for L-1A intracompany transferee status, he should be approved as a multinational executive or manager.

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 7, 2003 letter appended to the petition, the petitioner stated that:

[The beneficiary] as the president for [the petitioner], will continue to manage and be in charge of the general direction of the company. He is responsible for the day-to-day operations. He plans and directs the operations of the business, as well as the recruitment of new U.S. employees and distributors in the U.S. He plans business objectives [and] develop[s] procedures for achieving objectives. He also reviews activity reports and financial statements to determine progress and status. He is in charge of the budget. Furthermore, he develops and manages the company's relationships with our representatives.

The petitioner added that:

[The beneficiary] directs the organization, exercises authority over other executives and workers, directs the budget process and exercises authority over major decisions to be made in the usual course of business. He has hired a manager, technicians, mechanics, sales representative and other employees who will perform non-executive tasks.

The petitioner's organizational chart depicted the beneficiary as president. The chart listed a manager as reporting directly to the president and an assembling department, service department, and distributor department reporting directly to the manager. The assembly department included one employee and the service department included two employees and unidentified direct sales representatives. The distributor department included two third party entities located in Oregon and Michigan.

On May 18, 2004, the director requested: (1) the petitioner's organizational chart including brief descriptions of job duties and education of all employees under the beneficiary's supervision; (2) an explanation of the source of remuneration of all employees; and, (3) a copy of the petitioner's California Form DE-6, Employer's Quarterly Wage Report, for the first quarter of 2003, the quarter in which the petition was filed.

In a June 22, 2004 response, the petitioner provided a revised organizational chart showing the beneficiary as president, a manager reporting to the beneficiary, and one individual in the assembling department, and one individual in the service department. The chart again listed two third party entities as distributors and unidentified direct sales representatives reporting to the service department. The petitioner's description of the job duties for those individuals listed on the organizational chart included a manager of the assembling department,¹ an assembling supervisor, and a service supervisor.

The assembling department manager's duties included managing the assembling, service, and distributor departments, managing day-to-day operations, diagnosing mechanical problems, ensuring that welding, cuts, and brazing methods were properly used, controlling the work of other supervisory personnel, making final decisions after inspection, and hiring and training the welders for the service department. The assembling supervisor's duties included inspecting and testing motors and giving instructions to mechanics, ensuring adherence to quality control and safety standards, advising customers on vehicle conditions and work

¹ The individual identified as the assembling manager is listed on the organizational chart as the "manager."

performed, ensuring that deadlines are met and that proper assembling methods are used, and authority to make day-to-day decisions and hire and fire personnel. The service supervisor's duties included authority to make decisions concerning day-to-day operations, such as, estimates and quotes to clients, preparing reports and maintaining inventory, ensuring repairs and replacement of defective parts and components, controlling tests for quality control, and authority to make decisions and recommend and dismiss personnel.

The petitioner also listed job descriptions for two welders, two mechanics, three mechanic helpers, one machinist, and one receptionist.

The petitioner's California Form DE-6, for the quarter in which the petition was filed listed individuals in full-time positions of president, assembling manager, assembling supervisor, service supervisor, welders (2), and a receptionist. The petitioner's California Form DE-6, listed individuals whose names corresponded to the petitioner's job descriptions of individuals in the positions of mechanic, mechanic helper, and machinist. However, the earnings reported for the positions of mechanic, mechanic helper, and machinist reflected temporary or part-time employment. The California Form DE-6 was also unsigned and indicated that the petitioner employed a total of six individuals in the first month of the quarter and seven individuals in the last two months of the quarter.

The director determined that: (1) the general description of the beneficiary's job duties did not establish that the beneficiary met the criteria outlined in the definition of executive or managerial capacity; (2) it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with the day-to-day non-supervisory duties; (3) the beneficiary would be essentially a first-line manager who would not supervise managerial or professional employees; and, (4) that the beneficiary did not qualify as a functional manager as he would be involved in performing routine operational activities rather than managing a function.

On appeal, counsel for the petitioner restated the beneficiary's duties listed in the petitioner's offer of employment and asserted that the general description showed the beneficiary performed in a managerial and executive capacity. Counsel added that the beneficiary is also responsible for the petitioner's fiscal health, establishes and implements plans to efficiently use materials, labor, and equipment, and provides leadership in identifying potential sources, establishing new sales methods, and improving the overall production assembly and project design. Counsel explained that the petitioner's organizational chart depicted only the upper management and that all of the employees who had been identified with job descriptions were full-time employees. Counsel contends that the beneficiary's supervision of the individual identified as the petitioner's manager (assembly manager) is supervision of an individual who supervises and controls the work of other supervisory or managerial employee(s). Counsel also submits a list of sub-contractors who make custom parts for the petitioner's business.

Counsel's assertions 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). In this matter, the petitioner paraphrases the elements contained in the definitions of executive capacity and managerial capacity, without providing details of the beneficiary's actual job duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the

statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner must provide evidence that conveys an understanding of what the beneficiary does on a daily basis. The record does not contain sufficient evidence of the beneficiary's actual job duties to conclude that the beneficiary's role is primarily managerial or executive.

The petitioner has also presented confusing evidence regarding its actual number of full-time employees. Although counsel asserts that all of the petitioner's employees work full-time, the information contained on the petitioner's California Form DE-6, does not substantiate that assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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).

The petitioner's California Form DE-6 contains inconsistencies within the document. As noted above, the California Form DE-6 lists 13 employees but notes that only six individuals were employed the first month of the quarter and only seven individuals were employed the last two months of the quarter. 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). Further, the majority of the employees do not appear to have received a salary commensurate with full-time employment. Moreover, as the face of the document does not indicate that it was signed or filed with the proper California authority, the document garners less probative value.

The petitioner also fails to document and quantify what proportion of the beneficiary's duties would be managerial functions or executive functions and what proportion would be non-managerial or non-executive. Likewise, the petitioner fails to document and quantify the managerial or supervisory duties of the individual identified as "manager" and whether this individual primarily provides managerial or supervisory duties for the United States entity. Based on the current record, the AAO is unable to determine whether the beneficiary's claimed managerial or executive duties or the "manager's" claimed managerial or supervisory duties constitute the majority of their duties, or whether their duties are primarily non-qualifying administrative or operational duties. Again, 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 at 190.

Finally, counsel's initial reference to the beneficiary's approval as an intracompany transferee is not probative to the matter at hand. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant 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. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States

temporarily, and an immigrant E-13 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. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L1-A 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 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 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).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will include primarily executive or managerial duties.

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.