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U.S. Citizenship
and Immigration
Services

B4

[Redacted]

FILE:

[Redacted]
EAC 04 182 50143

Office: VERMONT SERVICE CENTER

Date:

NOV 23 2005

IN RE:

Petitioner:
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:

[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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 New York in 1997. It operates a specialty retail shop and provides woodworking 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 executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts that the director did not apply the correct "statutory regulation" when adjudicating the visa petition. Counsel submits a brief in support of the appeal.

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 March 10, 2004 letter appended to the petition, the petitioner stated:

[The beneficiary] will continue to be responsible for day-to-day operations of the New York office. He also has the authority to negotiate contracts on behalf of the company and to arrange financing. [The beneficiary] oversees all the purchasing of merchandise, by attending various trade shows, as well as the merchandising for the retail store (i.e. window display and store display). He also monitors customer responses to the new line of products. In addition, he arranges advertising and publicity aspects as well as publishing a catalogue for the retail business, along the lines of Pottery Barn and Bombay Gift Co. The catalogue will include gift items and small cabinetry pieces.

The petitioner added that the beneficiary would also continue: "to design a line of small cabinetry and mantel pieces," "design and develop closet organizer systems," and "design customized furniture and cabinetry." The petitioner noted that the beneficiary had full responsibility for the design and construction process. The petitioner further noted that the beneficiary would hire and train company contractors and currently had engaged a marketing consultant and a webmaster. The petitioner concluded by stating that the beneficiary would be compensated in his managerial position and requesting that the visa petition be approved so that the beneficiary could continue to operate in a managerial capacity as president.

On December 14, 2004, the director noted that the petitioner had not sufficiently described the beneficiary's duties to demonstrate that he would be employed in a qualifying capacity and requested additional evidence to establish that the beneficiary would be employed in an executive capacity in the United States firm including: a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; evidence of the staffing of the United States organization, indicating the number of employees, the duties performed by each employee, as well as the management and personnel structures of the United States firm; and if the company used contractors, evidence documenting the number of contractors used and the duties they performed.

In a March 9, 2005 response, counsel for the petitioner attached the beneficiary's March 1, 2005 letter describing his duties. The beneficiary indicated that: he spent approximately 12 to 15 hours per week overseeing the day-to-day operations of the New York office, including negotiating contracts on behalf of the company, arranging financing, attending trade shows, and overseeing the purchasing of merchandise and materials; 14 to 17 hours per week designing a line of products specific to the U.S. market; and 14 to 18 hours per week hiring, training, and overseeing the work of all other company contractors. The beneficiary identified the contractors the company used as a marketing consultant and a webmaster. The beneficiary also indicated he worked with an individual employed with a separate entity who met with clients and submitted the client's specifications so that the petitioner could provide storage organizer systems based on the data submitted.

Counsel also noted the beneficiary's prior approval as the petitioner's L-1A intracompany transferee in the position of president and referenced an unpublished matter that had found that a sole employee could be a manager or executive if the sole employee utilized outside contractors or if the business was complex. Counsel concluded that the duties of the position of president for the petitioner are primarily executive in

nature, that the duties relate to policy and operational management, that the beneficiary received only general supervision from the petitioner's owner, and exercised wide latitude in discretionary decision-making while establishing the goals and policies of the U.S. company.

The director denied the petition on March 31, 2005 determining that: (1) the record did not persuade that the beneficiary would be primarily functioning as a multinational executive/manager since there are no other employees working for the company; (2) the record suggested that the beneficiary would be performing the duties of subordinate employees and other day-to-day functions of the company; (3) even though the beneficiary would hire and fire contractors, the beneficiary's March 1, 2005 letter indicated that the beneficiary's primary duties would be overseeing the day-to-day operations of the company and producing a product; (4) the contractors hired would not be directly supervised or managed by the beneficiary; and, (5) the record did not persuade that the beneficiary primarily functioned at an executive level.

On appeal, counsel for the petitioner observes that the petitioner requested consideration of the beneficiary's position in a managerial capacity not in an executive capacity, but that the Citizenship and Immigration Services (CIS) applied only the statutory definition of executive capacity to the beneficiary's position. Counsel asserts that the petitioner claimed that the beneficiary's position would be primarily managerial, but notes that the beneficiary's position also satisfies the criteria of an executive. Counsel contends that the beneficiary directly supervises three independent contractors, a marketing consultant, a webmaster, and a designer, as well as managing the petitioner's essential functions of design and development of a new product line and marketing strategies. Counsel also acknowledges that CIS is not required to approve petitions based on past approvals but requests that the beneficiary's prior approvals as an L-1A intracompany transferee be given consideration.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, CIS 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's description of the beneficiary's duties shows that the beneficiary is negotiating contracts, arranging financing, purchasing merchandise, attending trade shows, monitoring customer's responses to the petitioner's products, arranging advertising, and designing cabinetry and closet organizer systems. These are the routine operational and administrative tasks necessary to establish and continue the petitioner's operations. However, 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).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Upon review of the totality of the record, including descriptions of the beneficiary's duties, the nature of the petitioner's business, and the failure to substantiate the employment of individuals or contractors, the petitioner has not established that the beneficiary's duties elevate the proposed position to a primarily managerial or executive position.

Although counsel asserts that the beneficiary directs three independent contractors, a critical analysis of the nature of the petitioner's business and the duties of the beneficiary and those of the three independent contractors purportedly utilized by the petitioner shows that the three independent contractors do not relieve the beneficiary from performing non-qualifying duties. For example, the beneficiary indicates that he spends 12 to 15 hours per week negotiating contracts, arranging financing, attending trade shows, and purchasing merchandise and materials and 14 to 17 hours per week designing products. Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. The petitioner bears the burden of establishing the beneficiary's duties are *primarily* managerial or executive and 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)); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Neither has the petitioner presented evidence to document the remuneration, and thus actual employment of the independent contractors. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Counsel's assertion that the beneficiary is a functional manager is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Again, 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir. 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner has not provided evidence that the beneficiary *manages* an essential function.

The AAO acknowledges that the director did not thoroughly analyze the beneficiary's position as both an executive and a manager. However, in this matter, the description of the beneficiary's duties demonstrates quite clearly that the beneficiary is primarily performing the operational tasks of the petitioner and not managerial or executive tasks. The actual duties themselves 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). It would serve no useful purpose to remand the matter when the beneficiary is clearly ineligible for this visa classification.

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

The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary. 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). 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.

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. 1103 (E.D.N.Y. 1989). 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).

Moreover each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As discussed above, the evidence submitted in support of this petition does not establish the beneficiary's eligibility as a manager or executive as defined at section 101(a)(44) of the Act, and the AAO finds that the director was justified in departing from the previous nonimmigrant approvals by denying the present immigrant petition.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported 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).

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.

are significant differences between the nonimmigrant visa classification, which allows an alien to enter the Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court

Beyond the decision of the director, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary's employment with the foreign entity was in a managerial or executive capacity. The description of the beneficiary's duties for the foreign entity depict an individual who was engaged in design of new product prototypes and upgrading the foreign entity's existing product line. Again, 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. at 604. The director specifically requested that the petitioner identify the number of employees under the beneficiary's supervision in the foreign entity, their job titles and duties, the beneficiary's degree of discretionary authority in the foreign company, and the amount of time he allocated to executive as opposed to non-executive functions. Failure to submit requested evidence that precludes a material line of inquiry shall be ground for denying the petition. 8 C.F.R. § 103.2(b)(14). Although the foreign entity referenced prototype production personnel as reporting to the beneficiary, this statement without supporting documentation is not sufficient to elevate the beneficiary's foreign position to that of a manager or an executive. 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. For this additional reason, the petition will not be approved.

In addition, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer. The petitioner indicates that an individual owns 50 percent of the foreign entity and that the same individual owns 50 percent of the petitioner. However, the AAO observes that the petitioner's 1997 and 1998 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return show at Schedule E, Line 1(d) that the beneficiary owns 100 percent of the petitioner. Although later IRS Forms 1120 do not depict the beneficiary as the petitioner's 100 percent owner, neither do the later IRS Forms 1120 indicate the petitioner's foreign ownership. 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). Moreover, the petitioner has not supplied evidence that the 50 percent stockholder controls either entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Without evidence that the 50 percent stockholder exercises control of the petitioner, the petitioner has not established a qualifying relationship. In this matter, the question of actual control still remains. Although the definition of a subsidiary includes a provision for a parent company that owns 50 percent of a 50-50 joint venture, there are no provisions in statute, regulation, or case law that allow for the recognition of veto power of negative control in other than a 50-50 joint venture. For this additional reason, the petition will not be approved.

Further, the petitioner has not established its ability to pay the beneficiary the proffered annual wage of \$55,900. The record does not contain evidence that the petitioner has paid the beneficiary or has sufficient net income or assets to pay the proffered wage. 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.