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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 24 2005
WAC 04 164 53173

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a California corporation operating as a travel agency focused on promoting and organizing tours to India. 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 denied the petition on the following independent grounds of ineligibility: 1) the beneficiary was not employed abroad in a qualifying managerial or executive capacity; 2) the beneficiary would not be employed in the United States in a managerial or executive capacity; and 3) 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 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 first two issues are both related to the beneficiary's employment capacity. The first issue questions the beneficiary's employment capacity abroad, while the second issue questions the beneficiary's proposed employment capacity at the time the petition was filed.

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 a letter dated April 14, 2004, which provided the following descriptions of the duties performed by the beneficiary during his employment abroad and duties to be performed by the beneficiary under an approved petition:

Abroad:

During his employment abroad, [the beneficiary]'s duties included overseeing the company's day-to-day operations. He was also responsible for promoting and organizing inbound tours to India. He coordinated the work of outside vendors under contract to perform services. He developed innovative ideas that he utilized in promoting tours and travel to India and other

countries. He created a travel package His responsibilities included maintaining contact with clients to assure their satisfaction with the company's services, coordinating vendors, and ensuring the company's overall growth.

United States:

[The beneficiary] is vested with the responsibility of ensuring the continued operation and growth of the company. To that end[,] he oversees the company's day-to-day operations, and assures that the company's set standards and guidelines are met.

As [p]resident[,] he has sole discretion to enter [into] contracts on behalf of the company with outside vendors for specialized services. When he deems necessary, [the beneficiary] has the authority to hire and fire personnel. Utilizing his marketing expertise[,] he oversees the promotion and organization of tours from the U.S. to India. He is answerable only to the president of the parent company in India. Finally, he must establish and maintain good relations with clients and see to it that their tourism needs are met.

The petitioner also provided the following additional description of the beneficiary's prior duties abroad:

Domestic Market Operations

Where he handles inbound traffic from foreign countries and cater[s] to the domestic travel request as well. [sic] [e]g. [sic] [h]otel [r]eservation/[t]ransportation/[a]irport [t]ransfers, etc. Time spen[t] here was 25%

Administration

Administer the duties he assigns to sub-agents/agencies involved in various cities/states in India and Nepal for the smooth running of our tours including feedback [sic], emergency services for our clients and public relations [sic]. Mr. [REDACTED] ([q]uality [c]ontrol Incharge [sic][]) and Mr. [REDACTED] ([t]ravel [a]gent, [m]gr.) under him. Time spen[t] here was 25%.

Marketing & Advertisement

[The beneficiary] has been directed to head [the] overseas operation in [the] U[.]S[.]A[.] since he has traveled extensively and gained enough experience in promoting India as a tourist destination abroad[;] besides [that,] the company uses his expertise for Internet marketing[,] as he is well aware of online requirements and of today [sic]. In marketing[,] time spent was 25%, Mr. [REDACTED] (director local-op)[,] Mr. [REDACTED] ([q]uality [c]ontrol Incharge [sic])[,] Mr. [REDACTED] ([t]ravel [a]gent, [m]gr.) worked with and under him.

Accounts & Finance

His financial duties also include negotiating competitive rates from hotel/airlines, etc.[.] to maintain our competitiveness besides accepting [sic]/withdrawing/allotting funds on behalf of [the] business and contribute in attaining/setting objective[s] to maximize returns on [the] investment. Here time spen[t] was 25% in assisting and updating our [c]hief [e]xecutive [o]fficer, Mr. [REDACTED]

The petitioner also provided organizational charts, one illustrating the personnel structure of the foreign entity and the other illustrating the personnel structure of the U.S. entity. It is noted that the beneficiary's name does not appear anywhere in the foreign entity's organizational chart despite the claim that he occupied the position of director.¹ Furthermore, the names of Mr. [REDACTED] and Mrs. [REDACTED] appear under the position of director, thereby indicating that these are the individuals that shared the duties of the director, not the beneficiary.

In regard to the petitioner's organizational chart, the beneficiary is identified as the president and chief executive officer at the top of the petitioner's hierarchy. The beneficiary's two subordinates include a quality control manager in charge of sales and a manager in charge of accounts, tours, and travel. The petitioner submitted several of its quarterly wage reports identifying all of the employees named in its organizational chart.

After reviewing the submitted documentation, the director denied the petition in a decision dated March 14, 2005. The director determined that the beneficiary's duties abroad primarily consisted of providing travel services to the foreign entity's clientele and concluded that these were operational tasks that could not be deemed managerial or executive within the statutory definition.

On appeal, counsel asserts that the director misstated the facts and took them out of context to mean something other than what the petitioner intended. Contrary to counsel's argument, however, there is no indication that any portion of the beneficiary's described duties was taken out of context. Although the director took the liberty of paraphrasing rather than restating verbatim the petitioner's job description, the plain meaning of the beneficiary's duties overseas clearly suggests that the beneficiary was providing travel services to the overseas entity's clientele. The petitioner's description clearly states that 25% of the beneficiary's time was spent "cater[ing] to the domestic travel request[s]," which included hotel reservations, and handling air and ground transportation. The petitioner also clearly stated that another 25% of the beneficiary's time was spent marketing the foreign company in the United States and other countries. Finally, 25% of the beneficiary's time was spent negotiating hotel and airline rates. Based on this brief description, the director accurately concluded that most of the beneficiary's time was spent performing the duties of a travel agent. Although the description indicates that 25% of the beneficiary's time was also spent assigning tasks to subagents, tasks associated with this responsibility were not the core of the beneficiary's tasks. Rather, 75% of the beneficiary's time was spent directly carrying out the foreign entity's daily operational tasks. 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). In the instant matter, the petitioner's own description illustrated the beneficiary in a nonmanagerial and nonexecutive capacity during his employment abroad.

Counsel also disputes the director's mention of the denial of the petitioner's previously filed I-140 petition. However, contrary to counsel's apparent misconception, this factor was stated as a review of the facts that are a part of the instant record of proceedings. There is no indication that the petitioner's prior denial was in any way a factor that weighed in on the director's most recent decision.

¹ The petitioner did not indicate whether the organizational chart of the foreign entity represents its personnel hierarchy before or after the beneficiary's transfer to the United States.

In regard to the beneficiary's proposed employment in the United States, the director stated that the beneficiary's managers cannot be deemed managerial employees because they "only have/share three clerks to supervise." Thus, it appears that the director applied the definition of managerial capacity contained in section 101(a)(44)(A) of the Act to the beneficiary's subordinates. However, that definition 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, managerial, or supervisory employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. As the director's comment implies an incorrect interpretation of the law, it is hereby withdrawn.

Notwithstanding the flawed comment, the director properly concluded that the beneficiary would not be employed in a qualifying managerial or executive capacity.

On appeal, counsel states that the beneficiary is responsible for overseeing the growth and operation of the U.S. entity and claims that only the beneficiary has the discretionary authority to enter into contracts, handle all personnel matters, and oversee the organization of tours to India. However, the beneficiary's general discretionary authority is only one of several factors considered in making a determination regarding the beneficiary's eligibility for classification as a multinational manager or executive. In 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). Thus, while the beneficiary must have discretionary authority in order to qualify as a multinational manager or executive, the nature of the beneficiary's actual day-to-day duties 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).

In the instant matter, the petitioner merely recites the beneficiary's general job objectives without discussing the actual duties the beneficiary would perform to achieve those objectives. As such, the petitioner has failed to convey an understanding of the beneficiary's daily activity. The only task defined with any degree of clarity was the beneficiary's need to maintain a relationship with the petitioner's customers in order to ensure that their needs are adequately met. However, this is a daily operational task, which, while necessary for the smooth operation of the petitioner's business activity, is not of a qualifying managerial or executive nature. As previously stated, 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 petitioner has failed to identify any managerial or executive tasks the beneficiary would perform under an approved petition. As such, the AAO cannot conclude that the beneficiary would *primarily* perform qualifying managerial or executive duties.

The third issue in this proceeding is whether the petitioner met the requirements of 8 C.F.R. § 204.5(g)(2), which states the following, 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 determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner stated in the I-140 petition, which was filed May 2004, that the beneficiary's proffered wage would be \$45,000 per year.

On appeal, the petitioner provided the beneficiary's W-2 wage and tax statement for 2004, which shows that the beneficiary was compensated \$45,000 the year the petitioner filed the Form I-140. Thus, the petitioner has provided sufficient evidence to establish its ability to pay.

Notwithstanding the petitioner's ability to overcome the third ground for the director's denial, the petitioner has not established eligibility for the benefit sought, as it has failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

Additionally, though not discussed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

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."

In the instant matter, the petitioner is a travel service provider. However, the record is void of any documents, such as invoices for services rendered, to show that the petitioner was providing its services to customers on a "regular, systematic, and continuous" basis one year prior to the date the petition was filed. *Id.*

Though also not addressed in the director's decision, the record lacks sufficient evidence of a qualifying relationship between the petitioner and the claimed foreign parent entity as required by 8 C.F.R. § 204.5(j)(3)(C).

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

Affiliate means:

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

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

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly,

half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the statement appended to the petition the petitioner stated that it is a subsidiary of the foreign entity. Specifically, the petitioner claimed that the foreign entity has a 51% ownership interest in the petitioning entity. In support of this claim, the petitioner submitted the following documents:

1. The petitioner's articles of incorporation indicating that the petitioner is authorized to issue 10,000 shares of its stock.
2. The petitioner's May 2000 bank account statement showing three deposits made on May 11, May 18, and May 22 in the amounts of \$100, \$5,647, and \$5,000, respectively. The statement contains a highlighted handwritten note indicating that \$1,000 of the deposits was used to purchase stock, while another \$4,000 was used as working capital.
3. \$2,000 in U.S. traveler's checks dated January 4, 2001 made out to the beneficiary.
4. Stock certificate nos. 1 and 2, the former issuing 510 shares to the foreign entity and the latter issuing 490 shares to the beneficiary.
5. The petitioner's stock ledger indicated that two stock certificates were issued: stock certificate no. 1 for 490 shares to the beneficiary no. 2 for 510 shares to the foreign entity.²

Although the petitioner also submitted a copy of its minutes of meeting of officers and directors, this document made no mention of the petitioner's shareholders.

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. 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). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the instant matter, the documentation submitted does not establish that the foreign entity paid for its ownership interest in the U.S. entity. Although the U.S. traveler's checks suggest the occurrence of a monetary transaction, the transaction appears to have been between the beneficiary and another individual, whose signature is ineligible and whose identity is, therefore, unknown. Although the petitioner claims that the deposits shown in the May 2000 bank statement represent the purchase of stock, this claim is not supported by independent documentary evidence. 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

² The AAO notes that the stock ledger shows stock certificate no. 1 as being issued to the beneficiary and stock certificate no. 2 as being issued to the foreign entity. This is the reverse of the stock certificates that were submitted.

Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 issues discussed above, this petition cannot be approved.

As a final note, counsel asserts on appeal that the director's reference to the denial of the petitioner's prior I-140 petition filed on behalf of the beneficiary is irrelevant. In addition, counsel points to the L-1 nonimmigrant classification petitions approved on behalf of the beneficiary and indicates that, in addition to the prior I-140 denial, the director should also have addressed these decisions.

First, it appears that the director's reference to the prior denial was intended to demonstrate that the current decision is not inconsistent with that of the petitioner's first I-140 petition filed on behalf of the beneficiary. Therefore, the AAO does not find the director's comments regarding the prior I-140 denial to be irrelevant.

Second, with regard to the L-1 nonimmigrant petitions approved on behalf of the beneficiary, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. 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 addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. See 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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

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 prior nonimmigrant approvals do not preclude CIS from denying an extension petition. See e.g. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting*,

Inc. v. INS, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, 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).

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.