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**U.S. Citizenship  
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134

FILE:



Office: CALIFORNIA SERVICE CENTER

Date: SEP 02 2005

IN RE:

Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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 limited liability company organized in the State of California in December 1998. The petitioner claims to be affiliated with L&M Optical Disc, LLC, (L&M NY) a limited liability company, organized in February 1998 in the State of New York. The petitioner also claims that Compact Disc International Ltd, (CDI) an Israeli company and DXB Video Tapes, Inc., a U.S. company, established L&M New York pursuant to a joint venture. The petitioner also includes a corporate organizational chart that shows CDI owns 50 percent of L&M Holding, which owns 60 percent of the petitioner and 100 percent of L&M NY.<sup>1</sup> The petitioner in this matter manufactures and sells compact discs and seeks to employ the beneficiary as its deputy plant manager. 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 had been employed abroad in a managerial or executive capacity for one of the three years prior to entering the United States as a nonimmigrant. The director also 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 asserts that the director offered no analysis for classifying the beneficiary as a first-line supervisor. Counsel notes that the director, in his previous approvals of the petitioner's Forms I-129 petitions, found that the beneficiary is an L-1A 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

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<sup>1</sup> L&M NY has submitted a Form I-140 for another beneficiary (WAC 02 242 50628). In that file, L&M NY claims it owns a 60 percent membership interest in L&M Optical Disc West, LLC. It appears from a review of both files that CDI has submitted Internal Revenue Service (IRS) Forms 1120-F, U.S. Income Tax Return of a Foreign Corporation and L&M NY and the petitioner have both submitted IRS Forms 1065, U.S. Return of Partnership Income. Although it appears these companies are all interrelated, the record remains unclear as to the exact relationship between the various entities.

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 first issue in this proceeding is whether the petitioner has demonstrated that the beneficiary had been employed in a managerial capacity for the foreign entity in one of the three years prior to entering the United States as a nonimmigrant. The petitioner does not claim that the beneficiary was employed in an executive capacity.

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.

In a December 23, 2003 letter appended to the petition, the petitioner indicated that the beneficiary had been last employed as shift manager/technical support manager for the foreign entity and that in this position he supervised four line operators, three printing machine operators, two shift managers, and one maintenance employee. In addition, the petitioner stated that the beneficiary oversaw the maintenance of the machinery and production line activity, coordinated, supervised, and directed ten shift operators, identified and corrected line faults, supervised and maintained production quality, analyzed production reports, trained and directed new operators, and oversaw technical support during night shifts.

The petitioner also provided a September 25, 2001 letter, repeating the above job duties and indicating that the beneficiary as the shift manager/technical support manager directed and coordinated six shift operators.

On November 18, 2004, the director denied the petition. The director observed that the petitioner had submitted two contradictory letters describing the number of the beneficiary's subordinate employees. The director also determined that the petitioner's job description of the beneficiary's duties showed that the beneficiary had been a first-line supervisor for the foreign entity. The director noted that the petitioner had not established that the beneficiary's subordinates were professional employees.

On appeal, counsel does not specifically address the director's determination regarding the beneficiary's position for the foreign entity. Instead, counsel seems to rely on the beneficiary's past approvals as an L-1A intracompany transferee to support the beneficiary's eligibility for this visa classification. Counsel asserts that without a showing or claim of Citizenship and Immigration Services (CIS) error in its previous findings that the beneficiary was a manager, it is arbitrary and an abuse of discretion for CIS to now conclude that the beneficiary is not a manager.

Counsel's assertions are not persuasive. 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). 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.

Moreover, it must be noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1A 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).

Further, the AAO is not bound or estopped by the previous decisions of the service center director. 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).

Finally, each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Because the approved nonimmigrant petitions are not part of the current immigrant visa record of proceeding, the AAO cannot determine whether the previous L-1A petitions were approved in error, or whether the beneficiary was originally eligible but the facts changed before the Form I-140 immigrant petition was filed.

The petitioner has not provided evidence sufficient to overcome the director's determination that the beneficiary had not been employed in a managerial or executive capacity abroad for one of the three years prior to entering the United States as a nonimmigrant. For this reason, the petition will not be approved.

The next issue in this proceeding is whether the beneficiary's position for the United States petitioner will be primarily managerial. The petitioner does not claim that the beneficiary's position will be an executive position.

In the petitioner's December 23, 2003 letter in support of the petition, the petitioner indicated that the beneficiary would oversee the running of the operating plant. The petitioner noted the beneficiary's specific duties would include: (1) plant management consisting of staff recruitment, training, and management, supervising plant quality control, overseeing the maintenance of machinery, overseeing coordination between the production, printing and packaging departments, and assigning and coordinating all plant job duties; (2) production control consisting of coordinating and directing CD/DVD production activities, responsibility for the manufacturing process (CD/DVD), supervising production, printing, and packaging procedures, overseeing the preparation of material for production runs, responsibility for carrying out the production schedule, implementing production and quality control standards, implementing production plans, problem solving, and supervising the maintenance of production inventory; and, (3) maintenance and technical support consisting of overseeing the maintenance of injection molding equipment and production line activity, supervising, identifying, and correcting line faults, providing technical support and solutions, analyzing production quality control and maintenance reports, and implementing new procedures and operating methods.

In the same letter, the petitioner indicated that the beneficiary would oversee: (1) the injection supervisor, who in turn would supervise five employees; (2) the packaging supervisor, who in turn would supervise five employees; (3) the mastering supervisor,<sup>2</sup> who in turn would supervise two employees; and, (4) and the printing and graphics supervisor, who in turn would supervise seven employees. The petitioner also outlined the responsibilities of each of these departments.

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<sup>2</sup> The mastering supervisor, the beneficiary of [REDACTED] was initially listed as supervising five employees in the mastering department and eleven employees in the injection department.

On November 18, 2004, the director denied the petition, determining that the beneficiary would be a first-line supervisor and that the petitioner had not shown that the positions subordinate to the beneficiary were professional positions. The director also observed that electronic mail included in the record showed that the beneficiary was the point of contact to purchase equipment, thus the beneficiary appeared to be performing a purchasing function for the petitioner. The director concluded that the evidence failed to establish that the beneficiary would be a manager or an executive for the petitioning entity.

On appeal, counsel for the petitioner asserts that the director offered no analysis or rational basis for classifying the beneficiary as a first-line supervisor. Counsel contends that even if the beneficiary could be classified as a first-line supervisor he would still qualify as a manager because he oversees four supervisory employees. Counsel again asserts that prior approvals, when there has been no change in job title or duties and no claims of error, should require approval in this matter in the interest of consistency and public policy.

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). 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).

In this matter, the petitioner portrays the beneficiary as the individual responsible for quality control, maintaining machinery, coordinating plant job duties, coordinating and supervising production, printing, and packaging activities, problem solving, maintaining inventory, and providing technical support and solutions. These are duties that are typical of a position directly involved in the day-to-day operations of the petitioner. The petitioner does not explain how these duties encompass the high level responsibilities specified in the definition of managerial capacity. The petitioner and counsel also depict the beneficiary as directly involved in staff recruitment, staff training, and supervising injection supervisor, packaging supervisor, mastering supervisor, and the printing and graphics supervisor. This description depicts an individual engaged in a supervisory role. If the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The AAO acknowledges that the petitioner labeled four of the beneficiary's subordinates' positions as supervisory positions, however, the petitioner offered insufficient evidence to establish that the duties of the positions comprised primarily supervisory duties rather than the responsibility of a senior team member. 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)). Providing a title for a position is not sufficient to establish the duties of that position. The petitioner did not provide sufficient evidence to establish that any of these employees supervised subordinate staff members or managed a clearly defined department or function such that they could be classified as managers or supervisors.

Moreover, the petitioner's description of the beneficiary's duties and supervision of other employees is contrary to L&M NY's indication in [REDACTED] that the marketing supervisor, [REDACTED] Syzfer, supervises the beneficiary rather than the beneficiary supervising her. It is incumbent upon the petitioner to resolve any perceived 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).

Counsel's complaint that the director did not offer an analysis or rational basis for classifying the beneficiary as a first-line supervisor is not persuasive. The director referenced documentary evidence showing the beneficiary performing the petitioner's purchasing functions. The petitioner, thus, had adequate notice that the director was questioning the beneficiary's actual role in the organization. The petitioner's description of the beneficiary's position and the disparate information received regarding this organization undermines the veracity of the petitioner's claim that the beneficiary primarily performs managerial or executive tasks. On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner encompass primarily managerial duties.

The petitioner has not offered evidence or argument sufficient to overcome the director's determination on the issue of the beneficiary's managerial capacity for the petitioner. For this reason, the petition will not be approved.

Beyond the decision of the director, as observed above, the petitioner is a limited liability company apparently organized in California. It claims to be affiliated with an organization established in New York and also claims to be subsidiary of a joint venture partially established by an Israeli organization. However, the petitioner has not sufficiently established a qualifying relationship between the beneficiary's U.S. employer and the beneficiary's actual foreign employer. Although the companies appear related, the petitioner has not established that the beneficiary has been employed for at least one 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.

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). For this additional reason, the petition will not be approved.

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.