



U.S. Citizenship
and Immigration
Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

B4

[Redacted]

FILE:

[Redacted]
WAC 04 052 53194

Office: CALIFORNIA SERVICE CENTER

Date:

SEP 07 2005

IN RE:

Petitioner:
Beneficiary:

[Redacted]

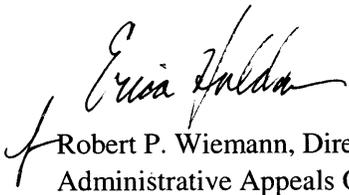
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, 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 AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organization under the laws of the State of Nevada that is operating as an investment company. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that while the beneficiary possessed the title of president, the record indicated that the beneficiary would be assisting in the daily non-managerial and non-executive functions of the business.

On appeal, counsel claims that the director's denial was "arbitrary and capricious" and a violation of the petitioner's due process rights.¹ Counsel states in his appellate brief that the beneficiary is employed in both a primarily managerial and executive capacity. Counsel claims that the petitioner's three previously approved L-1A nonimmigrant petitions are evidence of the beneficiary's employment in a qualifying capacity.

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 or 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.

¹ Counsel asserts on appeal that the denial of the petition also violates the beneficiary's due process rights. Pursuant to the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B), the beneficiary of a visa petition does not have legal standing in an immigrant proceeding. *See also Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979) (stating that the "party affected" in visa petition cases is the petitioner). Accordingly, counsel's claim is without merit.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary would be employed by the United States company in a primarily managerial or 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the instant petition on December 12, 2003 noting that the beneficiary would be employed as the president of the four-person United States corporation. In an appended letter, dated November 25, 2003, the petitioner provided the following statement regarding the beneficiary's proposed employment:

In his position as President of [the petitioning entity], [the beneficiary] will continue to supervise and control the operation of the entire company, including hiring and firing of personnel, directing business strategies and formulating financial plans for all business operations. [The beneficiary] will establish policy and overall operational guidelines and exercise wide latitude in personnel management. All financial reports and budget plans are subject to [the beneficiary's] review, and [the beneficiary] will negotiate contracts with potential suppliers and customers.

[The beneficiary] will continue to assume active roles in companies [the petitioner] purchases and controls as his schedule permits.

[The beneficiary's] extremely strong managerial track record will allow [the petitioning entity] to develop into a large and successful concern.

In a November 17, 2004 request for evidence, the director asked that the petitioner submit the following documentation in support of the beneficiary's employment in a qualifying capacity: (1) an organizational chart describing the petitioner's managerial hierarchy and staffing levels on the date of filing the petition and clearly identifying the beneficiary's position in relation to all subordinate employees; (2) a description of the job duties of each employee and their educational level and wages; (3) a detailed description of the job duties performed by the beneficiary on a "typical day"; and (4) copies of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports, for the fourth quarter of 2003 and the third quarter of 2004.

Counsel responded in a letter dated February 8, 2005 and submitted the following description of the beneficiary's "typical daily duties":

Do daily bank transactions, make purchase orders and negotiate prices with suppliers for beer, snacks, cigarettes, etc. Order gas and print on line gas invoices. Daily logging of environmental records as required by law for the gas station, checks and orders utilities supplies, generate daily sales report for Lotto machine and checks inventory of Scratchers lotto tickets. Go over mail with secretary, writes business letters, and returns phone calls. Responsible for renewal of business licenses. Supervises employees to check inventory and deal with vendors.

Counsel also provided an organizational chart of the United States entity identifying the job positions of president, vice president/secretary, manager/cashier, and clerk/assistant cashier. Counsel submitted a job description for the beneficiary similar to that outlined above, explaining that as the president, the beneficiary would supervise the company's employees, its main office, and the operations of the businesses acquired by the petitioner. Counsel also submitted the requested quarterly wage report filed by the petitioner for the fourth quarter of 2003, the time period during which the instant petition was filed. The petitioner, identifying only three of the four individuals named on the organizational chart, failed to indicate the employment of its clerk/assistant cashier during this period.

In his February 22, 2005 decision, the director determined that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. The director stated that despite his title of "president," the beneficiary would be employed as a first-line supervisor as he did not supervise managers or professional employees. The director determined that the beneficiary would not be "managing or directing the management of a function, department, subdivision or component of the petitioning company." The director further concluded that the beneficiary would not be employed as a functional manager, and instead, would be assisting in the day-to-day non-qualifying duties of the business. Consequently, the director denied the employment-based petition.

In an appeal filed on April 22, 2005, counsel states that the director's denial is "arbitrary and capricious" and violates the petitioner's due process rights. Counsel outlines the regulatory definitions of "managerial capacity" and "executive capacity," and contends that the beneficiary would be employed as both a manager and an executive. Counsel challenges the director's finding that the beneficiary would personally assist with the daily operations of the company, stating that the director did not identify which "non-supervisory" duties the beneficiary would perform, and noting that the beneficiary could perform non-qualifying duties while still performing in a primarily managerial or executive capacity. Counsel contends that the "statement of job duties well establish that the Beneficiary is responsible for the overall management of the organization," regardless of the petitioner's organizational structure. Counsel restates the job duties provided in the petitioner's November 25, 2003 letter and claims that as a manager, the beneficiary also manages several functions, including the petitioner's business negotiations. Counsel notes that, in accordance with the definition of "managerial capacity," the beneficiary would have authority over all personnel decisions, including hiring and firing, and would exercise broad discretion over the petitioner's daily operations by having the authority to bind the company in contractual relations. Counsel states that the beneficiary would also be employed as an executive, as he "establishes the goals and policies of the organization, exercise wide latitude in discretionary decision-making; and receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." Moreover, counsel asserts that the director's denial "defies logic," as Citizenship and Immigration Services (CIS) has previously approved three L-1A nonimmigrant petitions filed by the petitioner for this beneficiary.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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 petitioner has provided a vague and nonspecific description of the beneficiary's job duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary would "supervise and control the operations of the entire company," "establish policy and overall operational guidelines," "exercise wide latitude in personnel management," and review all financial reports and budget plans. The petitioner has not defined the specific daily managerial or executive job duties to be primarily performed by the beneficiary in his role as president. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

Additionally, as correctly noted by the director, many of the petitioner's statements pertaining to the beneficiary's job duties generally paraphrase the statutory definitions of "managerial capacity" and "executive capacity." Particularly, on appeal, counsel merely outlines the regulatory criteria for each employment capacity claiming that the beneficiary, as president, satisfies each requirement. 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. *Id.*

Moreover, upon careful review of the beneficiary's job description, the record fails to reveal managerial or executive job duties associated with the petitioner's business as an "investment company." Rather, it appears that the beneficiary's employment would involve the performance of non-qualifying duties related to operating a gas station. Specifically, the description of the beneficiary's "typical daily duties" indicates that the beneficiary would personally perform such non-managerial and non-executive job duties as making daily bank transactions, ordering gas and supplies, printing gas invoices, maintaining mandatory environmental records, generating lottery sales reports and lottery ticket inventory, and renewing business licenses. Obviously, the beneficiary is not primarily performing the managerial and executive job duties of an investment company, as claimed on the immigrant petition. More importantly, however, the job description clearly demonstrates that the beneficiary is personally responsible for performing the lower-level functions associated with maintaining the petitioner's convenience store and gas station.² 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).

Counsel suggests on appeal that the director's denial of the petition is a violation of the petitioner's due process rights. Counsel, however, has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioner. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, counsel's claim is without merit.

Counsel's also claims that the director's denial of the petition on the basis of the beneficiary's employment capacity "defies logic," as CIS had previously approved three L-1A nonimmigrant petitions filed by the petitioner for employment of the same beneficiary. 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*,

² The petitioner identified its business activity on its 2003 corporate income tax return as "retail sales." The record also contains a "Dealer Station Lease and Motor Fuel Supply Agreement" between the petitioner and a third party. The agreement, dated August 31, 2004, was entered into following the filing of the petition. The AAO notes that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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). 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 L-1-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(1)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record does not contain sufficient documentary evidence to establish the existence of a qualifying relationship between the United States and foreign entities. 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 (BIA 1988); 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.

The petitioner indicated in its November 25, 2003 letter that the United States company is a wholly owned subsidiary of the foreign entity. The petitioner submitted a stock certificate, dated October 20, 1999, identifying the foreign company as the owner of 5,000 shares of the petitioner's stock. However, the petitioner's 2001 and 2002 income tax returns for an S corporation and related forms indicate that the beneficiary and his spouse each own 50% of the petitioner's stock. In contrast, the petitioner's 2003 income tax return for a U.S. corporation identifies the beneficiary and his spouse as owners of 25% of the petitioner's issued stock and does not indicate on Schedule K that any portion of the petitioner's stock is owned by a foreign corporation, although the petitioner submitted a Form 5472 identifying the foreign entity as a shareholder.³

The record does not contain clear and adequate documentation that the petitioner is a subsidiary of the foreign corporation. The conflicting documents fail to identify the true stockholders of the United States entity. As the record does not include the petitioner's corporate stock certificate ledger, which would reflect any subsequent purchases or transfers of stock following the 1999 stock issuance, the AAO cannot conclude that the foreign entity "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." 8 C.F.R. § 204.5(j)(2). The AAO notes that the October 1999 stock certificate is unreliable. Even after the issuance of the stock certificate, the petitioner

³ The minutes from the petitioner's November 26, 2004 shareholders' meeting identifies the foreign entity as the owner of 50% of the petitioner's stock.

indicated on two consecutive income tax returns that the corporation was owned equally between two individuals. 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). 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)). For this additional reason, the petition will be denied.

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.