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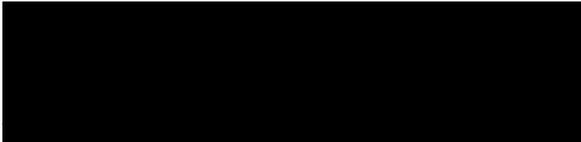
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 16 2005**
WAC 04 048 52326

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 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 claims to be a limited liability company organized in the State of California in March 1997. Its organization documents identify it as the California English Language Center, LLC but it filed this petition using the name English Language Center, LLP. It claims to provide language services. It seeks to employ the beneficiary as its managing director. 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.

In September 2002, the petitioner identified as California English Language Center LLC, filed a Form I-140 petition, Immigrant Petition for Alien Worker, (WAC 02 285 53217) seeking to employ this beneficiary as its managing director. On April 29, 2003, the director denied the petition determining that the beneficiary would not be employed in a managerial or executive capacity for the U.S. entity. Counsel for the petitioner submitted a timely appeal noting that the petitioner had not been represented by counsel in the initial proceeding. Counsel also provided a broad description of the beneficiary's duties broken down into small increments of the beneficiary's workweek and asserted that the denial of the petition in light of five previous approvals of the beneficiary's L-1A intracompany transferee classification was an abuse of discretion.

While the September 2002 petition (WAC 02 295 53217) was on appeal, the petitioner submitted a second Form I-140 petition (WAC 04 048 52326), on December 10, 2003. Counsel for the petitioner submitted a letter dated December 2, 2003 in support of the second petition that virtually copied her brief submitted in the first appeal (WAC 02 295 53217). In addition, counsel submitted the same documentation in support of the second petition (WAC 04 048 52436) as had been submitted in support of the appeal filed in the first petition (WAC 02 295 53217).

On September 2, 2004, the AAO rendered its decision on the first appeal (WAC 02 295 53217). The AAO determined: that the description of the beneficiary's duties submitted on appeal did not provide further detail and did not clarify the beneficiary's actual daily duties; that the description borrowed liberally from elements of the definition of executive capacity; and that the petitioner's initial description of the beneficiary's duties provided a clearer understanding of the beneficiary's actual duties. The AAO affirmed the director's conclusion that the record demonstrated that the beneficiary as the petitioner's sole employee would be performing the petitioner's day-to-day operational tasks.

The AAO specifically observed, in its September 2, 2004 decision, that the petitioner's description of the beneficiary's duties which included checking class schedules, preparing the weekly schedule, ordering textbooks, writing and adjusting the syllabus, checking test results, reviewing students' progress, updating information in brochures and on the website, providing translations, and checking on accounts payable and receivable, showed the beneficiary performing primarily non-qualifying duties.

The AAO also pointed out that the petitioner had made minimal payments to individuals it claimed to employ in the quarter in which the petition was filed and thus the record did not support a conclusion that the petitioner had sufficient staff to relieve the beneficiary from performing primarily non-qualifying duties. The

AAO also noted that the record contained letters and electronic mail indicating that the beneficiary provided consulting services. The AAO concluded that the record did not demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity.

The AAO emphasized that it was not required to approve applications or petitions where eligibility had not been demonstrated merely because of prior approvals of nonimmigrant petitions that were erroneous. The AAO specifically determined that if the approvals of the previous nonimmigrant petitions were based on the same evidence as in the current record, those approvals would constitute clear and gross error on the part of the director.

The AAO further determined, beyond the decision of the director, that the record contained inconsistencies relating to the petitioner's qualifying relationship with the beneficiary's foreign employer and that for this additional reason, the petition would not be approved.

On February 4, 2005, the director entered his decision on the second Form I-140 petition (WAC 04 048 52326), without requesting further evidence. The director noted that the AAO had entered a decision on the appeal filed in support of the first Form I-140 petition (WAC 02 285 53217). The director determined upon a complete review of the record that the current (second Form I-140) filing was identical to the first filing. The director then entered the AAO's September 2, 2004 decision in the record as his decision. The director specifically noted that the entire record had been reviewed and evaluated and that the beneficiary was not eligible for this visa classification.

On appeal, counsel for the petitioner submits the same brief that had been filed with the first Form I-140 appeal (WAC 02 2285 53217) with two additions.

First, counsel asserts that the submitted documents show that the petitioner and the beneficiary's foreign employer are affiliates in that the same two individuals own both companies in approximately the same share or proportion. Counsel claims that the beneficiary owns 55 percent of the petitioner and her husband owns 45 percent of the petitioner and that the beneficiary owns 51 percent of the foreign entity and her husband owns 49 percent of the foreign entity. Counsel claims that in November 2000, a third party who owned an interest in the foreign entity transferred her interest to the beneficiary and the beneficiary's husband resulting in the beneficiary's 51 and the beneficiary's husband's 49 percentage ownership. Counsel provides minutes of a meeting of the English Language Center, LLP located in the Russian Federation held November 26, 2000 in support of this claim.¹ The AAO notes that the documentation submitted clarifies the ownership of the foreign entity and that the record now shows a continuing chain of ownership in the foreign entity.

Second, counsel argues on appeal that the director should have issued a request for further evidence allowing the petitioner to supplement the record prior to making his decision. However, the regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of

¹ The AAO also observes that the individual translating the June 15, 1992 document organizing the foreign entity translated the document date as June 15, 1996. This error resulted in an apparent interruption in the foreign entity's chain of title.

ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. In this matter, the director relied on the AAO's interpretation of the evidence submitted in support of the first Form I-140 (WAC 02 285 53217) as the very same evidence was submitted in the support of the second petition (WAC 04 048 52326). Even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner and counsel had opportunity to supplement the record on appeal. Counsel has in fact provided an additional document regarding the issue of the petitioner's qualifying relationship. However, counsel and the petitioner fail to provide any evidence that when the second petition was filed (WAC 04 048 52326) the petitioner employed sufficient personnel to relieve the beneficiary from performing primarily non-qualifying duties. The AAO finds that it would serve no useful purpose to remand the case simply to afford the petitioner yet another opportunity to supplement the record with new evidence.

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 AAO has reviewed the record in its totality, including the documents submitted on appeal. The record does not demonstrate that the beneficiary's duties comprised or would comprise primarily managerial or executive duties when either the first or the second petition was filed. 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). In this matter, WAC 04 048 52326, the petitioner has not supplied any later documentation regarding its employees. The latest document in the file regarding the payment of salaries is an Internal Revenue Service Form 941, Employer's quarterly Federal Tax Return, for the quarter ending March 31, 2003. The petitioner has not submitted any evidence that would demonstrate that the beneficiary is relieved from performing the routine tasks of the organization. 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).

Further upon close review, the record does not contain adequate evidence that the beneficiary's position for the foreign entity comprised primarily managerial or executive tasks. Moreover, the record does not include evidence that the petitioner has the ability to pay the beneficiary her proffered salary of \$500 per week. 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)).

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.