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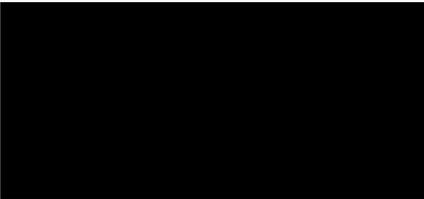
IN RE:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of Oklahoma in April 1990. It manufactures and sells roofing products. It seeks to employ the beneficiary as its manager/crew chief. 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 November 8, 2005, determining that the petitioner had not established: (1) a qualifying relationship with the beneficiary's foreign employer; or (2) that the beneficiary had been employed in a managerial or executive capacity for one year for the foreign entity prior to entering the United States as a nonimmigrant.

On appeal, counsel for the petitioner disputes the director's decision. Counsel asserts that the foreign entity was the petitioner's branch office when the petition was filed and that the beneficiary served in a managerial position with the right to hire, fire, and supervise employees for both the U.S. and foreign entity. Counsel submits documentation and a brief.

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 first issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

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.

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 a June 1, 2005 letter submitted in support of the petition, the petitioner claimed that [REDACTED] owned 51 percent of the petitioner and that the petitioner owned the [REDACTED] in New Zealand as one of its three wholly-owned divisions.¹

On August 16, 2005, the director requested documentary evidence to establish the exact degree of common ownership between the petitioning United States enterprise and the organization outside the United States that

¹ The petitioner claimed that it owned two other wholly-owned divisions, the [REDACTED] Team in the USA as well as the [REDACTED]

employed the beneficiary prior to his admission to the United States as a nonimmigrant. The director noted that the evidence must clearly establish the legal relationship between the two entities.

In a November 2, 2005 response, counsel for the petitioner stated that [REDACTED] owned 51 percent of the petitioner and [REDACTED] owned 49 percent of the petitioner. The petitioner provided its stock certificate number 1 dated May 3, 1990 issued to [REDACTED] in the amount of 17,000 shares and its stock certificate number 6 dated January 3, 2002 issued to [REDACTED] in the amount of 100 shares. The record also contains two agreements dated October 2000 and August 2001, between [REDACTED] as car owner [REDACTED] and [REDACTED] for [REDACTED] lease to [REDACTED] workshop and office facilities to operate [REDACTED] race car team operation and for [REDACTED] to be crew chief/manager to maintain and set up the race car. The first agreement was for a period of six months from October 31, 2000 to April 30, 2001, while the second agreement was extended from October 31, 2001 until April 30, 2005.

Counsel noted that [REDACTED] in New Zealand was one of the petitioner's wholly-owned divisions consisting of a parts fabrication, race car rental, and pit crew service that had been active in New Zealand since 2000 and had set up office facilities in 2001. Counsel indicated that the New Zealand business had been officially incorporated in September 2005 as [REDACTED] and reiterated that prior to that it had been a branch operation with no independent corporate identity. The petitioner provided a copy of [REDACTED] Limited's registration certificate that shows [REDACTED] owns 500 shares and that [REDACTED] the beneficiary, owns 500 shares [REDACTED]

On November 8, 2005 the director denied the petition, determining that the petitioner and the foreign entity's relationship had only been in force since September 2005, thus the petitioner and the foreign entity did not have a qualifying relationship when the petition was filed in June 2005.

On appeal, counsel for the petitioner contends that the director did not consider that the foreign entity had been the petitioner's branch office prior to its incorporation as a separate entity in September 2005. Counsel acknowledges that the relationship between the petitioner and the foreign entity has changed but asserts that the petitioner maintained a branch operation in New Zealand until the branch operation was incorporated and became the petitioner's affiliate. Counsel claims that Glen [REDACTED] owns a majority interest both in [REDACTED], the U.S. petitioner, and [REDACTED], the New Zealand entity.

Counsel's assertions are not persuasive. The AAO acknowledges that a branch office, bound to a parent company through common ownership and management, can be considered a qualifying entity. A beneficiary who seeks to enter the United States in order to work for the same employer, which includes a branch office, may establish eligibility for this visa classification. However, in this matter, the agreement entered into in August 2001 among [REDACTED] and Henderson Ave Auto's and [REDACTED] establishes a contractual rather than ownership relationship between [REDACTED] and the New Zealand operations. In addition, the petitioner's activities were only on a seasonal or intermittent basis, which would preclude a finding that it was engaged in the regular, systematic, and continuous provision of goods and/or services outside the United States.

The AAO also questions whether the foreign entity was in fact a branch office of the petitioner when the petition was filed. The AAO observes that two individuals, [REDACTED] owned a 51 percent interest and a 49 percent interest respectively, in the petitioner. For the foreign entity to be the petitioner's branch office, the same two individuals must share in the ownership of the branch office. The record contains no documentation that the petitioner's common shareholders received remuneration equal to their percentage ownership in the petitioner when the claimed branch office was divested. The lack of documentation establishing that the petitioner's common shareholders were treated equally when the foreign entity was incorporated further undermines the petitioner's claim that the foreign entity was, in fact, the petitioner's branch office.

The AAO finds that when the petition was filed in June 2005, the New Zealand operation was not bound to the U.S. petitioner through common ownership and management; thus the petitioner has not established a qualifying relationship with the foreign entity when the petition was filed.

The AAO disagrees with the director's comment that the U.S. petitioner and the foreign entity are currently affiliated or commonly owned. The AAO acknowledges that [REDACTED] may own a 51 percent interest in the petitioner.² However, [REDACTED] percent interest in the newly incorporated foreign entity does not constitute majority control. The petitioner has not supplied evidence that either of the stockholders of the newly incorporated foreign entity has agreed to relinquish his control, such that if the two equal stockholders disagreed, the foreign entity could continue operations. The petitioner has not provided evidence that the foreign entity is a joint venture, but only that it has two stockholders, each holding a 50 percent interest.

The petitioner has not established that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the beneficiary's employment for the foreign entity was in a managerial capacity for one year prior to entering the United States as a nonimmigrant. The petitioner does not claim that the beneficiary had been 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

² The AAO observes that the petitioner has indicated on its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, that [REDACTED] owns 51 percent of the petitioner. However, the record does not contain the petitioner's stock certificates 2, 3, 4, or 5, or the petitioner's stock ledger so that the petitioner's corporate records can be fully reviewed. The lack of supporting documentation regarding the petitioner's ownership raises questions, however, the AAO will accept that [REDACTED] owns a 51 percent interest in the petitioner as noted on the petitioner's IRS Forms 1120.

- 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 June 1, 2005 letter appended to the petition, the petitioner's president stated that the beneficiary "was given charge of hiring the crews, selecting mechanics, dealing with race officials and all related business issues" in assisting [REDACTED] with sprint car races in Australia and New Zealand. The petitioner's president also indicated that "[a]s a manager, [the beneficiary] selected, hired and supervised the entire racing team (except [REDACTED] consisting of 4-5 professional mechanics and other pit crew members," and that "[h]e also instructed [REDACTED] on racing and racing lines and also on the subtle workings of her racecar."

The petitioner also provides an organizational chart showing the petitioner's claimed New Zealand division consisting of parts fabrication and sales, racecar leasing and transportation, and pit crew services mechanics and fabricators, all subordinate to the beneficiary's position as manager/crew chief. The organizational chart is undated and it is not clear if the organizational chart depicts the beneficiary's position prior to his entry into the United States as a nonimmigrant.

The director concluded, without further discussion, that the petitioner had not established that the beneficiary performed in a managerial or executive capacity for the petitioner or an affiliate or subsidiary of the petition for a one-year period prior to entering the United States.

On appeal, counsel for the petitioner asserts that 100 percent of the beneficiary's work in New Zealand was managerial and that the beneficiary was the most senior person working in New Zealand during his time there.

Counsel's assertion is 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 petitioner has provided a general description of the beneficiary's duties while in New

Zealand. The duties, at most, suggest that the beneficiary is performing operational tasks associated with setting up a racing team and supervising non-professional, non-managerial, and non-supervisory employees. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, the petitioner has not provided descriptions of the beneficiary's subordinates' duties, sufficient to show that these individuals hold professional positions, rather than positions that require specialized tasks. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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. 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)). When evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In this matter, the beneficiary's duties do not comprise the managerial tasks of supervising professional, supervisory, or managerial employees.

Although the petitioner does not request consideration of the beneficiary's position as a function manager, the AAO notes that 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. 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). The petitioner has not established that the beneficiary performed primarily as a function manager for the foreign entity.

The petitioner has not established that the beneficiary's duties for the foreign entity comprised primarily managerial or executive duties for the petitioner, its affiliate, or a subsidiary prior to entering the United States as a nonimmigrant. For this additional reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary will be employed in a managerial or executive³ capacity for the U.S. petitioner.

In a June 1, 2005 letter appended to the petition, the president of the petitioner indicated that the beneficiary would be in charge of all race shop employees and volunteers consisting of 10 mechanic/car specialists and three drivers, and would also be assistant manager and pit boss for the ACRA certified pit crew consisting of an additional 15 to 20 persons. The president of the petitioner indicated that the beneficiary and his crews would be responsible for the following:

1. Supply race schedule and entry details for different venues
2. Assembly and fabrication of new vehicles
3. Engine tuning and development
4. Chassis tuning and development
5. Data gathering from vehicles for engine/chassis modification
6. Technical advice on shock/spring and weight packages
7. Purchasing of all parts, motors, tires, etc.
8. Organization of vehicles and vans for transporting cars between venues
9. Tire research and selection
10. Day to day organization of the race shop
11. Supporting the vehicles during races and making on-the-spot adjustments as needed.
12. Assuring the overall safety of the drivers and their cars by paying attention to detail.

The petitioner indicated that the beneficiary is responsible for all cars, all drivers, multiple pit crews, and the overall management of the collective racing teams, through subordinate mechanics and other specialists.

The petitioner's organizational chart showed the beneficiary in the position of (1) manager/crew chief with subordinates in the positions of mechanics, fabricators, drivers, tire changers and carriers; and (2) assistant crew chief with a pit crew as subordinate to his position.

The information in the record is not sufficient to elevate the beneficiary's position to a managerial or executive position. The record does not clearly delineate the beneficiary's daily duties for the petitioner but provides a broadly stated overview. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103. The beneficiary's authority to hire, fire, and supervise subordinate employees does not satisfy all four elements of the definition of managerial capacity. See 101(a)(44)(A)(i), (iii) and (iv) of the Act. The petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for manager not just one or two of the elements. Again, 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. In addition, although not asserted by counsel, the beneficiary's duties do not fulfill the criteria of the definition of

³ The director recited the definition of executive capacity in her decision, thus the definition will not be repeated here. See section 101(a)(44)(B) of the Act.

"executive capacity." To fulfill the criteria of "executive capacity" under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. The petitioner has not provided sufficient evidence to establish that the beneficiary's tasks for the petitioner comprise the tasks of an executive or a manager for the purposes of establishing eligibility for this visa classification. 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 AAO acknowledges that CIS approved L-1A nonimmigrant transferee 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 similar definitions of qualifying relationship. Although the statutory definitions for qualifying relationship are similar, the question of overall eligibility requires a comprehensive review of all of the provisions. 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. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. In addition, the AAO observes that the beneficiary's approvals were both for an L-1B classification, a classification requiring specialized knowledge and not employment in a managerial or executive capacity. Further, the evidence submitted with this petition shows that the beneficiary's employment abroad was not continuous as required by 101(a)(15)(L) of the Act, so that the approval of the

previous nonimmigrant petitions constituted 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).

Further, 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.

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.