



U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: AUG 07 2006
SRC 04 193 51657

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:
[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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner subsequently submitted a motion to reconsider to the Texas Service Center. The director granted the petitioner's motion, but upheld the prior decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal from the director's most recent decision, which was issued on August 23, 2005.¹ The appeal will be dismissed.

The U.S. entity is a Florida corporation. According to part 5, Item 2 of the Form I-140, the beneficiary's prospective U.S. employer is a sales and car washing business. No further information has been provided to describe the specific nature of the U.S. entity's business transactions. The petitioner states that the beneficiary would be employed by the U.S. entity as the general 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. In her latest decision, the director upheld the service center's prior conclusion, which was based on two findings: 1) the petitioner failed to provide sufficient information to establish that the beneficiary was employed abroad in a qualifying capacity; and 2) the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity.

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.

¹ In the appellate brief, counsel urges the AAO to reconsider the director's July 15, 2005 denial of the petition. However, if the AAO were to deem the petitioner's latest filing as an appeal of the director's initial decision denying the petition, the AAO would have to reject the petitioner's appeal as untimely filed. *See* 8 C.F.R. § 103.3(a)(2)(v)(B)(1). Pursuant to 8 C.F.R. § 103.3(a)(2)(i) the affected party must file the appeal within 30 days of service of the unfavorable decision. Thus, in an effort to provide the petitioner with a full decision on the merits as presented in the instant record of proceedings, the AAO must deem the petitioner's latest filing as an appeal to the director's most recent decision, which addressed the petitioner's motion to reconsider.

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 two primary issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established at the time it filed the Form I-140 that the beneficiary would be primarily employed in a 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) 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.

Despite the instruction in 8 C.F.R. § 204.5(j)(5), the petitioner failed to provide a letter containing a job offer and a detailed description of the beneficiary's proposed duties. As such, on April 6, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the beneficiary's employment capacity both abroad and in the United States: 1) a list of the beneficiary's day-to-day duties with a percentage of time assigned to each duty in order to indicate how much of the beneficiary's time had been and would be devoted to each of the listed duties; 2) the job titles and descriptions of duties of the beneficiary's subordinates; and 3) a statement describing who provided the product/services with the foreign entity and who would provide the product/services within the U.S. entity. The petitioner was also asked to discuss the beneficiary's level of authority and to state whether he functioned and would function in a senior level of each entity's respective hierarchy.

In response, the petitioner provided a letter from counsel dated June 28, 2005 in which counsel provided a general breakdown of the petitioner's response. Among the exhibits provided by the petitioner in response to the RFE, the petitioner submitted a translated letter dated June 8, 2005, which contained the following information regarding the beneficiary's position abroad:

[The beneficiary's] duties basically consisted of organizing the marketing and promotion department, hire [sic] a manager as well as several employees and at the same time overlook[ing] their activities while keeping an excellent working relationship with them.

[His] work also included outlining the acquisitions of the company always minding the quality and prestige.

[The beneficiary]'s working day consisted of eight (8) hours (approximately) working from Monday to Sunday, so he could have absolute control of management. Among [his] achievements is the acquisition of new accounts[,] which has greatly improved the commercial development of the company.

The petitioner provided another letter dated June 14, 2005, which provided the following percentage breakdown of the beneficiary's responsibilities: 1) 40% attributed to marketing; 2) 30% attributed to acquiring new accounts; 3) 20% attributed to commercial development; and 4) 10% attributed to hiring new employees and miscellaneous activities.

With regard to the beneficiary's employment in the United States, the petitioner provided a letter date June 13, 2005, which contained the following statements regarding the beneficiary's proposed employment:

[The beneficiary] is [the U.S. entity]'s [p]resident and as such his duties are, [sic] administration and supervision of the company's activities, coordinate [sic] the purchasing and sales of all products, as well as all financial activities, [sic] reviews [sic] daily costs and operations, authority [sic] to hire and fire employees, [and] supervising an average of 6 employees.

[The beneficiary]'s involvement in the company is dedicated 100% to the operation of the day-to-day activities at every level of the business, working Monday through Saturday 9 to 5.

[The U.S. entity] under [the beneficiary]'s planning expanded the original operation of the business to include the selling of new and used tires, and general mechanics of automobiles, and he increase[d] the lease[d] space of the business to accommodate its expansion.

Based on the information described above, the director denied the petition in a decision dated July 15, 2005, concluding that the petitioner failed to provide the service center with the requested details regarding the beneficiary's specific daily duties during his employment abroad and with regard to his prospective employment for the U.S. entity.²

The petitioner subsequently filed a motion to reconsider the director's denial. Although the director granted the motion and provided the petitioner with a full decision based on the merits of the record of proceeding, she upheld the prior decision concluding that the information provided on motion failed to establish that the beneficiary was employed abroad and would be employed in the United States in a position primarily requiring the performance of qualifying managerial or executive tasks. Again, the director discussed the lack of a detailed job description for either of the beneficiary's positions and further stated that marketing duties and the acquisition of new accounts constitute non-qualifying tasks.

On appeal, counsel makes continuous references to previously submitted evidence and information, asserting that the beneficiary's duties with both entities have been adequately described to establish the beneficiary's executive position. However, employing broad terminology to indicate that the beneficiary's discretionary authority fits the definition of managerial or executive capacity is not sufficient. The regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). In an attempt to elicit this extremely relevant information, the director issued an RFE specifying the level of detail that should be included in the response. Merely breaking down the beneficiary's duties into four key areas of responsibility and assigning a percentage of time to each responsibility does not reveal what the beneficiary had been and would be doing on a day-to-day basis. 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). In the instant matter, not only did the petitioner fail to specifically enumerate the beneficiary's duties, it failed to adequately discuss the types of business transactions that would be the focus of the U.S. entity and the beneficiary's role within the scope of those transactions. The petitioner stated only that the U.S. entity would make its revenue from some sort of sales transactions and car washing. However, the petitioner failed to state whether the U.S. entity would sell products, services, or both; who would conduct the sales transactions; and, if the U.S. entity planned to sell services, who would actually provide those services on a daily basis. This general lack of information and failure to describe the beneficiary's duties in detail prevent the AAO from

² The AAO acknowledges the director's error in finding that the RFE included a request for an organizational chart with which the petitioner failed to comply. A close review of the service center's RFE shows a comprehensive request for information regarding the U.S. and foreign entities. However, as properly pointed out by counsel, the RFE did not specifically include a request for an organizational chart either for the U.S. or foreign entity. Regardless, since the current appeal applies to the director's subsequent ruling on the petitioner's motion to reconsider, the AAO cannot withdraw the director's comment, as the scope of its appellate review is limited to the contents of the decision currently being appealed.

determining how the U.S. entity plans to conduct its business and what the beneficiary's role would be on a daily basis within the organization and with respect to others in the company hierarchy.

Counsel asserts that the U.S. entity's reasonable needs should be considered. However, in consideration of such needs, the AAO cannot disregard the actual duties to be performed. There is no statute or regulation allowing the reasonable needs of a prospective U.S. employer to override the statutory requirement that the beneficiary's duties be primarily of a managerial or executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, respectively.

Furthermore, the petitioner's claim that the beneficiary supervises six employees is not corroborated with any documentation. 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)). In fact, the petitioner clearly indicated at the time of filing that the U.S. entity had a total of two employees, not six as suggest on appeal. 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). This discrepancy has neither been acknowledged nor explained by the petitioner.

Counsel further states that Citizenship and Immigration Services (CIS) has overlooked the beneficiary's "indispensable leadership" in guiding the U.S. entity to financial growth and success and claims that such oversight is contradicted by statute and case law. However, counsel fails to fully explain which specific case law or portion of the Act supports this reasoning. Moreover, counsel completely disregards the statutory and regulatory provisions that require a petitioner to describe the beneficiary's duties both abroad and in the United States and to establish eligibility by showing that the beneficiary's duties have been and would be primarily within a managerial or executive capacity.

Although counsel uses the term function manager, he fails to provide the necessary information to establish how that term can be applied to the fact pattern set out in the ambiguous record of proceeding before the AAO in this matter. 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. However, 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. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In the instant matter, the record is entirely unclear as to the duties performed by the beneficiary abroad and the duties he would perform for the U.S. entity.

The remaining portion of counsel's argument focuses on the U.S. entity's previously approved L-1 employment of the beneficiary. Counsel claims that the beneficiary and his family relied on those prior

approvals and that CIS is now estopped from denying the instant Form I-140 based on its decisions with regard to the prior L-1A petitions. However, 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.

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 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 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).

Accordingly, based on the lack of information and evidence establishing the U.S. entity's eligibility to employ the beneficiary as a multinational manager or executive, this petition cannot be approved.

Furthermore, though not previously addressed in the director's prior decisions, the record shows three additional factors rendering the U.S. entity ineligible for the benefit sought on its behalf by the foreign entity.

First, the AAO notes that the Form I-140 that is the subject of this proceeding was filed by the beneficiary's foreign employer, not by the prospective U.S. employer. However, 8 C.F.R. § 204.5(j)(1) specifically states that an I-140 petition is to be filed by the prospective U.S. employer. As such, the foreign entity, which was the petitioner in the instant matter, was ineligible to file the Form I-140.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) requires the petitioner to establish that it had been doing business for at least one year prior to filing the Form I-140. 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 Form I-140 was filed on August 27, 2004. However, none of the invoices showing the U.S. entity doing business account for the relevant one-year period prior to the filing of the Form I-140. Although the AAO notes that the petitioner provided the U.S. tax documentation predating the filing of the petition, it does not show that the U.S. entity was engaged in business transactions on a "regular, systematic, and continuous" basis.

Third, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, Part 6, Item 9 of the Form I-140 indicates that the beneficiary's proffered wage is \$36,400. However, the petitioner failed to provide sufficient documentation establishing its ability to pay this wage.

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 grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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 at 1043, *aff'd*, 345 F.3d 683.

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.