

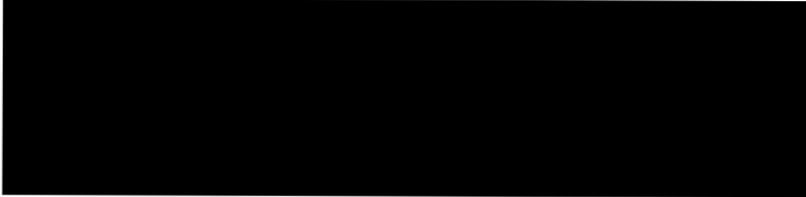
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U.S. Citizenship  
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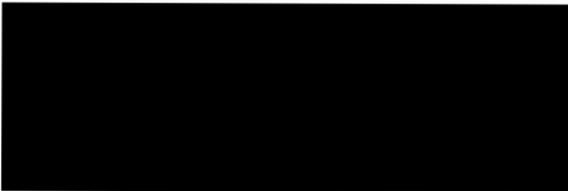
Petitioner:



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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation operating as a retail travel service. It seeks to employ the beneficiary as its president. 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 beneficiary would not be employed in the United States in a managerial or executive capacity and denied the petition.

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.

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 primary issue in this proceeding is whether the beneficiary would be employed in a managerial or executive.

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.

In support of the petition, the petitioner submitted a letter dated August 24, 2004, which provided the following description of the beneficiary's duties in the United States:

[The beneficiary's] duties in the United States are primarily the same as those in Canada where he occupied the position of [p]resident for more than 9 years. Since entering the United States . . . [the beneficiary] has performed his executive position as [p]resident. He has come to function in his executive role with a focus on directing and managing all aspects of [the] day-to-day operations. [He] has direct responsibility for all personnel and operational functions.

In the area of personnel management, [the beneficiary] exercises authority in regard to hiring, terminating, recruiting, training, delegating new assignments according to capabilities, preference, goals and remuneration. He is responsible for ensuring that subordinates under

his responsibility follow operational, financial and corporate procedures. Functioning autonomously, [the beneficiary] is responsible for managing and directing all financial aspects of the United States operation. In addition, as [p]resident, he is responsible for long-term strategic initiatives which include financial compliance issues.

In summary, [the beneficiary] has autonomous control and exercises wide latitude and discretionary decision making in his capacity as [p]resident.

On May 9, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to explain how most of the beneficiary's duties fall within a managerial or executive capacity. The petitioner was asked to describe the job duties of the beneficiary's subordinates and to provide an organizational chart illustrating its staffing structure.

Counsel provided a response dated July 27, 2005, which indicated that the beneficiary's direct subordinate is the company's general manager. The following statements were used to describe the beneficiary's U.S. job position:

On average, the beneficiary typically allocates 80% of his time to executing executive/managerial functions. This includes analyzing the Florida market, establishing strategic planning goals, analyzing and establishing sales objectives and developing advertising and promotional strategies for the United States market. The beneficiary has full responsibility for the direction and coordination of all activities of the United States operation and is responsible for all planning, formulating and implementing of strategic, operational and administrative policies and procedures.

The beneficiary's duties include conducting general administrative affairs for the company and acting as liaison and representative for the petitioner between the Canadian affiliate. The beneficiary has autonomous responsibility for developing, [sic] marketing strategies to service the United States affiliate. His role as [p]resident requires significant commitment in [sic] engaging in long range planning and identifying business development opportunities in the United States. The beneficiary is required to direct all business activities of the petitioner, including the negotiation and execution of contracts on behalf of the petitioner. In his role as [p]resident, the beneficiary is required to have a knowledge of general management procedures including corporate and administrative procedures. As [p]resident the beneficiary brings with proven experience in operations management including budget and finance issues.

In his role as [p]resident, the beneficiary is responsible for exercising wide latitude and autonomous discretionary authority in entering into contracts on behalf of the petitioner. The beneficiary is responsible for managing and directing all financial aspects of the United States affiliate operation. This includes all related financial compliance issues. The beneficiary is also responsible for assessing organizational performance with a view to improving revenues.

The beneficiary has discretionary authority over the day[-]to[-]day functions of the business with gross annual revenues in excess of \$800,000.00. This includes discretion and control over the company's [g]eneral [m]anager, Mr. [REDACTED]

The beneficiary spends a significant portion of his time focusing on the direction and coordination of the company's marketing and developmental efforts. The beneficiary has significant responsibilities in the management of the petitioner. The beneficiary's responsibilities also include entering into contracts for the performance of services on behalf of the company.

Although instructed to do so, the petitioner did not provide a copy of its organizational chart or discuss the job duties performed by the beneficiary's direct subordinate. Furthermore, while the petitioner claimed a total of three employees, it provided documentary evidence for only two employees. None of the documentation submitted in response to the RFE even remotely suggested that the petitioner employed anyone other than the beneficiary and the office manager.

Accordingly, on August 12, 2005, the director denied the petition noting the lack of a job description for the beneficiary's subordinate employee as well as the lack of evidence showing that the petitioner has a third employee as claimed in Part 5, Item 2 of the Form I-140. The director concluded that the petitioner failed to submit sufficient evidence to establish that the beneficiary would primarily perform qualifying duties.

On appeal, counsel asserts that the director abused his discretion by drawing an arbitrary conclusion that is contrary to the law. Counsel further asserts that the office manager's statement in support of the Form I-140, the beneficiary's résumé, the statement submitted in response to the RFE describing the beneficiary's duties, and the petitioner's tax information demonstrating that the beneficiary is functioning in an executive position. Counsel's argument, however, is without merit and is based on the assumption that merely claiming that the beneficiary would be employed in a qualifying capacity is sufficient to establish this fact by a preponderance of the evidence. In applying the preponderance of the evidence standard, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If, however, the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Contrary to counsel's statements on appeal, the petitioner has failed to "clearly outline and detail the primary duties of the beneficiary." Instead, the petitioner has submitted a vague job description repeating the statutory and regulatory language. However, 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties, which the petitioner has failed to provide. For instance, there is no indication as to the duties involved in carrying out the responsibility of developing marketing strategies. The AAO can only assume that because the petitioner has no employees to perform marketing-related tasks, that the beneficiary would actually engage in carrying out this non-qualifying task. The petitioner also failed to specify how the beneficiary would direct the negotiation and execution of contracts. Again, in light of the petitioner's lack of a support staff, it is unclear who, if not the beneficiary, would meet with clients to negotiate and execute contracts. It is noted that 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).

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). As discussed above, the petitioner failed to provide a detailed description of the beneficiary's daily tasks. Moreover, the petitioner's claim regarding the beneficiary's employment capacity is primarily based on the beneficiary's claimed knowledge and on the claims of the beneficiary's subordinate, who happens to be the petitioner's only documented employee aside from the beneficiary himself. The AAO notes that 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)).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as a multinational manager or executive in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization. Nor is there any evidence that the beneficiary will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel. Rather, the record indicates that the petitioner lacks a sufficient support staff relieve to relieve the beneficiary from performing nonqualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. As the petitioner has failed to provide sufficient documentary evidence to support its claims regarding the beneficiary's employment capacity, the AAO cannot conclude that the petitioner has shown by a preponderance of the evidence that the beneficiary would primarily perform managerial or executive duties.

Additionally, though not directly addressed in the director's decision, the petitioner has failed to establish that the beneficiary was employed abroad for at least one out of three years prior to entering the United States as a nonimmigrant in a qualifying managerial or executive capacity pursuant to 8 C.F.R. § 204.5(j)(3)(i)(B). As with the petitioner's description of the beneficiary's proposed duties, the general statements regarding the beneficiary's position abroad is comprised primarily of vague job responsibilities without any meaningful indication as to the beneficiary's daily tasks. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

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 by the petitioner in September of 2004. Accordingly, the petitioner must establish that it was engaged in "the regular, systematic, and continuous" provision of its travel services since September of 2003. *Id.* Although the petitioner has submitted its corporate tax return for 2003, this

document is not an accurate indicator of whether the petitioner provided its travel services on a "regular, systematic, and continuous" basis. *Id.* As the petitioner is a sales-oriented business, its sales invoices and the dates therein would determine the frequency of sales transactions. Although the petitioner has submitted a significant number of its sales invoices, none were dated prior to September of 2004. Therefore, the AAO cannot conclude that the petitioner was doing business for the one year period prior to filing its Form I-140.

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). Accordingly, based on the two additional grounds of ineligibility discussed above, this petition cannot be approved.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, 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.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

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 prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 and contradictory 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows 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.