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U.S. Citizenship
and Immigration
Services

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B-4



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 24 2006
SRC 05 001 50514

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, 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 California corporation operating as a general shipping and transportation enterprise. It seeks to employ the beneficiary as its president and chief executive officer at an annual salary of \$40,000. 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 the following independent grounds of ineligibility: 1) the petitioner failed to submit sufficient evidence establishing a qualifying relationship with the beneficiary's foreign employer; and 2) the beneficiary would not be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings 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 first issue in this proceeding is whether the petitioner has a qualifying relationship with a 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.

In support of the Form I-140, the petitioner provided evidence documenting its incorporation. However, no evidence was provided regarding the petitioner's ownership or the ownership of the beneficiary's foreign employer.

Accordingly, the director addressed this lack of evidence in a request for additional evidence (RFE) dated April 28, 2005. The director instructed the petitioner to provide documentation establishing who owns the U.S. and foreign entities.

In response, the petitioner provided its two issued stock certificates indicating that the beneficiary and his wife each own 50% of the U.S. entity. The petitioner also provided a number of Peruvian documents with various translations suggesting that the beneficiary owns the foreign entity.

Nevertheless, the director denied the petition, noting that most of the foreign documents were submitted without English translations and that, even though the registrar of Callao was partially translated, the translation was incomplete. *See* 8 C.F.R. 103.2(b)(2).

On appeal, the petitioner has provided complete translations of the relevant documents, thereby establishing the beneficiary's ownership of the foreign entity and overcoming this ground for the director's denial. Accordingly, the AAO hereby withdraws the first ground for the director's denial.

The second issue in this proceeding is whether the beneficiary would be employed in a capacity that is 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 September 28, 2004, which provided the following statements regarding the duties to be performed by the beneficiary under an approved petition:

[The beneficiary] makes executive decisions concerning company policy, and makes all decisions concerning operations, expansion, and retention or termination of staff. He supervises all of the foreign entity's employees and independent contractors and negotiates compensation. [His] experience and knowledge of the foreign operations are both extensive and detailed.

In the RFE, the director instructed the petitioner to submit, in part, a detailed description of the beneficiary's job duties accompanied by a percentage breakdown of time spent performing each duty; the number of subordinates reporting to the beneficiary as well as their respective duties, job titles, and educational levels; a description of the beneficiary's position within the petitioner's organizational hierarchy; and information as to who provides the products or services offered by the petitioner.

The petitioner's response included a letter dated July 21, 2005, in which the following was provided as the beneficiary's job description:

1. **Establishing and directing financial objectives** — [The beneficiary] directs and coordinates the organization's financial and budget activities to fund the operations and increase its efficiency. He determines services to be sold, and sets prices and credit terms. He reviews financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement. He also analyzes the company information to determine areas that need cost reduction. [The beneficiary] establishes and implements company policies, goals, objectives and procedures. He establishes staffing requirements, also monitoring the budgetary limits [He] monitors the business to make sure that it is efficiently providing its services to our clients. [He] spends approximately 55% of his time in exercising these responsibilities.
2. **Developing business** — [The beneficiary] runs the North American operation of our company by negotiating contracts and seeking out new clients and new ventures for the entity. The key to the success of a business is to increase its efficiency and its client base. [He] does this by negotiating deals with companies in the South Florida area. He also studies the market to determine the company's objectives, as such, he is now setting the scene for the operation of mechanical repair for the trucking industry, where he has seen a great need.

[The beneficiary] directs the expansion of the business. [He] spends approximately 30% of his time developing business and negotiating contracts on behalf of [the petitioner].

3. **Formulating policy** — The ability to understand a business and formulate policies that lead a company to success is rare and yet one of [the beneficiary]'s strongest assets. At [the petitioning entity], [the beneficiary] has formulated policies that streamlined the work and are optimizing the company's resources. He is working hard to make the American dream a reality by working hard and knocking on doors of opportunities to make himself and the petitioning company successful.

[The beneficiary] has built a system through which a network has been devised that permits the company to act as a back-up to major hauling companies for construction projects. [He] spends approximately 15% of his time formulating policy for the organization.

The petitioner also provided the following additional information about the beneficiary's role within the organizational hierarchy:

[The beneficiary] develops and directs the strategies for the company to achieve its financial goals. He directs the development of new projects and establishes relationships with potential clients to develop the company's core business. [He] makes all executive decisions concerning acquisitions and determinations of development, directing the development of new projects. He primarily negotiates agreements on behalf of the company, directing marketing objectives and delegating the actual work to the company's [a]ccount [m]anager, Ms. [REDACTED] Ms. [REDACTED] is responsible for coordinating the sales of the

company's services under the direction of the beneficiary. [The beneficiary] also supervises the company's [o]perations [m]anager, Mr. [REDACTED] Mr. [REDACTED] is responsible for the operations of the hauling services we provide and for seeking out drivers for the contracts we sign. Additionally, [the beneficiary] supervises the work of Mr. [REDACTED] who is in charge of the maintenance of the trucks and also assists in the operations of the business.

The petitioner also provided its organizational chart depicting the beneficiary at the top of the hierarchy. The remaining three of the petitioner's employees include an office manager, an "operations/driver," and a maintenance employee. As stated in the petitioner's description, all three employees are the beneficiary's subordinates.

Additionally, the petitioner provided its tax return for 2004 as well as a Form 1099 issued by the petitioner to the beneficiary in 2004. It is noted that the amount of officer compensation that appears in the petitioner's tax return is the exact amount shown in the beneficiary's Form 1099, thereby indicating that the beneficiary was the petitioner's only employee in 2004.

On August 17, 2005, the director denied the petition concluding that the beneficiary oversees the work of three direct subordinates who do not occupy supervisory, managerial, or professional positions. The director also noted that the petitioner did not indicate who prepares the financial statements and sales and activity reports that the beneficiary reviews.

On appeal, counsel refers to the current approved L-1 employment of the beneficiary, stating that the nonimmigrant petition was approved based on the same description of job duties as the one provided with the instant Form I-140. 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 Citizenship and Immigration Services (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). Therefore, counsel's argument that the instant petition should be approved based on a prior approval of a nonimmigrant petition is without merit.

Counsel also asserts that none of the prongs that comprise the definition of executive capacity require the beneficiary to supervise professional personnel. While counsel is correct with regard to the specific language of the relevant statutory definition, the petitioner cannot claim that the beneficiary is an executive without clearly establishing how the beneficiary's duties fit that definition. The first prong of the definition of executive capacity requires the beneficiary to direct the management of the petitioning organization or a major component or function of the organization. Section 101(a)(44)(B)(1) of the Act. In the instant matter, the petitioner does not have a tier of managerial employees to manage its daily operations. Therefore, the beneficiary cannot be deemed to direct the management of the petitioning organization. Since the beneficiary is at the top of the petitioner's organizational hierarchy, he cannot be deemed as overseeing a single component or function. Rather, the petitioner indicated that the beneficiary is a personnel manager. Based on this indication, the director properly applied the definition of managerial capacity to the beneficiary's list of duties.

However, counsel asserts that the beneficiary fits the definition of managerial capacity because his duties are those of a function manager, which is a term that 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. 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. at 604. In this matter, the petitioner has consistently maintained the claim that the beneficiary supervises three employees, which is entirely inconsistent with the more recent claim made by counsel on appeal, suggesting that the beneficiary is a function manager. It is noted that, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel cannot claim that the beneficiary fits the definition of function manager merely to avoid meeting the criteria of a personnel manager.

Counsel asserts that the beneficiary manages the essential functions of negotiating contracts, networking, and planning strategies. However, the record strongly suggests that the beneficiary is the one who actually negotiates contracts and networks to solicit business for the company. His performance of these operational tasks negates the purpose and definition of a function manager. *See Matter of Church Scientology Int’l.*, 19 I&N Dec. at 604.

Furthermore, the record shows that at the time the petition was filed, the beneficiary was the petitioner's only employee. While the size of a petitioner's personnel staff is not the only factor considered in determining whether the petitioner is eligible to classify the beneficiary as a multinational manager, this factor can and should be considered in order to determine who would be performing the petitioner's daily operational tasks. In the instant matter, the petitioner's failure to provide evidence of a support staff, strongly suggests that the petitioner filed the Form I-140 before it attained the capability of relieving the beneficiary from having to perform the necessary daily operational tasks. Thus, despite the beneficiary's discretionary authority and overall position at the top of the petitioner's hierarchy, the record does not establish that at the time the petition was filed the petitioner was able to employ the beneficiary in a primarily managerial or executive capacity. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Additionally, though not directly addressed in the director's decision, the record lacks sufficient evidence establishing that the beneficiary was employed abroad in a qualifying managerial or executive capacity for at least one out of three years prior to entering the United States as a nonimmigrant pursuant to 8 C.F.R. § 204.5(j)(3)(i)(B). The description of the beneficiary's position abroad suggests that the beneficiary was charged with many oversight tasks. However, the petitioner does not explain who performs the tasks the beneficiary was overseeing. Thus, the record lacks sufficient evidence to establish that the foreign entity was adequately staffed to allow the beneficiary to focus on performing primarily qualifying managerial or executive tasks.

Furthermore, though also not discussed in the director's decision, 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 petitioner filed its Form I-140 on October 1, 2004 and is therefore required to establish that it has been engaged in "the regular, systematic, and continuous" course of business since October 1, 2003. *See* 8 C.F.R. § 204.5(j)(2). However, on page three of the response to the director's RFE, the petitioner stated that

even though it was officially established in May of 2003, it did not commence its operations until 2004. Therefore, based on the petitioner's own admission, the AAO cannot conclude that the petitioner was doing business for the requisite one-year period.

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 two additional grounds for ineligibility addressed 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 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.