

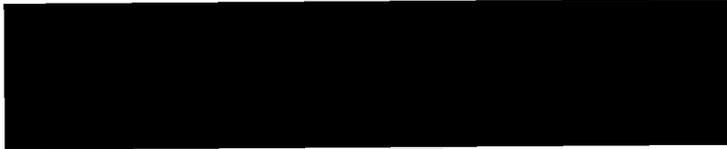


U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **APR 24 2006**
WAC 04 144 53571

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further consideration.

The petitioner was incorporated on April 26, 2000 in the State of California. It is engaged in the purchase and export of automobiles and the provision of transportation/logistics services. The petitioner seeks to employ the beneficiary as its president and chief financial officer. 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 petitioner had not established that the beneficiary would be employed in a managerial or executive capacity and denied the petition. However, a thorough review of the denial indicates that the director's findings were based on an improper and often erroneous analysis of the petitioner's record and submissions contained therein.

Among the director's errors was the undue emphasis placed on the petitioner's original organizational chart, which was submitted in support of the Form I-140. While the chart attempted to illustrate the petitioner's organizational hierarchy, there was no information with regard to the educational levels of the beneficiary's direct subordinates, and various positions that were included in the chart were unfilled. However, in response to the director's request for additional evidence (RFE) dated March 10, 2005, the petitioner provided another organizational chart, which clearly identifies each of the petitioner's employees by name and position title, and provides each individual's level of education. Despite the fact that the latter organizational chart provides a far more accurate illustration of the petitioner's staffing levels and more information regarding the staff itself, there is no indication that the director considered this highly relevant submission prior to rendering his decision.

Further, the director made reference to the petitioner's third quarterly wage report for 2003, comparing the employees listed in the wage report with the employees named in the initially submitted organizational chart. However, the instant Form I-140 was filed in April of 2004, which falls within the second quarterly wage report for 2004. There is no explanation as to the relevance of the petitioner's quarterly wage reports for 2003 to the instant proceeding. Moreover, there is no indication that the director actually reviewed the relevant wage report which identifies each of the employees named in the relevant organizational chart and which was submitted in response to the RFE for the director's review.

The director also made reference to the description of the duties of the managers listed in the organizational chart. While this information is relevant, it was neither requested by the director nor submitted by the petitioner. Therefore, it is unclear which description of duties the director purportedly reviewed in making this finding.

On appeal, counsel points out additional deficiencies in the director's decision. Namely, the director made the following observations:

The beneficiary cannot be classified as an "executive", [sic] for immigration purposes. The petitioning entity does not have [a] reasonable need for an executive. This type of business does not require or have a reasonable need for an executive. It is contrary to common business practices and defies standard business logic for such a company to have an

executive, as such a business does not possess the organizational complexity to warrant having such an employee.

These comments are inappropriate. The director should not hold a petitioner to an undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although Citizenship and Immigration Services (CIS) must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In the instant case the director based the denial, in large part, on his own perception of the petitioner's staffing structure. However, the decision fails to suggest that the director conducted an adequate review of the relevant submissions, which should have been considered prior to rendering adverse findings. While the record shows that two of the petitioner's nine employees were receiving salaries commensurate with those of part-time employees, the remaining seven employees were apparently employed on a full-time basis. There is no indication that any consideration was given to this relevant factor or that any inquiries were made as to the duties of these full-time employees to assess which operational duties they performed.

Finally, as also pointed out in counsel's appellate brief, the director cited the regulation that directly pertains to the petitioner's burden of establishing its ability to pay the beneficiary's proffered wage despite the fact that the petitioner has submitted sufficient evidence satisfying this burden.

After a thorough review of the record, it is concluded that the denial is deficient, as it is based on the director's vague definitions of the law, which are unsupported by any actual statutes or regulations. As the decision is void of a proper factual analysis of the evidence of record, there is no indication that the director actually considered any of the relevant documentation submitted in response to the RFE. Nor did the director specify any documentation in the RFE upon which to draw a proper conclusion.

Thus, although the AAO is not prepared to issue a finding that is favorable to the petitioner with regard to the beneficiary's duties, the record clearly shows an RFE and a final decision that lack proper consideration of the submitted evidence. As such, the director failed to adequately convey what the AAO deems a more apparent deficiency in the instant matter—the petitioner's failure to provide a detailed description of the beneficiary's actual day-to-day job duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives 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). 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). Thus, the petitioner must specifically discuss the duties the beneficiary would perform on a daily basis and establish who performs the petitioner's daily operational tasks. The AAO notes the importance of establishing not just the specific duties of the beneficiary, but also those of the other employees within the petitioning organization, as 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).

Accordingly, the case will be remanded for a new decision. The director is instructed to issue an RFE, instructing the petitioner to provide a comprehensive description of the beneficiary's duties and the duties of

her subordinates. The director may issue a notice requesting any additional evidence he deems necessary in order to determine the petitioner's eligibility for the benefit sought.

As a final note to counsel, the AAO acknowledges the petitioner's previously approved petitions seeking to classify the beneficiary as an L-1A nonimmigrant. 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).

Therefore, while the instant matter is remanded to the service center for further action, the prior approvals of the beneficiary's L-1A petitions will not guide the director's final decision with regard to the petitioner's eligibility to classify the beneficiary as a multinational manager or executive.

ORDER: The decision of the director dated October 20, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.