



U.S. Citizenship
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FILE:

[REDACTED]
EAC 05 070 51229

Office: VERMONT SERVICE CENTER

Date: DEC 06 2006

IN RE:

Petitioner:
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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in Washington, D.C and is operating as an auto repair shop and cab company. 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 petitioner failed to establish that the beneficiary would be employed 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 petitioner established that the beneficiary would be 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. § 101(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 Form I-140, the petitioner submitted a letter dated October 1, 2004 claiming that the beneficiary's employment in the United States would include overseeing the auto repair shop and cab company, including managing the staff, overseeing financial matters, addressing government authorities, and exercising discretionary authority. The petitioner also provided a chart illustrating the petitioner's organizational hierarchy. The chart indicates that the petitioner is the owner of SP & BS Corporation, which operates two businesses—an auto repair shop and a cab company. The petitioner indicated that the auto repair shop consists of the following: body and paint shop, which has one fulltime employee; a mechanical and electrical department, which has one full-time and one part-time employee; and a parts and accessories department, which has one full-time employee. The petitioner also indicated that its cab company owns three cabs and has independent contractors for an additional 44 cabs. The relationship between the petitioner and the independent contractors was not discussed.

On October 4, 2005, the director issued a comprehensive request for additional evidence (RFE) instructing the petitioner to provide further evidence and information. With respect to the beneficiary's proposed employment in the United States, the director requested the following documentation: 1) a detailed description of the beneficiary's proposed day-to-day duties with an hourly breakdown indicating how much of the beneficiary's time would be devoted to each of the listed duties on a weekly basis; 2) evidence showing the petitioner's management and personnel structures; 3) the petitioner's 2004 tax documentation, including all Form W-2s issued, its Form W-3, complete Form 941s for the second two quarters of 2004, and its 2004 tax return. The petitioner was specifically instructed to provide evidence documenting claimed independent contractors.

In response, the petitioner provided the following description of the beneficiary's proposed employment:

- The beneficiary oversees the staff conducting the day-to-day transactions of SP and BS Corporation including cash transactions, management, purchasing, billing, delivery, etc. Payments are received and bills are paid by the office secretary. Records are to be maintained for the accountant. The checks to be issued are done by the beneficiary.
- Overseeing the day-to-day handling of dealing with the insurance companies which is done by the SP and BS secretary. Some time is utilized looking for the insurance matters of the cabs. Some affiliations coming in have to be informed to the insurance company. Accidents, if any, related to the cab company has [sic] to be dealt with.
- Overseeing the operations of the auto shop including cash flow projections, advertising and planning for expansion.
- Planning being the prime aspect takes a significant amount of time.
- Working with the accountant/consultant to refine the structure of [the petitioner] for maximum profitability.

Regarding the request for tax documentation, the petitioner provided its 2004 corporate tax return as well as the requested Form 941s. It did not, however, provide any W-2 wage and tax statements or its Form W-3.

The petitioner also provided an additional organizational chart, which shows additional employees in the auto repair shop business. Specifically, it appears that the mechanical and electrical division has three commissioned mechanics and a company employed supervisor. The repair shop also appears to have added an upholstery department, which has two commissioned employees.

With regard to the petitioner's taxi cab business, it appears to have nine less independent contractors than it had at the time the Form I-140 was filed. Although the chart shows that the cab company owns its own cabs, it is unclear whether any changes have occurred.

On February 13, 2006, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying capacity. In support of this conclusion the director made a number of findings. First, the director noted that the petitioner failed to submit W-2 wage and tax statements and the Form W-3, all of which were requested in the RFE. Second, the director found that the petitioner

failed to submit sufficient evidence documenting the number of employees it had at the time of filing, which was also discussed in the RFE. The director noted that this lack of evidence precludes Citizenship and Immigration Services (CIS) from determining whether the petitioner had a sufficient staff to relieve the beneficiary from having to primarily perform non-qualifying tasks. Third, the director found that the petitioner failed to provide the hourly breakdown of duties for the beneficiary and for his subordinates.

On appeal, counsel points out that the director made contradictory statements with regard to the petitioner's submission of its Form W-2s and further disputes the finding that the petitioner failed to submit the requested documentation. While the AAO acknowledges the director's contradictory statements, it is noted that counsel's claim that the requested documentation was submitted is not corroborated by the record of proceeding. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The director's comment suggesting that the unsubmitted documents were actually submitted is hereby withdrawn.

Counsel further asserts that the beneficiary's responsibilities within the petitioning entity meet each of the four prongs of the definition for executive capacity. *See* section 101(a)(44)(B) of the Act. In support of this assertion, counsel discusses specific business decisions the beneficiary has made within his role as president of the petitioning entity. However, the beneficiary's discretionary authority and position within the petitioner's organizational hierarchy are not disputed. Counsel's statements suggest that discretionary authority and position within the petitioner's hierarchy are indicative of the performance of primarily qualifying tasks. This interpretation of the law is incorrect. In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the 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). Accordingly, the director properly instructed the petitioner to provide a detailed description of the beneficiary's duties accompanied by an hourly breakdown of time to be spent performing such duties.

On appeal, counsel expresses his dismay at the director's dissatisfaction with the descriptions provided and claims that the description provided in response to the RFE adequately illustrates the beneficiary's executive role within the petitioning organization. Counsel's statements, however, are without merit. The director's request properly specified the information and evidence sought. Regardless of counsel's opinions as to whether the requested information was necessary, the fact remains that the petitioner failed to comply with the director's request. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the director's finding was accurate and the conclusion based on such finding was warranted. Rather than comply with the director's specific request, the petitioner chose to provide a general overview of the beneficiary's responsibilities, which conveyed a heightened degree of discretion, but failed to provide a detailed account of the actual duties the beneficiary would perform on a weekly basis. 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. Merely stating that the beneficiary's job would entail overseeing staff who would perform the daily operational tasks is insufficient.

Furthermore, 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 the instant matter, a significant portion of the petitioner's claim hinges on the existence of subordinate employees, who purportedly carry out the daily non-qualifying tasks. However, the petitioner has failed to provide adequate documentation to establish that it actually employs any of the claimed individuals, either directly or on a commission basis. The petitioner also provided a general and very confusing explanation of its relationship with the more than 35 individuals who are claimed to work for its taxi cab business as independent contractors. The petitioner's failure to provide documentation to corroborate its somewhat confusing claims precludes a finding that the petitioner has an adequate support staff to relieve the beneficiary from having to primarily engage in non-qualifying tasks.

While counsel properly states that the petitioner's overall purpose and stage of development must be considered along with the organizational structure, there are no circumstances under which the petitioner is relieved from having to meet its statutorily imposed burden of proof. In the instant matter, the petitioner's claim is simply lacking in basic documentary evidence. The AAO does not find that the organizational structure proposed in the petitioner's organizational chart renders the petitioner ineligible. Rather, the AAO finds that the petitioner simply failed to document the employees it has claimed within its organizational structure. As such, the AAO cannot determine whom the petitioner employed at the time the Form I-140 was filed and whether it had sufficient personnel to support the beneficiary's executive role. This documentation as well as a clear description of the beneficiary's duties and the duties of his subordinates are essential to establishing eligibility for the benefit sought.

Additionally, the AAO notes that the handwritten organizational chart submitted in response to the RFE indicated that additional employees were hired to work in the petitioner's auto repair shop. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, any additional employees that were hired after the filing of the petition are irrelevant for the purpose of determining the petitioner's eligibility.

Counsel is correct in pointing out the director's error in implying that the beneficiary's subordinates must also be managerial or executive employees. Accordingly, the improper statements are hereby withdrawn. Notwithstanding the erroneous comments, however, the director made proper findings with regard to the petitioner's failure to submit evidence and, based on such findings, rendered a proper conclusion with regard to the petitioner's overall eligibility. Therefore, as the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive position, this petition cannot be approved.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to entering the United States as a nonimmigrant. In the instant matter, the petitioner has failed to provide sufficient information about the specific duties performed by the beneficiary during his employment abroad. See 8 C.F.R. § 204.5(j)(5). The petitioner's description of the beneficiary's position abroad included general job responsibilities rather than specific duties as requested in the RFE. Therefore, the AAO cannot determine whether the beneficiary primarily performed duties of a qualifying nature during his employment abroad.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the instant matter, the petitioner claims to be a wholly owned subsidiary of the foreign entity. However, in an addendum to Schedule E of the petitioner's 2004 tax return, the petitioner indicated that the beneficiary owns 100% of its outstanding stock. The same claim is reiterated in the petitioner's 2004 franchise tax return, Schedule C. 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). In the instant matter, the petitioner has provided its stock certificate No. 2 indicating that 510,000 out of one million shares were issued to the foreign entity. However, this document cannot be deemed "objective evidence." *See id.* As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The petitioner has submitted no other documentation, including evidence of funds contributed towards the purchase of the petitioner's stock, which would establish who, in fact, owns the majority of the petitioner's outstanding stock. Therefore, the petitioner has failed to provide sufficient evidence in support of its claim regarding its relationship with the beneficiary's foreign employer.

As an alternative, the AAO has also considered the possibility that the petitioner may be an affiliate of the foreign entity, in light of the beneficiary's ownership interest in both entities. 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;

In the instant matter, the petitioner has submitted documentation indicating that the beneficiary has a 30% interest in the foreign entity. However, according to the petitioner's tax documentation, the beneficiary owns 100% of the outstanding shares of the U.S. entity. As such, the petitioner does not fit the definition of affiliate as defined above.

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 as discussed above, this petition cannot be approved.

As a final note, counsel makes a brief reference to the petitioner's current 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, 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).

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.