



U.S. Citizenship
and Immigration
Services

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Office: VERMONT SERVICE CENTER

Date: DEC 15 2006

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IN RE:

Petitioner:



Beneficiary:

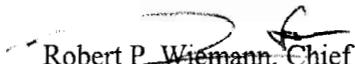
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

The petitioner is a Maryland corporation engaged in the business of acquiring and exporting various goods to China.¹ It seeks to employ the beneficiary as its president and chief executive 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 failed to establish that the beneficiary would be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel asserts that the denial is erroneous and disputes the director's findings.

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.

¹ It should be noted that, according to the Maryland State Department of Assessments and Taxation, the petitioner is not currently in good standing in Maryland due to its failure to file a 2005 personal property return. Therefore, regardless of whether the petitioner's tax issues in Maryland can be easily remedied or not, it raises the critical issue of the company's current and continued existence as a legal entity in the United States.

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 Form I-140, the petitioner submitted a letter dated June 27, 2002, which contained the following list of criteria for the beneficiary's position in the United States:

- An ability to delegate responsibility to subordinate management[.]
- An ability to motivate subordinate management[.]

- A working knowledge, through experience, of business functions, marketing, and relevant sales strategies[.]
- The ability to negotiate effectively with suppliers[.]
- The ability to establish and acquire contacts in local and national business communities in both China and the United States[.]
- Acting as the liaison between the [p]arent and [s]ubsidiary [o]rganizations[.]
- Ability to make crucial decisions regarding the finances, staffing, and legal responsibilities of the organization[.]
- An ability to communicate effectively with suppliers, distributors, clients, and employees in English and Chinese through both oral and transcribed media[.]

On April 13, 2005, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following: 1) a detailed description of the beneficiary's proposed job duties with an hourly breakdown of time to be spent on each of the duties on a weekly basis; 2) an organizational chart illustrating the petitioner's executive and management structures clearly indicating which positions will be supervised by the beneficiary; and 3) the petitioner's 2002 tax documentation, including the W-2 wage and tax statements it issued to its employees, its own tax return, its 2002 payroll roster, and Forms 941 for the first and second quarters of 2002. The petitioner was specifically asked to provide documentation for any contract labor it used and to specify the services provided.

The petitioner provided a response dated June 29, 2005 in which it listed the documents that were included with the response, including several that were requested in the RFE. More specifically, the petitioner provided the requested organizational chart and all of the requested tax documentation. Accordingly, the AAO hereby withdraws the director's erroneous comments stating that the petitioner failed to provide the requested documentation.

The petitioner's organizational chart identifies the beneficiary as the president and CEO of both the foreign and U.S. entities. The chart indicates that the beneficiary is at the top of the organizational hierarchy. With regard to the petitioning entity, the chart indicates that the beneficiary's direct subordinate is the operations manager whose two subordinates include a sales and service manager and a marketing and public relations manager. However, based on the number of W-2 tax statements issued by the petitioner in 2002, the record did not employ a marketing and public relations manager in 2002 when the Form I-140 was filed. Rather, the organization appears to have been comprised of a total of three employees—the beneficiary, an assistant manager to the beneficiary, and the sales and service manager. Therefore, the record is unclear as to who was performing the marketing and public relations tasks during the time the Form I-140 was filed.

In compliance with the director's request, the petitioner also provided the following breakdown of the beneficiary's proposed duties and responsibilities:

- [The beneficiary] delegates administrative tasks and telephone calls to [redacted] the [o]perations [m]anager. [redacted] in turn, directs most of the activities of [redacted] [the

sales and services manager] and _____ [the marketing and public relations manager]. The delegation process is daily when [the beneficiary] is in the U[.]S[.]A[.], and frequent when he is working from his _____ China office. This delegation may take . . . approximately 5 hours per week.

- Development and implementation of efforts to expand business, including resource planning to expand business. This is a core duty of [the beneficiary] and takes about 11 hours per week, including high-level business meetings.
- Approval of payroll and financial matters. Since these tasks are completed mostly by the accounting firm . . . this takes up no more than 1 hour per week
- Hire, fire, and promote staff, as well as to increase salaries and benefits. Since most of this area is delegated to _____ staff matters take up no more than 1 hour per week[.]
- Development and revision of corporate policy, as well as to raise salaries and benefits. [The beneficiary delegates most of these tasks to _____, so that these tasks take up no more than 1 hour per week.
- Ability to enact disciplinary action against a staff member who has violated company rules or policies. This is not a frequent occurrence, and we were unable to assign a specific number of hours to it.
- Development, evaluation and revision of corporate employee development and training programs. [The beneficiary] frequently meets with staff for instruction and training. Thus, this duty takes up about 3 hours of his time per week.
- Supervision of subordinate managerial or supervisory staff, as well as general supervision of all employees. . . . [The beneficiary's] supervision of other staff, including staff in China, takes up about 9 hours per week, and includes staff meetings, communications with managers and staff about internal matters, as well as instructions to managers.
- Responsibilities for coordinating business matters with the parent company. Since [the beneficiary] is frequently traveling back and forth between China and the U[.]S[.]A[.], coordination of business practices is very important. We determined that this type of coordination, including daily telephone calls with managers at the Shanghai headquarters, takes up about 5 hours of his time.
- Development of general and specialized budgets. Most of these tasks are delegated to the [o]perations [m]anager and the [a]ccounting [f]irm. Thus, this duty takes up only one hour of his time per week.
- Based upon [s]taff recommendations, deciding what services and inventory are to be added, cut, or maintained. His review of manager reports in this regard may take approximately 2 hours per week.

Development of marketing strategy and advertising campaigns, and assignment of marketing-related tasks to [the sales and services manager] or managers at the Shanghai headquarters. This duty is regularly done and takes approximately 3 hours of his time per week.

- Establishment of company goals. This is a leadership tasks [sic] that is occasionally conducted, and certainly takes up on average no more than 1 hour per week.

On August 30, 2005, the director issued a decision denying the petition based on the conclusion that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. While the director's overall conclusion is correct, his underlying analysis as well as several of his factual findings were erroneous. One such finding, which was addressed above, was that the petitioner failed to submit requested tax documentation. A review of the record clearly shows that the petitioner complied with the RFE request for documentation.

The director also made an erroneous finding regarding the petitioner's submission of the beneficiary's hourly breakdown of duties. While the adequacy of the description submitted may be questionable, the fact that the beneficiary's job description was submitted with the requested time breakdowns should not have been disputed. Consequently, the director's comment to the contrary is hereby withdrawn.

Lastly, the director stated that the descriptions of duties of the petitioner's remaining staff members suggest that they are not performing tasks of a managerial or executive nature. This statement is inaccurate on two counts. One, the director previously stated that the petitioner failed to provide job descriptions for its employees. Any conclusion analyzing employee job descriptions necessarily implies that the requested information was submitted. Thus, the director's comment contradicts the one made earlier within the same decision. Two, there is no statute or regulation that requires the beneficiary's subordinates to fit the same statutory definition of managerial or executive capacity as is required of the beneficiary. Rather, in the event that the beneficiary is claimed to be employed in a managerial capacity and is primarily a personnel manager, the petitioner has the burden of establishing that the beneficiary's subordinates are supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. The director's erroneous statement imposing an unnecessary burden on the petitioner is hereby withdrawn.

Notwithstanding the flawed analysis that contributed to the denial, the director's adverse conclusion regarding the petitioner's ineligibility was warranted by the evidence of record and will be upheld in this decision.

On appeal, counsel first refers to the previously approved L-1 employment of the beneficiary.² 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

² Service records show that the AAO dismissed an appeal from a denied L-1A petition (with receipt no. EAC-98-213-50480), which was filed by the same petitioner on behalf of the same beneficiary.

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).³

Next, counsel refers to the petitioner's \$7 million in revenue for 2005. However, the petitioner filed its Form I-140 in 2002, not in 2005. 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, the revenue accrued nearly three years after the filing of the petitioner's Form I-140 is irrelevant for the purpose of determining the petitioner's eligibility. Regardless, the amount of revenue does not establish that the beneficiary is employed in a primarily managerial or executive capacity. It is foreseeable for a beneficiary to be performing primarily non-qualifying tasks within a highly successful organization. Therefore, neither the petitioner's business success nor the beneficiary's contributions thereto should be deemed as indicators of the beneficiary's employment capacity.

Rather, 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). In the instant matter, a significant portion of the job description provided in response to the RFE consists of broad job responsibilities. For instance, the petitioner stated that approximately 11 hours, or 27.5%, of the beneficiary's time would be attributed to developing and implementing efforts to expand the business; another one hour, or 2.5%, would be devoted to developing and revising corporate policy; three hours, or 7.5%, would be attributed to developing, evaluating and revising employee training programs; five hours, or 12.5%, would be spent

³ It is noted that the AAO has remained consistent in its prior decisions regarding this petitioner and beneficiary. Specifically, the AAO has upheld the service's decision regarding its revocation of a prior Form I-140 and denial of a previously filed Form I-129 (as noted above on p.6).

coordinating business matters with the foreign entity; and one hour, or 2.5%, would be spent establishing company goals. The petitioner claims that these responsibilities would cumulatively consume about 53.5% of the beneficiary's time. However, these broad statements fail to convey an understanding of the specific duties the beneficiary would perform in meeting his overall responsibilities. 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).

The petitioner also indicated that one hour, or approximately 2.5%, of the beneficiary's time would be spent hiring, firing, and promoting personnel. However, in an organizational hierarchy that consisted of three employees, including the beneficiary, at the time the Form I-140 was filed, it is doubtful that the petitioner's employee turnover required even one hour per week to be spent on duties regarding human resources. Furthermore, the petitioner stated that approximately nine hours, or 22.5% of the beneficiary's time would be allotted to staff management, including staff employed by the foreign entity. However, the petitioner did not clarify how much of the beneficiary's time would be allotted to managing the U.S. staff which, as previously mentioned, included only two subordinates at the time the Form I-140 was filed. The petitioner also did not clarify how the beneficiary proposes to manage a staff that is located thousands of miles away from the beneficiary's physical place of work.

Additionally, with regard to [REDACTED] letters describing the beneficiary's employment with the petitioner, the letters were both dated June of 2005 and appear to discuss the beneficiary's duties at that time rather than the duties that would have been performed within the business scheme and organizational hierarchy at the time the Form I-140 was filed three years prior to [REDACTED]. However, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Moreover, [REDACTED] June 9, 2005 letter states that the beneficiary would negotiate with export agencies, handles inquiries and purchase orders, and conduct the administrative tasks to ensure customer payment. [REDACTED] description suggests that the beneficiary would carry out the petitioner's operational tasks, which are deemed non-qualifying. 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 "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 International*, 19 I&N Dec. at 604. While [REDACTED] letter dated June 21, 2005 also addressed the beneficiary's position with the U.S. petitioner, its contents include a broad description of job responsibilities, which are unaccompanied by further information regarding actual duties to be performed. Despite the beneficiary's discretionary authority and overall role within the petitioner's organizational hierarchy, which were illustrated in [REDACTED] letter, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

An overall review of the record suggests that at the time the Form I-140 was filed, the petitioner lacked the organizational complexity to employ the beneficiary in a primarily managerial or executive capacity. The record simply does not reveal how, with a personnel structure that is comprised of three people including the beneficiary, the petitioner would be able to relieve the beneficiary from having to primarily perform non-qualifying operational tasks on a daily basis.

Furthermore, the record supports a finding of ineligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, 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 record shows that the petitioner previously filed another Form I-140 (receipt no. EAC-00-158-50490) whose approval was ultimately revoked based partly on the director's determination that the petitioner failed to properly document the existence of a qualifying relationship with the beneficiary's foreign employer. The AAO subsequently dismissed the petitioner's appeal, concluding that the petitioner provided conflicting evidence with regard to its ownership and control. The AAO focused on the petitioner's claim, i.e., that it is a wholly owned subsidiary of the beneficiary's foreign employer, and cited the evidence submitted in support thereof. The evidence included stock certificate no. 1 showing that 100 shares of the petitioner's stock were issued to _____ Ltd.; the petitioner's stock ledger indicating that only one stock certificate was issued; and the petitioner's corporate tax returns for 1997 and 1997, both showing that the beneficiary owns 100% of the petitioner's stock.

In a response to an RFE issued by the director, counsel for the petitioner stated that there were no discrepancies. He further asserted that based on the beneficiary's ownership of the foreign entity, he is, in affect, owner of the petitioning entity as well. The AAO dismissed the appeal, concluding that the petitioner's claim, i.e., that it is a wholly owned subsidiary, and counsel's explanation, i.e., that the two entities are similarly owned by the beneficiary, are inconsistent. 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). The AAO concluded that the petitioner failed to submit evidence resolving the considerable inconsistencies.

A review of the record in the present proceeding shows that the inconsistencies regarding the petitioner's ownership still have not been resolved. Despite the petitioner's initial claim regarding its ownership, the record contains more recent federal tax returns for 2002 and 2003 identifying the beneficiary as the sole owner of the petitioner's stock. Despite the AAO's prior statements dismissing counsel's argument that the beneficiary is technically the petitioner's owner by virtue of owning the foreign entity, the petitioner provided a letter dated December 11, 2004 from its certified public accountant reiterating the same claim. These conflicting statements regarding the petitioner's ownership have not been resolved. For this additional reason, this petition must be denied.

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 ground of ineligibility as 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.

Finally, based on the reasons for the denial of the instant immigrant petition, a review of the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary is warranted to determine if they were approved in

error. Therefore, the director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9). Of particular concern is the recently approved petition (EAC-06-087-52334), which appears to have been filed and approved at a time when the petitioner was not in good standing.

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.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9).