

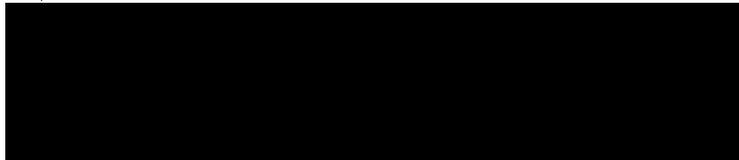
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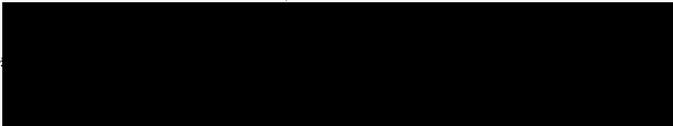
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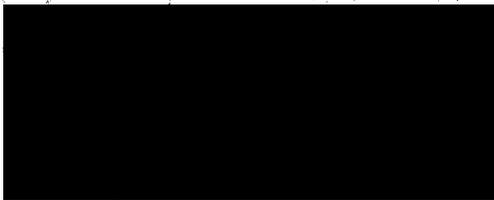
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in April 2002. It trades in steel and metal products. It seeks to employ the beneficiary as its vice-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 had not established: (1) that it had a qualifying relationship with the beneficiary's foreign employer; or (2) that the beneficiary would be employed in a managerial or executive capacity with the petitioner.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) erroneously denied the petition. Counsel submits petitioner's statement in support of the appeal.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the 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.

The petitioner in this matter claims that [REDACTED] owns 100 percent of the petitioner's outstanding shares. The director in this matter pointed out that the petitioner's stock certificate bears an inconsistency on its face; in the "share block" the stock certificate indicates that the petitioner issued 10,000 shares to the foreign entity and the body of the share certificate indicates that the petitioner issued "One Hundred Thousand" shares. In addition, the director noted that the stock certificate was issued September 29, 2002 but that payment for the purchase was not transferred to the petitioner until January 2003, more than three months later.

On appeal, the petitioner points to the fact that the foreign entity paid \$100,000 for the petitioner's 100,000 shares and that the petitioner's tax returns all substantiate the foreign entity's 100 percent ownership of the petitioner. The petitioner observes that the inconsistency on the face of the issued stock certificate is a typographical error and does not undermine the legitimacy of the foreign entity's ownership.

The petitioner's explanation and evidence on appeal is persuasive. The AAO considers the inconsistency on the stock certificate a minor discrepancy that does not negatively impact on the foreign entity's 100 percent ownership of the petitioner. Further, the foreign entity's payment of \$100,000 to the petitioner in January 2003, sufficiently established that the purchase of the earlier issued shares was legitimate. The petitioner has provided sufficient evidence to establish a qualifying relationship with the beneficiary's foreign employer.

The director's decision will be withdrawn as it relates to the issue of the petitioner's qualifying relationship with the beneficiary's foreign employer.

The second issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 an attachment to the Form I-140, Immigrant Petition for Alien Worker, the petitioner described the beneficiary's duties as:

The vice president of the petitioner is responsible for formulating company's policies, establishing operation goals and methods of implementation, delegating assignments to the subordinates, coordinating the activities of departments, making company expansion plans, overseeing the financial operations, reviewing company's short-term and long-term performance, reporting progress and making strategic suggestions to the board of the directors.

The petitioner also included its letter of transfer, dated August 8, 2002, in support of the petitioner's L-1A intracompany transferee petition. The August 8, 2002 letter provided the same information as above, only adding that the beneficiary had responsibility for hiring and firing personnel.

On March 10, 2005, the director requested: the petitioner's California Forms DE-6, Quarterly Wage and Tax Statement, for all employees for the last eight quarters; copies of the petitioner's payroll summary, Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, and IRS Forms 1099, Miscellaneous Statement, evidencing wages paid to the beneficiary during his stay as an L-1A nonimmigrant.

In a May 27, 2005 response, the petitioner provided its organizational chart and a list of employees with brief job descriptions for the position each held as well as the date of their employment. The beneficiary's position was shown as vice-president over four departments. The vice-president's job description as previously stated was included once again.

The petitioner's organizational chart depicted an office administrative department with one position. The employee list indicated that the office administrator had been employed in March 2004, continued to be employed, and that she was responsible for the petitioner's day-to-day operations, managing client accounts and answering customer's inquiries, suggesting general administrative procedures including invoicing and record keeping, and preparing correspondence, scheduling meetings, and making travel arrangements. The employee list also identified an office assistant who was not included on the organizational chart and had been employed shortly prior to the date of filing the petition for a six-month period.

The petitioner's organizational chart also depicted a trading and development department with a manager, a marketing coordinator, and a trading assistant. The employee list showed that the manager had been employed in March 2005, continued to be employed, and was responsible for negotiating and signing contracts, increasing customer base through prospecting, referrals and networking, sold the company's products to wholesalers, developed, built, and maintained new client relationships, provided customer services, achieved quarterly and annual revenue goals, quotas and performance objectives, and collaborated with sales associates during the design and delivery of client products. The employee list indicated the marketing coordinator had been employed in February 2005, continued to be employed, and was responsible

for assisting the trading and development manager with day-to-day sales and marketing tasks, wrote and edited sales and marketing materials, reported to the trading and development manager, and implemented tasks as directed by the manager. The trading assistant had been employed in May 2003, continued to be employed, and followed orders and contracts, assisted the manager to prepare packing list invoices, updated suppliers' data and customer information, kept trading records, and answered customer's inquiries.

The petitioner's organizational chart also depicted an accounting department with a manager, a corporate accountant, and an accounting assistant. The employee list showed that the accounting manager had begun employment in March 2004, continued to be employed, and reported to the general manager, oversaw the activities of the accounting department for accuracy and timely dissemination of financial management reports, reviewed internal and external monthly financial statements, annual audits and budgets, maintained systems and controls for the integrity of all systems, processes, and data. The corporate accountant was shown as employed in March 2003, as continuing her employment, and as being responsible for strategic analysis of major opportunities, lines of businesses, expenses, cash flow, products, and customer agreements, generating internal and external monthly financial statements, annual audits and budgets, and providing monthly reports and variance analysis against plans, forecasts, and the prior year. The accounting clerk was shown on the employee list as working for the petitioner from March 8, 2004 to May 15, 2004, preparing journal entries, job orders, keeping record of company costs and income, drafting and collecting financial reports, reconciling bank statements, processing refunds, mail orders, and performing general office duties.

The petitioner's organizational chart also showed a customs and logistics department with a manager, customs coordinator and warehouse assistant. The chart indicated that only the position of warehouse assistant had been filled. The employee list indicated that the warehouse assistant had begun employment with the petitioner in May 2003, continued to be employed, and assisted the customs and logistics manager throughout the warehouse, developed and implemented company-wide inventory procedures and controls, improved productivity, and reduced warehouse and manufacturing overtime to ensure shipment schedules.

In addition, to the above employees, the employee list identified a sales manager employed for nine months in 2004, a second sales manager employed for two weeks in 2005, and a salesperson employed for six months and released from employment prior to the filing date of the petition. The petitioner's California Form DE-6 for the quarter ending September 30, 2004, the quarter in which the petition was filed, substantiated the employment of the beneficiary and individuals in the positions of office administrator, trading assistant, accounting department manager, corporate accountant, and warehouse assistant. The California Form DE-6 for this same quarter listed the individual in the position of sales manager (whose employment terminated December 31, 2004), an office assistant who had been employed shortly prior to the date of filing the petition for a six-month period (whose employment terminated January 2005), and an office assistant employed for a sixteen month period (whose employment terminated February 2005).

The director denied the petition on July 9, 2005, observing that the petitioner had continued to provide the same description for the beneficiary's position since it had filed the initial L-1A intracompany transferee petition in 2002. The director questioned the beneficiary's apparent continued performance of duties required to initiate a business. The director determined, based on the petitioner's California Forms DE-6, that the beneficiary was conducting the petitioner's business through a trading assistant, an accounting manager, a

corporate accountant, and a warehouse assistant. The director notes that the positions of salesperson and sales manager were not included on the petitioner's organizational chart or identified on the petitioner's California Form DE-6 for the quarter in which the petition was filed. The director determined that the evidence in the record did not show which department would be conducting sales or packing. The director concluded that the description of the beneficiary's duties was vague and general and that based on the inconsistencies among the California Forms DE-6, the petitioner's organizational chart, and the employee list, the petitioner had not established that the beneficiary would supervise and control the work of other supervisory, managerial, or professional employees or would manage an essential function of the organization.

On appeal, the petitioner disagrees with the director's interpretation of the record and states that the beneficiary holds the highest executive position in the U.S. company, is the sole decision-maker for the U.S. company with little guidance from the foreign parent company, and has wide discretionary latitude. The petitioner also adds language to the description of the beneficiary's duties, indicating that the beneficiary:

[D]irects and coordinates the formulation of financial, sales and marketing programs to provide funding and strategic support for new and/or continuing operations to maximize sales of the company's products. He develops and oversees the sales, administration and marketing functions. He establishes responsibilities and procedures for attaining sales and market expansion objectives. He defines and develops market research and sales information and reporting necessary to determine potential sales. He reviews activity reports, sales statistics, and financial statements to determine and assess progress towards sales goals. He forecasts budgets.

The petitioner also indicated that the beneficiary:

- locates and negotiates contracts with existing clients for their existing and new lines of merchandise;
- travels frequently to maintain and expand business contacts with the company's clientele and to review new products;
- oversees the negotiation and administration of contracts with U.S. suppliers;
- oversees the office administrator's work as to the daily operations of the office, delivery schedules, import and transportation logistics;
- oversees the general manager to ensure a steady flow of sales;
- devises and oversees marketing strategies;
- identifies business opportunities; and,
- develops and oversees the implementation of product management strategies.

The petitioner asserts that the beneficiary has an "oversight function delegating duties so that the company's services are primarily undertaken by professionals – Trading and Development Manager, General Manager, Account Manager, Logistics Manager, Trading Coordinator, Trading Assistant, Corporate Accounting Staff, Warehouse Staff, and Office Clerk."

The petitioner provides a current California Form DE-6 and organizational chart and contends that the petitioner's business is not being conducted as CIS had speculated. The petitioner states that: (1) its accounting department handles all invoices, internal payroll and external accounting matters and is responsible for billing clients and recording payment history; (2) its trading and development department handles the actual trading of the company's products, securing the steel, scrap leather, scrap metal, and gemstones and dealing with foreign companies for importing and exporting products, and conducting sales; and, (3) its logistics department handles the actual shipping and receiving of the products, inventorying the products coming in and leaving the warehouse, and conducting the packing and shipping of products. The petitioner concludes by contending that the beneficiary is employed in an executive capacity for the petitioner.

The petitioner's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. §204.5(j)(5). The petitioner on appeal seems to suggest that the beneficiary will perform in a primarily executive capacity as defined in section 101(a)(44)(B) of the Act. Of note, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner in this matter failed to initially provide a detailed description of the beneficiary's actual duties for the petitioner. 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). 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. at 1103. The petitioner's brief formulaic description of the beneficiary's duties is not sufficient to establish the beneficiary's managerial or executive capacity for the petitioner.

The petitioner's list of employees, organizational chart, and California Forms DE-6, although helpful, is not sufficient to elevate the beneficiary's position to that primarily of a manager or an executive. As the director observed, the record presented confusing evidence regarding the petitioner's sales department. The petitioner's organizational chart did not depict a sales department yet the petitioner's employee list showed that a sales manager had been employed for ten months during the year the petition was filed. The record also showed that the petitioner had employed another salesperson prior to filing the petition and another sales manager for a two week time period after the petition was filed. The record before the director was sufficiently undefined to question whether the petitioner employed sales personnel permanently, or whether the petitioner relied on the beneficiary or other individuals to sell the petitioner's product. The petitioner's claim on appeal that its trading and development department included a sales component does not sufficiently explain the necessity or lack of necessity of a sales department.

In addition, the petitioner's description of the beneficiary's actual duties on appeal suggests that the beneficiary was involved in negotiating contracts, expanding business contacts, and promoting the company's services when the petition was filed. The record shows that the trading and development department manager

and the marketing coordinator, the individuals charged with negotiating and signing contracts, increasing the customer base, selling products to wholesalers, building and maintaining client relationships, providing customer services, collaborating with sales associates and day-to-day sales and marketing tasks, were not hired until February and March 2005, almost a year after the petition was filed. Thus, the record does not provide evidence that the petitioner employed individuals other than the beneficiary to perform the day-to-day sales, promoting, and marketing tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner's assertion on appeal that the beneficiary conducts these tasks through the trading and development department is not reflective of the conditions in place when the petition was filed. 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).

The AAO acknowledges that when the petition was filed, the petitioner employed individuals who worked as an office administrator, a trading assistant, an accounting manager, a corporate accountant, and a warehouse assistant, as well as having an intermittent sales position. However, the descriptions of the job duties for these individuals, when considered with the lack of substantiating evidence of other employees, do not provide evidence that these positions were primarily managerial, supervisory, or professional. Thus, the portion of the beneficiary's duties relating to oversight of the petitioner's departments is similar to that of a first-line supervisor over non-professional employees.

The record before the director was not sufficient to establish that the beneficiary's role for the petitioner was primarily managerial or executive when the petition was filed. Although the director did not request further detail regarding the beneficiary's actual duties in a request for further evidence, the director specifically noted in his decision that the beneficiary's description of the beneficiary's duties was insufficient. The petitioner had notice of the deficiencies of the record and provided more information regarding the beneficiary's specific duties on appeal. As the petitioner has in fact supplemented the record on appeal, it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with repetitive information.

The description of the beneficiary's duties in this matter, coupled with other evidence in the record, demonstrates only that the beneficiary was responsible for performing operational tasks and the tasks of a first-line supervisor of non-professional employees when the petition was filed. The petitioner has not established that the beneficiary's duties comprise primarily managerial or executive duties. For this reason, the petition will not be approved.

The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, 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 general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 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).

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 approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, 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). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

The petition will be denied for the above stated reason. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.