

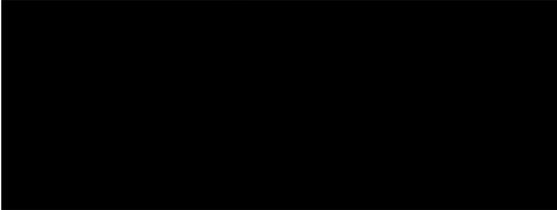
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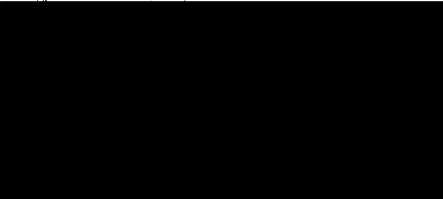
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Office: TEXAS SERVICE CENTER Date: FEB 21 2006

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 Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Florida in November 2000. It owns and operates two retail dollar stores. It seeks to employ the beneficiary as its area manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on November 12, 2004, determining: (1) that the petitioner had not established that the beneficiary had been employed in a managerial or executive capacity for the foreign employer for the required time period prior to entering the United States as a nonimmigrant; (2) that the "petitioner failed to verify that they are indeed 'doing business' in the foreign company or in the U.S. company;" and, (3) that the petitioner had not provided proof of the qualifying relationship between the U.S. company and the foreign companies.

On appeal, counsel for the petitioner asserts that the beneficiary's foreign employer, a Tanzanian sole proprietorship, was purchased and merged into a Pakistani registered partnership creating a qualifying parent/subsidiary relationship between the foreign entity and the United States petitioner. Counsel also asserts that the beneficiary occupied a qualifying position the foreign company and the United States petitioner. Counsel submits a brief and re-submits documents already in the file.

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).

Preliminarily, the AAO will comment on the requirement that any document containing foreign language submitted to Citizenship and Immigration Services (CIS) must be accompanied by a full English language translation which the translator has certified as complete and accurate and that the translator is competent to translate from the foreign language into English. See 8 C.F.R. § 103.2(b)(3). The director in this matter observed that the beneficiary had translated some of the foreign documents. The director determined that because the beneficiary was not a "certified translator," the translated documents were not acceptable. Counsel contends that the regulation does not require that the translator the petitioner uses must be from a translation agency but only that the translation must be accompanied by a certification declaring the translator's competency to translate and that the translation is a true and correct translation. The AAO agrees with counsel's premise.

In this matter, however, the AAO questions the competency of the translator of the foreign documents in the record. The translator (beneficiary) has signed a "translator's certificate" certifying the translator is competent to translate and that the translation is true and accurate to the best of his ability; however, the record contains only a two-page translation for several purported foreign business licenses (exhibits six through twelve). The business licenses appear similar but even to the untrained eye contain some differences. A translator must provide true and accurate translations for each document, not a general translation that is purportedly applicable to all similar documents.

Although the translation of the business licenses is questionable, even if the translations are accepted as evidence, the AAO does not find these documents relevant to the issues of qualifying relationship and the beneficiary's claimed employment in a managerial or executive capacity for one year with a qualifying entity prior to entry into the United States as a nonimmigrant.

The director in this matter focuses on whether the beneficiary was employed by a qualifying entity in one of the three years preceding his entry into the United States as nonimmigrant. 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 record shows that the petitioner, incorporated November 1, 2000, is a wholly-owned subsidiary of Metal Convertor's, a Pakistani registered partnership. The petitioner indicates that the beneficiary had been employed by a sole proprietorship operating a wholesale store in Lindi, Tanzania since 1996. The petitioner states that Metal Convertors, its foreign parent company, purchased the Tanzanian sole proprietorship in August 2001, transferred the Tanzanian sole proprietorship's assets to Metal Convertors, and liquidated the Tanzanian sole proprietorship's inventory. The petitioner provides a copy of a purchase and sale agreement dated August 27, 2001 that indicates it is Metal Convertors intention to transfer the beneficiary to the United States upon the completion of the purchase of the sole proprietorship. The record shows that the beneficiary entered the United States in April 2001 on a B-2 visa and that his status was changed to an L-1A intracompany transferee on April 13, 2002. Counsel asserts in a September 21, 2004 response to the director's notice of intent to deny that the beneficiary continued his employment as a general manger of the wholesale store in Tanzania after his entry into the United States in April 2001, became an executive and manager for Metal Convertors, and served in that capacity for 12 months during the three years preceding his entry into the United States.

The director determined that the petitioner had not substantiated that the beneficiary was working for the foreign subsidiary for one year prior to his transfer to the United States and that the petitioner had not submitted credible evidence to verify that the foreign entity had purchased the Tanzanian sole proprietorship. Thus, there was no proof of the relationship between the United States petitioner and the foreign entity.

Counsel asserts that it is not necessary for the beneficiary to have worked directly for the petitioner's Pakistani parent company to be eligible for this visa classification; rather that it is enough that he worked for the Pakistani's subsidiary in Tanzania which subsequently merged into and became part of the Pakistani company. Counsel references *Matter of Chartier*, 16 I&N Dec 284 (August 3, 1977) and contends that the Chartier Court stated: "it could see no reason why a distinction was made between the United States companies with subsidiaries abroad, and the United States companies with employees abroad who work directly with the parent company."

Counsel's assertions are not persuasive. The petitioner must establish that the petitioning company is the same employer or an affiliate or subsidiary of the beneficiary's foreign employer. The petitioner does not claim that it is the same employer as the beneficiary's foreign employer nor does it claim that it is an affiliate of the beneficiary's foreign employer. The petitioner claims that it is a subsidiary of the beneficiary's foreign employer. Counsel and the petitioner arrive at this conclusion by indicating that the beneficiary's foreign employer, a Tanzanian sole proprietorship, was purchased and subsumed into the petitioner's parent company.

However, the petitioner has not provided documentary evidence that the Tanzanian entity continued to exist after the petitioner's parent company purchase. The record suggests that the Tanzanian entity was liquidated and no longer existed when the Form I-140, Petition for Immigrant Worker, was filed in January 2003. The record does not contain any evidence that the beneficiary ever worked for the petitioner's parent company in any position after the liquidation of the Tanzanian sole proprietorship. The petitioner was never connected to the beneficiary's foreign employer as the beneficiary's foreign employer ceased to exist when it was purchased and liquidated in August 2001. The beneficiary cannot claim to have entered the United States in April 2002 to continue to render services to the same employer (as the Tanzanian sole proprietorship), or an affiliate or subsidiary of the Tanzanian sole proprietorship. The petitioner in this matter is not the "same employer" as the beneficiary's foreign employer because the beneficiary's foreign employer was a distinct legal entity separate and apart from the petitioner which ceased operations on or before August 2001.

The purchase of the Tanzanian sole proprietorship's assets and liquidation of its inventory does not result in the transfer of the beneficiary's employment to that of the purchaser/liquidator. An employment-based immigration classification can be based on an *ongoing* qualifying relationship between a parent and branch office, a parent and subsidiary, or two affiliates possessing the required common ownership and control. The AAO again emphasizes that in the context of this immigrant visa classification, the qualifying relationship must exist when the petition was filed.

Counsel also fails to establish the relevance of the *Matter of Chartier*, to this proceeding. *Matter of Chartier* involved an L-1A intracompany transferee not an employment-based immigrant petition. Further, counsel misquotes the *Matter of Chartier* decision-makers in his brief. The petitioner has not established that a qualifying relationship existed between the petitioner and the beneficiary's foreign employer when the petition was filed. For this reason, the petition will not be approved.

Counsel also notes that CIS previously found a valid relationship between the companies when it approved an L-1A petition filed by the petitioner on behalf of this beneficiary and contends that the Form I-140 should have been approved as it is based on the same facts. 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. See 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii) 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).

Further, 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.

Finally, the AAO observes that as the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

Beyond the decision of the director, the petitioner did not establish that the beneficiary was employed in a managerial or executive capacity for one year in the three years preceding his entry into the United States as a nonimmigrant.

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.

Counsel for the petitioner indicates in a January 27, 2003 letter appended to the petition that the beneficiary was employed as a general manager for the Tanzanian sole proprietorship. Counsel states that the beneficiary "manages the store and its staff, including hiring and firing employees, establishing policy and procedure, and

exercises discretionary control over the daily activities of the business." Counsel claimed that a sales manager and a cashier/office manager reported to the beneficiary in his position as general manager for the Tanzanian sole proprietorship.

In an undated attachment to the petition, the petitioner indicated that the executive and technical skills required to perform the overseas duties included:

Ability to plan, develop and establish policies and objectives for firm, ability to work together with other executives and managers to develop organizational policies and coordinate functions and operations and to establish responsibilities and procedures for obtaining objectives; ability to analyze financial information and prepare budgets; ability to communicate with staff, clients, vendors and vendees; ability to understand marketing strategy and implement marketing strategies.

The petitioner indicated in the same attachment that the beneficiary spent 90 percent of his time on executive duties.

The record does not contain further information regarding the beneficiary's actual daily duties for the Tanzanian sole proprietorship. The record does not contain any evidence that the beneficiary worked in a managerial or executive capacity for the Pakistani registered partnership. The description of the beneficiary's duties for the Tanzanian sole proprietorship is general and does not establish that the beneficiary spent the majority of his time performing managerial or executive duties. 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. Although the petitioner claimed that the Tanzanian sole proprietorship employed a sales manager and a cashier/office manager, the petitioner has not provided any documentary evidence to establish this claim. The record does not substantiate that the beneficiary was relieved of performing the daily operational tasks associated with operating a wholesale store. 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. at 604. 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)).

The record does not establish that the beneficiary's duties for a foreign entity were in a managerial or executive capacity. For this additional reason, the petition will not be approved.

Furthermore, the petitioner has not established that the beneficiary's duties for the United States entity will comprise primarily managerial or executive duties. The petitioner has provided a general description of the beneficiary's duties for the petitioner. In a January 27, 2003 letter appended to the petition, counsel for the petitioner indicated that the beneficiary:

Directs and coordinates activities of subordinate managerial personnel involved in operating retail chain stores in assigned area: Interviews and selects individuals to fill managerial vacancies. Maintains employment records for each manager. Terminates employment of store managers whose performance does not meet company standards. Directs, through subordinate managerial personnel, compliance of workers with established company policies, procedures, and standards, such as safekeeping of company funds and property, personnel and grievance practices, and adherence to policies governing acceptance and processing of customer credit card charges. Inspects premises of assigned area stores to ensure that adequate security exists and that physical facilities comply with safety and environmental codes and ordinances. Reviews operational records and reports of store managers to project sales and to determine store profitability. Coordinates sales and promotional activities of store managers. Analyzes marketing potential of new and existing store locations and recommends additional sites or deletion of existing area stores. Negotiates with vendors to enter into contracts for merchandise and determines allocations to each store manager.

The petitioner has provided evidence that it owns and operates two retail dollar stores. The petitioner claims on the Form I-140 that it employs eight individuals. The petitioner provided an organizational chart showing that the beneficiary was the immediate supervisor of one full-time worker employed in store number one and of two full-time workers and one part-time worker in store number two. The record does not contain any independent evidence substantiating the employment of these workers 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).

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 description of the beneficiary's duties for the United States entity is general, suggesting at most that the beneficiary is engaged in supervisory duties. However, the petitioner does not establish that the beneficiary's subordinate employees perform primarily managerial, supervisory, or professional tasks. Rather, the record suggests that the beneficiary is a first-line supervisor of individuals who perform the clerical and sales tasks associated with a retail shop. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Further, 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. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise. The petitioner has not provided evidence that the petitioner has continuously employed individuals subordinate to the beneficiary that hold managerial, supervisory, or professional positions.

The petitioner has not established that the beneficiary's position with the United States entity will be primarily managerial or executive. For this additional reason, the petition will not be approved.

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).

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. Here, that burden has not been met.

ORDER:        The appeal is dismissed.