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FILE:

SRC 06 013 50557

Office: TEXAS SERVICE CENTER

Date:

JUL 27 2006

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a Texas corporation operating as a rice milling equipment and supply company. It seeks to employ the beneficiary as its research and development 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 determined that the beneficiary would not 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 her 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 beneficiary would be employed in the United States 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. § 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.

The petitioner provided no evidence or additional information in support of the Form I-140. Accordingly, the director issued a notice of intent to deny (NOID) on October 27, 2005. The NOID included a request for a detailed description of the beneficiary's proposed job duties and the percentage of time that would be allotted to each duty. The petitioner was also instructed to provide the job titles and brief descriptions of duties to be performed by the beneficiary's subordinates, if any. The petitioner was specifically asked to identify who would provide its products and/or services.

In response, the petitioner submitted a letter dated November 17, 2005 stating that the beneficiary would spend 50% of his time researching and developing systems for color sorting equipment and the other 50% of his time researching, developing, and managing the installation of rice processing systems. The petitioner further stated that during the course of rice processing projects, the beneficiary would supervise between five and fifteen temporary employees who would actually install the rice processing systems. The petitioner stated that the installation process includes metal working, welding, painting, and other related duties. With regard

to the color sorting equipment, the beneficiary designs all of the optical electronic products, which are later sent to companies for assembly and manufacturing. The petitioner focused on the beneficiary's knowledge and experience in grain handling systems and various design and computer software development.

The petitioner also provided a general organizational chart depicting the beneficiary's position as research and development engineering and project manager. The chart shows field services and customer support as future positions. However, there is no indication that the petitioner employed anyone or contracted individuals or companies to provide these services at the time the Form I-140 was filed. The chart also suggests that the beneficiary supervises the completion of projects within the rice mill division, which requires work crews of approximately 15 employees. Although the director specifically instructed the petitioner to submit all of the W-2's issued in 2004, the petitioner failed to comply with that request.

On November 30, 2005, the director denied the petition noting that the petitioner failed to establish that it has a sufficient support staff to relieve the beneficiary from having to primarily perform nonqualifying tasks. Although the director stated on page three of the decision that the petitioner claimed five employees in Part 5 of the Form I-140, that statement is incorrect. Part 5 of the petitioner's Form I-140 indicates that the petitioner claimed two employees in the United States. However, despite the petitioner's claim, the record contains no corroborating evidence.

On appeal, counsel vehemently opposes the director's emphasis on the size of the petitioner's support staff, stating that the director failed to consider the petitioner's staff of independent contractors who purportedly perform the company's daily tasks. However, 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)). As previously stated, the petitioner failed to provide any W-2 statements as evidence of the two claimed employees and has provided no other documentation to corroborate the claim regarding the hiring of independent contractors. It is noted that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, counsel states that the beneficiary manages the research and development function and thus suggests that the beneficiary is in essence a function manager. However, in order to corroborate this claim, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In the instant matter, the petitioner's description, while vague and lacking any indication as to the actual tasks to be performed on a daily basis, strongly suggests that the beneficiary would carry out, not merely manage the essential functions of research and development. While counsel indicates that the beneficiary does not participate in the production of equipment that the petitioner sells, the petitioner's statements suggest that the beneficiary would actively engage in researching and designing the machinery that would later be mass produced by manufacturers. The fact that the beneficiary would not participate in the manufacturing process does not

indicate that he would be relieved from having to perform nonqualifying duties, a list which is not limited to manufacturing.

Counsel also refers to several of the AAO's prior decisions where the conclusions were favorable to the respective petitioners of each case. However, the decisions referenced by counsel were unpublished and therefore cannot be deemed precedent case law that is binding on Citizenship and Immigration Services (CIS) employees. *See* 8 C.F.R. § 103.3(c).

On review, the record lacks sufficient evidence to enable the AAO to conclude that the beneficiary would be employed in a managerial or executive capacity. 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, the description of the beneficiary's job duties fails to convey an understanding of the beneficiary's daily activities and further suggests that the beneficiary would directly participate in executing the petitioner's daily operational tasks. Although counsel places great emphasis on the beneficiary's knowledge and unique capabilities, the record does not establish that a majority of the beneficiary's duties will be primarily managerial or executive. Rather, the record suggests that the petitioner has not reached a level of organizational complexity wherein the beneficiary would be relieved of having to primarily engage in nonqualifying tasks. Despite the possibility of the petitioner's success and consequent expansion in its work force, which may alter the nature of beneficiary's duties, 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).

Additionally, the petitioner is ineligible to classify the beneficiary as a multinational manager or executive based on a number of issues that were not addressed by the director.

First, the record lacks sufficient evidence that the petitioner has a qualifying relationship with the beneficiary's foreign employer as required in 8 C.F.R. § 204.5(j)(3)(B). Although the record indicates that the petitioner is owned by two people, each owning 50% of the entity, the record is silent as to the ownership and control of the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. As the record lacks the necessary documentation to establish the foreign entity's ownership, the AAO cannot affirmatively conclude that the U.S. petitioner and the beneficiary's foreign employer are commonly owned and controlled.

Second, the record lacks sufficient evidence to suggest that the petitioner had been doing business for at least one year prior to filing the petition. *See* 8 C.F.R. § 204.5(j)(3)(D). Pursuant to the regulations at 8 C.F.R. § 204.5(j)(2) *doing business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation or other entity and does not include the mere presence of an agent or office. In the instant matter, the petitioner provided random invoices for October 2004, May 2005, and September 2005. While these invoices suggest that the petitioner had been doing business during the year prior to filing the

petition, the evidence is insufficient to establish that such business had been ongoing on a regular, systematic, and continuous basis.

Finally, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, the petitioner failed to complete Part 6, Item 9 of the Form I-140 in which the beneficiary's proffered wage is to be disclosed. Thus, the AAO cannot affirmatively make a conclusion as to the petitioner's ability to pay the proffered wage as the petitioner has failed to provide a definitive statement of what that wage would be.

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 for ineligibility discussed above, this petition cannot be approved.

As a final note, service records show the petitioner's previously 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, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported 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.