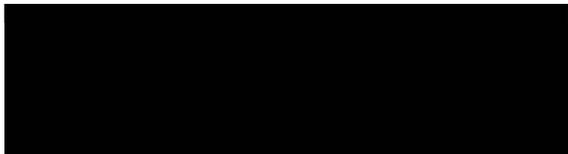


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FILE: WAC 04 800 48436 Office: CALIFORNIA SERVICE CENTER Date: JUN 26 2006

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is operating as a steel and iron importer. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel for the petitioner disputes the director's finding, claiming that as the president of the petitioning organization, the beneficiary would be employed in a primarily executive capacity. Counsel submits a brief 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 or 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, 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 issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 electronically filed the instant immigrant visa petition on July 16, 2004 noting the beneficiary's proposed position as president of the United States organization. The director subsequently issued a request for evidence on March 24, 2005 asking that the petitioner provide a "more detailed description" of the beneficiary's job duties in the United States company, including a "concrete description" of what the beneficiary would do on a day-to-day basis, the percentage of time the beneficiary would spend on each task, and the job titles and job duties of the employees to be supervised by the beneficiary. The director asked that the petitioner also submit an organizational chart clearly depicting the beneficiary's position in the petitioning company and those of his subordinate employees. The director also requested copies of the petitioner's payroll summary, copies of Internal Revenue Service (IRS) Forms W-2 and W-3, state quarterly wage reports filed by the petitioner for the last eight quarters, and income tax returns for the years 2002 through the present.

Counsel for the petitioner responded in a letter dated June 15, 2005. In an attached exhibit, the petitioner noted the following job responsibilities of the beneficiary:

- Business Correspondence 02 Hours Per Week;
- Banking negotiations and documentation 02 Hours Per Week;
- Business Development and Vendor Relationship 08 Hours Per Week;
- Parent Company Sales/Imports and other matters 08 Hours Per Week;
- Marketing and Sales – Customer Relationship 09 Hours Per Week;
- Accounting 02 Hours Per Week;
- Business Meetings 05 Hours Per Week;
- Incidental & Situational Meetings 04 Hours Per Week;

The petitioner also provided a brief statement of the positions held by the beneficiary's subordinate workers, employed in the positions of vice-president, manager of operations, management analyst, and logistics, as well as an organizational chart reflecting the petitioner's staffing levels. The petitioner submitted its requested quarterly wage reports and IRS Form W-2, which documented the employment of the above-named workers at the time of filing.

On October 25, 2005, the director issued a second request for evidence requesting that the petitioner submit a more specific job description of the beneficiary's position in the United States company, including a description of his "typical day."

Counsel for the petitioner responded in a letter dated November 15, 2005, referencing the following job description for the beneficiary's position as president:

- Designs, develops and implements organization policies and goals with expectation that organization operates at uttermost productivity and profitability.
- Direct promotion of products to develop new markets, enhance market share, and attain competitive position in the industry ensuring products are effective and timely.
- Promotes organization in the industry, manufacturing or trade organizations, making sure that product and services are effective, complete and timely ensuring business development with professional and productive efforts.
- Develop, foster and facilitate a high performance full-time, incentive-based workforce that will deliver and drive the programs; administer and enhance the systems, which ensure high eminence results that fulfill the noble mission and fiscal expectations.
- Confers with sales and marketing personnel and evaluate activity, operating, and sales reports to determine changes in programs or operations requisite, give guidelines, with expectations that recommended changes are advantageous, precise and timely.
- Evaluate activity reports and financial statements to determine growth and status in attaining objective and modify objective, and plans in accordance with current situation, making sure plan are th[o]rough, accurate, apparent and beneficial.

- Communicates clearly and directly with staff concerning performance, expectations, productivity and accountability, making sure communication is constant, clear, concise and complete.
- Cooperatively and proactively interact with parent company to ensure apposite controls within the organization, and exploitation of all opportunities available and also involve parent company with [sic]
- Timely presiding of meeting with employees and meeting with director ensuring meetings are creative, prolific, productive, and proficient.
- Provide executive oversight and coordination of organization's logistics operations.

Counsel further provided an outline of the beneficiary's "typical workday," which included such tasks as communicating with the parent company, meeting with the finance, sales and marketing, and shipping and receiving departments, responding to e-mails from the company's vendors and customers, meeting with customers and vendors, devising the development of the business, reviewing newsletters and industry articles, and addressing personnel issues.

In a decision dated December 14, 2005, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity. The director addressed the beneficiary's job duties, noting that many are not considered to be managerial or executive in nature. The director stated that, rather, the beneficiary's job duties "are more indicative of an employee who is performing the necessary tasks to provide a service [of the petitioner's] or to produce a product [offered by the petitioner.]" The director also noted that the beneficiary's job description was "vague and nonspecific," and did not "define the [the petitioner's] goals, policies, [or] strategies, or clarify who actually performs the marketing, budgeting, finance and accounting, advertising, and personnel functions." The director further stated that the limited job descriptions offered for the positions of the beneficiary's subordinates did not corroborate the petitioner's claim that the beneficiary's "subordinate staff is composed of supervisory, professional, or managerial employees." The director determined that the beneficiary would supervise a staff of non-professional workers, and that he would be assisting in performing the "day-to-day non-supervisory duties" of the organization. The director also concluded that the beneficiary would not be employed as a function manager. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on January 12, 2006. In an appended appellate brief, counsel contends that the petitioner satisfied its burden of demonstrating that the beneficiary would be employed in a primarily executive capacity. Counsel states that the petitioner submitted a "detailed description of the [beneficiary's] duties," and contends that Citizenship and Immigration Services (CIS) failed to take into consideration the beneficiary's job description in its review of the record. Counsel emphasizes the information represented on the petitioner's tax returns, particularly noting its annual trade "in excess of \$4 million," and questions how, based on the success of the petitioner's business in the United States, CIS cannot consider the beneficiary to be employed as an executive. Counsel also references the payroll records offered by the petitioner for its employees, who counsel claims are professionals. Counsel contends that CIS disregarded the evidence provided for the record, and abused its discretion in denying the immigrant petition.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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 did not clarify the specific tasks to be performed by the beneficiary in the position of president. The first job description provided by the petitioner in its June 15, 2005 response briefly identified eight job responsibilities without actually addressing the beneficiary's role with respect to each. The overly broad and nonspecific outline failed to even indicate whether the beneficiary would be performing the named tasks or whether he would be directing others in the performance of the job duties. The petitioner subsequently offered an equally vague outline of the beneficiary's job responsibilities in its November 15, 2005 letter, despite the director's request for a more specific job description. The petitioner's response did not provide clarification as to what daily managerial or executive tasks the beneficiary would perform. The limited statements provided by the petitioner fail to address the extent of the beneficiary's role in the "[d]irect promotion of products," in promoting the company, in "making sure that product and services are effective," and in "interact[ing] with [the] parent company," particularly with respect to its sales and imports. Additionally, the petitioner has not identified the managerial or executive job duties associated with "[b]usiness [c]orrespondence" and "[i]ncidental & [s]ituational activities." Moreover, the petitioner did not explain why the beneficiary's responsibilities of "[b]anking negotiations & documentation" and conversing with customer and vendors via e-mail and facsimile would be considered managerial or executive in nature. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the petitioner's failure to clarify the beneficiary's job description prevents a clear understanding of his true job responsibilities. The descriptions offered for the beneficiary's position appear to conflict with those provided for the beneficiary's subordinates. For example, the petitioner represented the beneficiary as maintaining the company's marketing, sales, and customer relations, as well directly promoting the petitioner's products. However, the petitioner also identified its manager of operations as being responsible for "local US sales," while its management analyst would research "potential markets." In addition, the beneficiary is identified as being responsible for the company's accounting, which incidentally is not typically deemed to be a managerial or executive task. *See* sections 101(a)(44)(A) and (B) of the Act. In any event, the petitioner fails to reconcile this responsibility with the vice-president's responsibility of "supervising accounts and finance." The true job duties of each employee, and particularly those of the beneficiary, are not clearly outlined in the record. The actual duties themselves reveal the true nature of the employment. *Id.* at 1108. 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).

Additional evidence in the record raises doubt as to the petitioner's true staffing levels, and whether the petitioner's reasonable needs are satisfied through the employment of its five-person staff. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner noted on the Form I-140 the employment of six workers, yet subsequently identified five employees, including the beneficiary, on its organizational chart. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Regardless, the petitioner represents its organizational hierarchy as being comprised of the beneficiary, a vice-president, a manager of operations, a management analyst, and a logistics employee. According to Schedule E of the petitioner's 2004 income tax return, its vice-president and manager of operations, who are both officers of the organization, devote approximately fifty percent of their time to the petitioner's business. In light of their supposed part-time employment, it is unclear who would perform their respective job responsibilities during their absence. As the only other employees are the beneficiary, the management analyst and the logistics employee, it is probable that the beneficiary would personally assume the performance of at least a portion of these non-qualifying tasks. The AAO notes 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). As a result, it does not appear that the reasonable needs of the petitioner might plausibly be met through the employment of the beneficiary, two full-time employees, and two part-time workers. It is further questionable as to why the petitioner's manager of operations, an employee subordinate to the beneficiary, would receive compensation in the year 2004 of \$196,004, approximately \$148,000 more than the beneficiary. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner did not demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Counsel for the petitioner submitted with her June 15, 2005 letter a statement of the beneficiary's overseas employment, noting that as the company's vice-president the beneficiary acted as a bridge between the foreign and United States entities and coordinated imports and marketing. The petitioner's brief statement does not identify the specific managerial or executive job duties performed by the beneficiary in the foreign entity. The AAO notes that the director specifically requested a "detailed description of the beneficiary's duties," as well as an outline of the percentage of time the beneficiary spent on each. The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Again, 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 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).

Counsel notes on appeal CIS' prior approval of two L-1A nonimmigrant visa petitions filed by the petitioner on behalf of the beneficiary. 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, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. See 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). Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

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 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 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 and contradictory 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). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approvals by denying the present immigrant petition.

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 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.