

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2006

WAC 05 033 53752

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:

[REDACTED]

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 Nevada in March 1996. It concentrates on real estate development, real estate investment, and mortgage and development financing. It seeks to employ the beneficiary as its 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 for the petitioner.

On appeal, counsel for the petitioner submits a brief and documentation 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 between the petitioner and 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 it is a wholly-owned subsidiary of a Canadian entity. The record contains several of the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, showing that the beneficiary's foreign employer owns 100 percent of the petitioner.

The director observed that the record also contained a letter from the foreign entity's solicitors confirming that the beneficiary is the president and director of the foreign entity and noting that the Walker Family Trust 1992 Trust is the foreign entity's sole shareholder. The director determined: that the evidence submitted was insufficient to establish ownership and control as it had not been supported by corroborative documentary evidence as requested; and that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. The director concluded that the petitioner had not established through the submission of independent, objective evidence that the claimed parent-subsubsidiary or affiliate relationship existed.

On appeal, counsel for the petitioner provides a copy of the petitioner's stock certificate issued to the foreign entity, a letter from the foreign entity's corporate counsel confirming that the foreign entity owns 100 percent of the petitioner, and copies of the foreign entity's Canadian tax returns identifying the petitioner as a 100 percent-owned subsidiary.

In this matter, the petitioner has not presented inconsistencies regarding its ownership and control. The tax returns of both the foreign entity and the U.S. petitioner identify the foreign entity as the 100 percent owner of the petitioner. Upon review of the totality of the record, the evidence submitted is sufficient in this matter to establish that the petitioner and the foreign entity enjoy a parent-subsidiary relationship as defined in the regulation. The director's decision on this issue will be withdrawn.

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 October 5, 2004 letter appended to the petition, the petitioner stated that the duties of the beneficiary's position include:

The management and oversight of all operations in the Seattle subsidiary, including the current real estate and development investments in Texas and Southern California and assessing the possibility of further investments in California and other parts of the United States. His job duties are similar to his executive/managerial duties at the parent company abroad, including responsibility for all operations of the business and its investments. The beneficiary will direct the management of the US company, exercise broad discretion to establish the goals and policies including the business planning, policy decision-making, and operational managements, including analysis, acquisition, financing, development, marketing and sale of Muskoka's assets; supervise necessary feasibility studies; financial planning and investment controls; supervision of contract negotiations; and hire, fire, and supervise professionals and contracted employees. The US company will also provide his management services to the Canadian parent company as required. As the top executive, he will receive only general direction from the board of directors.

The petitioner also identified three of its current real estate projects and noted that the beneficiary was in the United States as an L-1A intracompany transferee.

Counsel for the petitioner in a November 12, 2004 letter in support of the petition stated that the beneficiary would operate as a manager in that he would manage the organization, manage an essential function within the company, have the authority to hire and fire employees and independent contractors, and exercise discretion over the day-to-day operations of the entire company. Counsel added that the beneficiary would also operate as an executive in that he would direct the management of the entire company, establish the goals and policies of the entire company, exercise wide latitude in discretionary decision-making, and would receive only general supervision from the parent corporation.

On May 24, 2005, the director requested, among other things, a more detailed description of the beneficiary's duties as well as noting that the beneficiary was the petitioner's sole employee. The director requested an explanation if the beneficiary managed a function or contracted out the petitioner's tasks, and if tasks were contracted out, the names of the contractors with signed contracts and an indication of whom the beneficiary directed and all employees under the beneficiary's direction. The director cited the regulations for both executive and managerial capacity and requested that the petitioner provide a list of the specific goals and policies the beneficiary had established over the last six months, a list of the discretionary decisions the beneficiary had exercised, and a specific day-to-day description of the beneficiary's duties the previous six

months. In addition, the director requested copies of the petitioner's quarterly state employment reports. The director gave the petitioner until August 16, 2005 to submit the information it wanted considered.

In a letter dated August 12, 2005, counsel for the petitioner requested an additional 30 days to submit the requested information noting that the request for evidence was extensive, that the petitioner was waiting for some additional information, and the officer of the company that would sign the submission was out of town.

In a September 7, 2005 decision, postmarked September 15, 2005, the director denied the petition. The director acknowledged receipt of the request for an extension of time to provide evidence but cited 8 C.F.R. § 103.2(b)(8) which states that additional time may not be granted in conjunction with a request for further evidence. The director rendered his decision based on the evidence in the record. The director determined: that the petitioner's job description for the beneficiary suggested that the beneficiary would be providing the petitioner's services; that the job description paraphrased many of the elements in the definitions of managerial and executive capacity, without specifying the beneficiary's activities associated with the broad responsibilities; the job description was vague and nonspecific; that with the organizational structure provided, the beneficiary would be performing non-qualifying duties; that the petitioner had not established that the beneficiary managed a function rather than performing the petitioner's operational tasks; and that the petitioner had not established that the beneficiary would function at a senior level within the organizational hierarchy or with respect to the function managed. The director concluded that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner submits the documentary evidence submitted in response to the director's request for further evidence, including a September 29, 2005 letter from the president of a company involved in a joint venture with the petitioner; a number of checks signed by the beneficiary on behalf of a limited liability company; a copy of an unpublished decision relating to the approval of an L-1A intracompany transferee classification even though the beneficiary was a "sole employee;" and, an undated letter providing a description of the beneficiary's job duties. Counsel asserts that the beneficiary is both an executive and a manager of an essential function.

Counsel's assertions are not persuasive. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence in a timely manner and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

As the director observed, the petitioner has not provided a description of the beneficiary's duties sufficient to establish that the beneficiary primarily manages or directs the petitioner's operations rather than performing the necessary tasks to operate a real estate development and investment firm. 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).

In addition as the director observed, both counsel and the petitioner paraphrase elements of the definitions of managerial and executive capacity rather than providing an actual description of the beneficiary's duties. 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).

Of note, the petitioner's description of the beneficiary's duties and the percentage of time allocated to those duties provided on appeal, even if considered, further confirms that the beneficiary is the individual seeking out real estate acquisitions, development, and financing opportunities, researching the merits of properties and investments, selecting business partners, evaluating work, and negotiating the terms of services of accountants, bankers, lawyers, construction companies, marketing personnel, and office personnel. Again, these duties suggest that the beneficiary performs the petitioner's investment and real estate development services.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The petitioner has not provided sufficient evidence that the beneficiary is relieved from performing the petitioner's day-to-day research, investment, and operational services. Contractors and subcontractors who carry out the actual development of real estate properties do not relieve the beneficiary from performing the daily tasks associated with operating an investment company.

Further, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. However, if a petitioner claims that the beneficiary is managing an essential function, 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. Again 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 this matter, the petitioner has not identified the essential function or functions the beneficiary purportedly manages and has not explained how the beneficiary's daily duties comprise the management of a function rather than the performance of the operational tasks associated with a function. The petitioner has not established that the beneficiary manages an essential function.

Counsel's citation to an unpublished decision is not probative. First, counsel has not established that the facts of the instant petition are analogous to those in the unpublished decision concerning an L-1A intracompany transferee. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Beyond the decision of the director, the record is insufficient to establish that the beneficiary was employed in a primarily managerial or executive capacity for the foreign entity for one year prior to his entry into the United States as a nonimmigrant. The petitioner references the beneficiary's duties for both the petitioner and the foreign entity and asserts the duties are similar. For similar reasons discussed above, the petitioner has not established that the beneficiary's provision of investment services and monitoring of those investments constitutes primarily managerial or executive duties. 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 AAO acknowledges that CIS approved L-1A nonimmigrant transferee 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). 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 information 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).

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.