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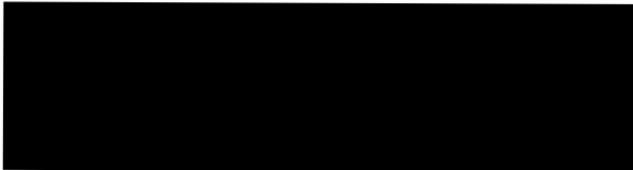
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 05 2007
WAC 05 256 52738

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

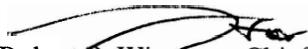
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief
Administrative Appeals Office

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

The petitioner is a California corporation engaged in the business of real estate development.¹ It seeks to employ the beneficiary as its chief executive officer and general 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 petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the basis for denial and submits a brief in support of his 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 petitioner established that the beneficiary would be employed in the United States in a managerial or executive capacity.

¹ It should be noted that, according to California state corporate records, the petitioner's corporate status in California has been suspended. Although the reason for this suspension is unclear, it raises the issue of the company's continued existence as a legal entity in the United States.

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 support of the Form I-140, the petitioner submitted a letter dated September 12, 2005, which contained the following list of the beneficiary's proposed job responsibilities:

- Take [over] the full responsibilities and overall management of [the petitioner].

Make [the] company's important decisions on retaining outside professional services, purchase and sale of real estate, export and import of building materials and equipment, etc.

- Formulate objectives and policies of the company's operations and the budget plan.
- Decide the organizational structure, including hiring, promoting, and firing managerial and professional staff of the company.
- Direct and manage the work of the professional staff and other employees of the company.
- Coordinate international business operations between [the] parent company and the U.S. subsidiary company.
- Make monthly report[s] to the parent company.

The petitioner also provided a list of its claimed employees and an organizational chart illustrating each employee's position within the petitioner's hierarchy. It is noted that while the petitioner's support letter indicates that the petitioner had ten employees at the time of filing its Form I-140, the organizational chart names only nine positions and identifies the nine employees purportedly occupying each position listed in the chart. None of the documentation provided in support of the petition suggests that the petitioner had ten employees at the time of filing.

Accordingly, in a notice, dated March 3, 2006, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the beneficiary's proposed employment specifying the duties that would comprise a typical day of work. The petitioner also requested the submission of the petitioner's wage reports for the third and fourth quarters of 2005.

Counsel responded to the request with a letter dated May 18, 2006, which included the following schedule of tasks the beneficiary would perform during the course of a typical working day:

- 09:00 am: [H]ad an office/sales meeting to discuss office and sales related issues, including to [sic] find out any new real estate property available on the market and set an [sic] on site preview schedule in the afternoon; also discuss the progress of current projects.
- 09:30 am: [I]nterviewed a job applicant.
- 10:00 am: [R]eviewed the cash flow balance sheet, A/R, and A/P reports from [the] [f]inancial [d]epartment.
- 11:30 am: [R]ead the real estate market investment related news and information.
- 01:30 pm: [W]as in the office of a real estate law firm to consult for [sic] real estate rules and regulations in the U[.]S.
- 02:30 pm: On [sic] the field to check the potential properties.
- 06:00 pm: [I]nternational conference call with [the] parent company's C.F.O. Usually, fax the consolidated cash flow sheet, short[-]term project budget's cost, and

projection on future financing on all projects. Ask the advice on certain budget's [sic] GAP in order to get funds from the parent company.

Counsel's response was accompanied by the requested quarterly wage reports. The third quarterly wage report indicates that the petitioner employed no more than eight workers when the Form I-140 was filed. This information conflicts with the organizational chart previously submitted and with the petitioner's initial claim of having a total of ten employees at the time of filing. Specifically, neither the financial manager nor the sales manager, both of whom were identified in the petitioner's organizational chart, was named in the third or fourth quarterly wage statement. Additionally, the wage reports show that the petitioner lost one employee, i.e., the office clerk, as of October 2005, and therefore had only seven employees.

The director determined that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity and denied the petition in a decision dated July 6, 2006. The director noted that the list of job responsibilities initially submitted in support of the petition lacked sufficient detail to convey an understanding of the specific duties the beneficiary would perform on a daily basis. The director also commented on the inconsistency between the hierarchy illustrated in the petitioner's organizational chart and the employees named in the relevant quarterly wage report. The AAO affirms the director's findings and concurs with the ultimate conclusion regarding the petitioner's eligibility. However, the denial lacks a discussion of the more detailed job description provided in response to the RFE. Accordingly, the AAO will incorporate the relevant information in the discussion below.

On appeal, counsel asserts that the petitioner has met its statutory requirements for the immigration benefit sought by virtue of obtaining approval of its employment of the beneficiary as an L-1A nonimmigrant. He further asserts that CIS failed to acknowledge the quarterly wage reports, corporate tax return, organizational chart, and documentation establishing that the petitioner is doing business. Counsel's arguments, however, are without merit.

First, with regard to the petitioner's prior approvals of an I-129 petition to employ the beneficiary as an L-1A nonimmigrant intracompany transferee, 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. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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, because CIS spends less time reviewing Form I-129 nonimmigrant 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, 29-30 (D.D.C. 2003) (recognizing that CIS approves some petitions in error).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition 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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals 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).

Second, the director's specific reference to employee names and salaries clearly contradicts counsel's assertion that the director failed to consider the organizational chart and relevant wage reports submitted by the petitioner. The director could not cite specific information found within these relevant documents without first scrutinizing their contents and their significance to the overall question of the petitioner's eligibility and specifically to the issue of the beneficiary's proposed employment capacity.

Third, with regard to the lack of a discussion of the petitioner's corporate tax return and other documentation submitted to show that the petitioner is doing business, the director has the discretionary authority to determine which documents are relevant to the basis for denial. In the present matter, the basis for denial was the petitioner's inability to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Incorporating a random discussion of the petitioner's financial documents merely for the purpose of assuring the petitioner that all documents were reviewed is not required to form a firm basis for denial. Instead, the director accomplished this by discussing other relevant factors, including inconsistencies directly pertaining to the petitioner's organizational hierarchy. The director's discussion suggests that the inconsistencies between the petitioner's organizational chart and quarterly wage reports gave rise to doubt the petitioner's ability to relieve the beneficiary from being directly and primarily involved in the company's non-qualifying operational tasks on a daily basis. This factor is relevant and must be considered in order to determine whether the petitioner is adequately staffed such that any involvement by the beneficiary in the petitioner's daily non-qualifying tasks is minimal and does not consume the primary portion of the beneficiary's time. 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.

Furthermore, while the AAO acknowledges the director's oversight in failing to discuss the more detailed description of the beneficiary's job duties submitted in response to the RFE, doing so would not justify an outcome favorable to the petitioner, as the job description in question does not establish that the beneficiary would primarily perform duties within a qualifying capacity. According to the daily schedule provided in counsel's letter dated May 18, 2006, the beneficiary spends approximately two hours reading news and information related to the real estate market. If the petitioner employs a vice general manager and a sales

manager to assist the beneficiary; it is unclear why the beneficiary spends nearly 25% of his time conducting preliminary market research. The same job description indicates that the beneficiary spends approximately 3.5 hours, or approximately 40% of his time physically visiting potential properties. In fact, if the petitioner readily admits that the beneficiary personally visits the potential properties, it is unclear why the first 30 minutes of the beneficiary's time is spent in staff meetings where he purportedly elicits information from subordinate staff members about new real estate property. This suggests that the beneficiary performs the same operational tasks performed by subordinates in an effort to purchase property for real estate development. Regardless, if the beneficiary has an adequate support staff, as claimed, it is unclear why more than 50% of his time is spent performing operational tasks necessary to provide the petitioner's product and services. *See id.*

Additionally, inconsistencies in the record and the apparent shortcomings of the petitioner's organizational structure further undermine the petitioner's claim and its overall credibility. More specifically, the petitioner initially claimed to employ ten workers, but submitted an organizational chart that included only nine positions that are purportedly filled by nine employees. However, neither the initial claim nor the organizational chart was corroborated by the petitioner's wage reports, which did not include individuals that were named as the petitioner's sales and financial managers. 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). In the present matter, even though the director pointed out the lack of evidence to support the staffing structure illustrated in the organizational chart, counsel has neither acknowledged the inconsistencies nor provided evidence to resolve them. Therefore, while the record currently corroborates the employment of eight workers at the time of filing, the petitioner has claimed that ten or possibly nine employees were part of its organization during the relevant time period. Further, aside from its failure to address and reconcile these inconsistencies, the petitioner has not explained who is performing the sales and financial management duties that have been assigned to the vacant positions.

On review, the record as presently constituted is not persuasive in demonstrating that at the time the Form I-140 was filed, the petitioner was able to relieve the beneficiary from primarily engaging in its daily operational tasks. The fact that an individual manages a small business where he occupies the senior-most position and has ultimate decision making authority does not necessarily establish that he would be employed in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not discussed in the director's denial.

First, the regulations at 8 C.F.R. § 204.5(j)(3)(B) require that the beneficiary has been employed abroad within a qualifying managerial or executive capacity for one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the present matter, the petitioner's initial support letter dated September 12, 2005 contains a broad list of the beneficiary's general job responsibilities.

However, the petitioner failed to provide information revealing the specific job duties performed by the petitioner on a daily basis. As previously discussed, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the petitioner must specify the actual duties that were performed on a daily basis, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As the petitioner has failed to provide this information, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying capacity prior to entering the United States to work for the petitioner as an L-1A intracompany transferee.

Second, the regulations at 8 C.F.R. § 204.5(j)(3)(C) require that the petitioner establish a qualifying relationship with the beneficiary's foreign employer. 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.

In the present matter, the petitioner claims to be wholly owned by Nanning City Jiangyu Real Estate Co., Inc. (Nanning City), the beneficiary's foreign employer, located in China. In support of the petition, the following documentation was provided to establish the latter company's purchase of the petitioner's stock:

1. Foreign and U.S. bank documents showing that \$1.2 million was transferred to the petitioner's bank account on May 5, 2004. [REDACTED] is shown as the originator of the fund transfer.
2. A Bank of America wire transfer receipt dated May 21, 2004 showing that \$59,982 was transferred to the petitioner's account by [REDACTED] and \$149,982 was transferred to the petitioner's account by Fairwind Shipping Company.
3. A Bank of America wire transfer receipt dated June 7, 2004 showing that \$104,699 was transferred to the petitioner's account by Fairwind Shipping Company.

4. The petitioner's Minutes of Organizational Meeting dated August 27, 2004 indicating that the chairman suggested the authorization and issuance of 734,000 shares of the petitioner's stock to Nanning City in exchange for consideration in the amount of \$734,000. Page three of the same document states that an officer of the petitioning organization must file a Notice of Issuance of securities within 10 days of receiving consideration for the stock.
5. A copy of stock certificate No. 1 dated August 24, 2004, issuing 734,000 shares of the petitioner's stock to Nanning City.
6. A copy of the petitioner's 2003 tax return in which Schedule L shows that by the end of that tax year, the petitioner issued \$390,000 in common stock. Schedule PH, Part IV identifies Nanning City as 100% owner of the issued common stock. Federal Statement 4 of the same tax return reiterates the ownership claim.

Despite the petitioner's claim, the above documentation, when reviewed jointly, gives rise to serious reservations about the claimed relationship between the petitioner and the beneficiary's foreign employer. First, the petitioner's stock certificate was issued months after money was transferred to the petitioner's account for the alleged purpose of funding the purchase of stock. As a result of the time lapse, there is no real nexus between the fund transfers and the issuance of stock.

Second, even if the time lapse between the fund transfers and the issue of the stock certificate were entirely overlooked, there is another time-related anomaly in the record. Specifically, the fund transfers, which took place in May and June of 2004, and the issuance of the stock certificate, which is dated August 24, 2004, predate the August 27, 2004 Minutes of Meeting, where the idea to purchase stock was purportedly proposed by the chairman. Additionally, the petitioner's 2003 tax return, which also identifies Nanning City as the petitioner's owner, indicates that the petitioner received \$390,000 in exchange for issuing stock, rather than the \$734,000, as claimed in several other documents submitted by the petitioner.

Third, the fact that the petitioner claims to have issued a stock certificate several months after having received compensation for the sale of its stock suggests that the petitioner violated the terms specified in its Minutes of Meeting, which require that stock be issued within 10 days of receiving compensation. Cumulatively, the numerous discrepancies between the various documents submitted, at best preclude the AAO from determining that a qualifying relationship exists between the two claimed entities. That being said, when the petitioner provides documentation so fraught with incongruity, the AAO is forced to question and ultimately doubt the validity of the petitioner's claim. 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. Furthermore, if CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In the present matter, the petitioner's inconsistent documentation falls far short of corroborating its claimed relationship with Nanning City. As such, the AAO concludes that the claimed relationship did not exist at the time the Form I-140 was filed.

Finally, 8 C.F.R. § 204.5(j)(3)(D) requires that the petitioner establish that it was doing business for one year prior to filing its Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that 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 present matter, the petitioner claims to be a real estate development enterprise. While it has submitted documentation suggesting that preliminary steps were taken in February of 2005 in order to purchase a plot of real estate, which would eventually lead to real estate development, the petitioner's evidence does not establish that it was doing business since September 2004, the year prior to the filing of the Form I-140.

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 of ineligibility discussed above, this petition cannot be approved.

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.

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.