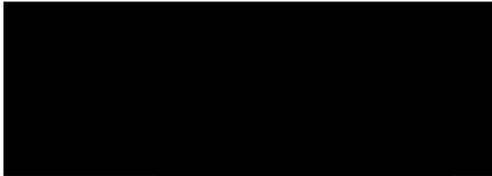




U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



B4

FILE:



Office: VERMONT SERVICE CENTER

Date: MAR 07 2007

EAC 05 108 53543

IN RE:

Petitioner:

Beneficiary:



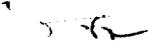
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 preference visa petition was denied by the Director, Vermont Service Center. The petitioner attempted to appeal the matter. However, in failing to file a proper appeal accompanied by the necessary Form I-290B, the director treated the petitioner's submission as a motion in which the denial was affirmed. 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 printing and event planning industries. 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 failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition. On motion, the director determined that insufficient evidence had been presented to overcome the grounds of the denial. As such, the director affirmed the prior decision denying the petition.

On appeal, counsel disputes the director's findings and presents arguments in support of the petitioner's claims.

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 by the U.S. petitioner 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.

In support of the Form I-140, the petitioner submitted a letter dated February 14, 2005 in which it referred to the beneficiary's proposed position in the United States as that of an executive within the statutory definition of executive capacity. *See id.* The petitioner described the beneficiary's proposed position in the context of the components that comprise the statutory definition of executive capacity. First, the petitioner discussed the heightened degree of discretionary authority with which the beneficiary has been entrusted and described the variety of instances in which the beneficiary has used that authority to make decisions to benefit the petitioner. With regard to directing management and establishing goals and policies, the petitioner discussed the two main components of its business—the printing component and the hospitality/event planning

component. The petitioner described the staffing hierarchy with regard to each component, identifying the vice president as the beneficiary's direct subordinate and overall supervisor of the daily activities in printing. The petitioner stated that the beneficiary's main responsibility is to coordinate the human resources and administration duties within the various departments that comprise printing. The petitioner's other direct subordinates include a financial advisor, who assists with company finances within both components of the business, and the planner/designer within the hospitality/event planning component. The petitioner discussed the various instructions the beneficiary provided to the company's event planner and provided her job description as well as the job description of the vice president, financial advisor, sales manager, graphic designer, plant manager, shop supervisor, machine operators, the printer assistants/trainees, and office manager. It is noted that each job description was accompanied by an hourly breakdown, which was based on a 40-hour, or full-time work week for each employee. The petitioner claimed that the beneficiary's duties are strictly limited to directing those charged with the management of the printing and events planning/hospitality components of the U.S. business and stated that the beneficiary does not perform the petitioner's daily operational tasks.

The petitioner also provided an organizational chart describing the hierarchy of the petitioner's printing and hospitality/event planning components. According to the organizational chart, the printing component is comprised of four divisions—the administration division, the sales and marketing division, the technical design division, and the production division. The administration division named an office assistant and identified an office administrator, an accounting payroll, and customer relations positions. The sales and marketing division named a sales manager and identified a sales/technical support position, direct marketing position, and independent contractors. The technical division named a company that provided the graphic design services and identified in-house design, custom design, and outside job work as the three support positions. Finally, the production division named a shop supervisor, a screen maker/machine operator, a machine operator, and a printer and showed two helper positions within that division. The vice president was identified as the manager of all four divisions in printing.

On August 16, 2005, the director issued a request for additional evidence (RFE). The director acknowledged the submission of the organizational chart illustrating the petitioner's organizational hierarchy. The director erroneously noted that the beneficiary's spouse carries the title of vice president. While the beneficiary's spouse does head the hospitality/event planning component of the business, the individual named as vice president oversees the printing component and is not the beneficiary's spouse. The director noted that the petitioner's organizational chart is mainly comprised of positions that had not been filled and determined that the petitioner had not grown to a point where the beneficiary's activities would primarily be within a managerial or executive capacity. The petitioner was instructed to provide any additional evidence to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

In response, the petitioner provided a letter dated November 10, 2005, which contained a discussion of the various business decisions the beneficiary has made using his discretionary authority. The petitioner explained how the various decisions helped the petitioner progress towards financial success. The petitioner also stated that the beneficiary's broad discretionary authority allows him to explore options for expanding the business into different industries and negotiate with potential business partners. The petitioner reiterated the prior claim that the beneficiary directs the management of the overall organization by overseeing the work of the vice president, who manages the printing component, the financial advisor, who oversees the financial aspects of both components, and the event planner, who carries out the duties of the hospitality/event planning component. The petitioner also provided a revised management chart, which includes additional managerial

and contract employees. The chart is accompanied by a number of financial documents, which were submitted in an effort to corroborate the petitioner's claims. While the AAO acknowledges that changes in the petitioner's personnel structure may have occurred between the time the Form I-140 was filed and the date the RFE was issued, precedent case law has firmly established that 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). As such, the petitioner's altered organizational chart and invoices showing payment for professional services provided after March 4, 2005 will not be considered, as these documents do not address the petitioner's organizational make-up at the time the petition was filed.

On January 5, 2006, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's proposed employment in the United States would primarily consist of duties within a managerial or executive capacity. While the AAO concurs with this general conclusion, the director's underlying analysis contained flaws that will be addressed below.

First, a number of the director's findings are directly based on the financial information provided in response to the RFE. While those observations may be accurate in and of themselves, it is noted that the documents discussed by the director reflect an organizational structure that predated the Form I-140 by at least three months, as all of the tax documents submitted are for the year 2004, not 2005, the year the petition was filed. Although the director could have requested more recent tax documents that would more accurately establish the petitioner's paid employees at the time the Form I-140 was filed, such documentation was not requested.

Second, the director's analysis is limited to a discussion of the petitioner's organizational composition, but fails to focus on the beneficiary's proposed duties. In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). An analysis of the beneficiary's proposed duties is germane to a determination of the petitioner's eligibility, as the actual duties themselves 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). Thus, the director's proper conclusion lacked a discussion of the relevant factors.

Nevertheless, the record does not support a finding of eligibility. With regard to the beneficiary's proposed duties, the petitioner's discussion is limited to the discretionary decisions the beneficiary has made and the responsibilities of his subordinates. The record does not, however, include a discussion of what specific duties the beneficiary would actually carry out on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* Without a detailed discussion of the beneficiary's daily activities, the petitioner's entire claim rests on the magnitude of the business decisions he has made and the petitioner's claim that it employees a sufficient support staff that would relieve the beneficiary from having to carry out the non-qualifying daily operational tasks.

Additionally, even if, *arguendo*, the petitioner were to submit a more detailed description of the beneficiary's duties, the financial documentation submitted belies the claim that the employees identified in the organizational chart were actually providing their services at the time the Form I-140 was filed. Based on the 2004 and 2005 W-2 wage and tax statements, the vice president, who was to oversee the entire printing component of the petitioner's business, was not hired as a full-time employee until the fourth quarter of 2005, or at least six months after the Form I-140 was filed. Although the petitioner claims that [REDACTED] was

employed as a contractor prior to being hired on a full-time basis, the record lacks documentation to corroborate this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record also lacks evidence to establish that the petitioner employed anyone in the sales and marketing division or in the technical design division at the time the Form I-140 was filed. The petitioner's claim on appeal that ██████ assumed the duties of a department head on a volunteer basis is not persuasive, as there is no documentation to verify such a claim. With regard to the graphics design services provided by Rush Graphics and the administrative services provided by Job Connections Services, Inc., the invoices generated for the work of the two respective contractors account for services provided after the Form I-140 was filed. As previously stated, eligibility must be established at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 49. As such, services that were provided after the filing will not be considered in determining the petitioner's eligibility.

Accordingly, the petitioner's inability to document its purported employment of any sales staff or graphics designers and in light of the petitioner's employment of a single part-time employee to perform office administrative tasks, the AAO questions who, if not the beneficiary, was performing these necessary operational tasks at the time the Form I-140 was filed. The credibility of the petitioner's claim is further undermined by the fact that the initial set of employee job descriptions were based on a comprehensive support staff with each member of the staff contributing 40 hours of their respective services. Based on the evidence provided, only four employees, including the beneficiary, were employed by the petitioner on a full-time basis at the time of filing.

In the petitioner's improperly filed appeal, which the director treated as a motion, counsel provided the status of each employee listed within the petitioner's original organizational chart and explained why there was no documentation to establish that certain employees were providing services for the petitioner at the time of filing. However, regardless of any explanations, a determination of the petitioner's eligibility to classify the beneficiary as a multinational manager or executive must rest, in large part, on the petitioner's ability to relieve the beneficiary from having to engage in non-qualifying tasks so that he can allot the primary portion of his time to managerial or executive tasks. Where, as in the present matter, the petitioner has identified all necessary employees with the tasks each would need to perform during a 40-hour week, and has admitted that many of these employees were not, in fact, employed as of March 4, 2005, CIS cannot conclude that the petitioner was able to sustain the beneficiary in a managerial or executive capacity. Rather, the beneficiary would likely have to compensate for the petitioner's lack of employees to perform necessary operational tasks by assuming those duties upon himself.

While counsel is correct about the need to consider the petitioner's reasonable needs, in the present matter, the petitioner's support staff at the time of filing the Form I-140 cannot be deemed as having met the petitioner's needs without the beneficiary's direct and active involvement in performing the sales, graphics design, and administrative functions. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). The AAO further notes that the petitioner's reasonable needs do not override the statutory requirement that the beneficiary primarily perform duties of a qualifying nature. *See* § 101(a)(44)(B) of the Act, 8 U.S.C.

§ 1101(a)(44)(B). Furthermore, counsel's continued reliance on the professional opinion of Dr. James Gould is not persuasive in establishing the petitioner's eligibility, as Dr. Gould neither has first-hand knowledge of the tasks actually performed by the beneficiary at the time the Form I-140 was filed, nor is there any evidence that his professional opinion is based on his knowledge of the relevant statutory definitions and legal standards.

In affirming the denial on motion, the director recites a number of the documents submitted in support of the petitioner's motion and states that the documents submitted on motion were not previously submitted in response to the RFE. However, the director's assessment and underlying inference as to the petitioner's failure to comply with a prior RFE request are flawed. A number of the documents submitted by the petitioner in support of the motion were also submitted in response to the RFE. Regardless, the director's conclusion that the submission of the 2005 tax documents on motion does not overcome the grounds for the denial was correct. As discussed above, the record lacks documentation to support the organizational structure illustrated in the petitioner's initial organizational chart. Thus, even after a comprehensive review of all documentation submitted in support of the petition and in response to the director's adverse conclusions, the significant deficiencies cited in the AAO's present discussion have not been overcome. More specifically, the petitioner has failed to supplement the record with a detailed job description where the beneficiary primarily performs tasks of a qualifying nature in the context of a documented organizational structure that includes an adequate support staff available to relieve the beneficiary from having to primarily perform non-qualifying tasks. 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 previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to the beneficiary's entry into the United States as a nonimmigrant. In the instant matter, the petitioner's description of the beneficiary's employment abroad is primarily comprised of broad terminology discussing his overall job responsibilities rather than specific daily tasks. While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties. Where, as in the instant matter, the petitioner fails to provide CIS with a specific list of duties, a determination cannot be affirmatively made that the beneficiary primarily performs qualifying tasks.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the present matter, the petitioner claims that it is wholly owned by the beneficiary's foreign employer. In support of this claim the petitioner has provided its Articles of Incorporation showing that the petitioner is authorized to issue 100,000 shares of its stock; a stock certificate showing the issuance of 1,000 shares of the petitioner's stock to the claimed parent entity; and a Notice of Transaction Pursuant to Corporations Code Section 25102(f), which indicates that the petitioner received \$1,000 in exchange for issuing its stock. This documentation, however, is inconsistent with Schedule L, item 22(b) of the petitioner's 2004 tax return, which indicates that the petitioner received \$10,000 in exchange for issuance of stock. 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). Such evidence has not been provided.

Moreover, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. In the present matter, the petitioner has submitted a single stock certificate showing the issuance of 1,000 shares of stock and a notice of transactions showing that \$1,000 was received as consideration for the issued amount. The fact that the petitioner's 2004 tax return shows that \$10,000 was received in exchange for stock suggests that the petitioner may have shareholders other than the sole shareholder claimed thus far. As the petitioner has not provided a stock ledger or other comparable documentation, the AAO cannot determine with any degree of certainty that only 1,000 shares of stock were issued, particularly since this information is directly contradicted by the information provided in the relevant tax return. 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 the petitioner has failed to provide consistent documentation establishing its ownership and control, the AAO cannot find that the beneficiary's foreign employer is the majority owner of the petitioner's issued stock.

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 as discussed above, this petition cannot be approved.

As a final note, counsel makes a brief reference to the petitioner's current 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, 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).

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.