



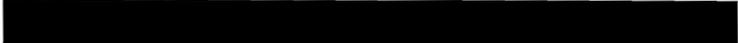
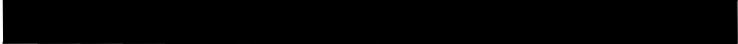
U.S. Citizenship
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FILE: WAC 05 800 50195 Office: CALIFORNIA SERVICE CENTER Date: **MAR 07 2007**

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, California Service Center. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO) to review the director's decision. Instead of forwarding the appeal to the AAO as required by 8 C.F.R. § 103.3(a)(2)(iv), the director determined that the appeal was improperly filed and rejected it. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted. Upon review, it is determined that the director lacked jurisdiction to take such action. Accordingly, the AAO hereby withdraws the director's decision to reject the petitioner's appeal and it will now review the appeal initially filed with the office on a de novo basis. The appeal will be dismissed.

The petitioner is a California corporation¹ claiming to be engaged in the business of marketing and business development. It seeks to employ the beneficiary as its chief financial officer (CFO) and corporate secretary. 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 denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's findings and submits a brief in support of her arguments.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

¹ The record shows that the petitioner was previously known as [REDACTED] and that it filed an amendment to its Articles of Incorporation to change its name to [REDACTED] on July 1, 1999.

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 first issue in this proceeding is whether the beneficiary would be employed in the United States in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated May 18, 2005 stating that the beneficiary "shall be employed in an executive/managerial capacity as [CFO] and [s]ecretary representing the Group in

the United States." The petitioner further stated that the beneficiary will have executive and managerial responsibilities, which will include "the direction, control and management of the U.S. subsidiary . . . and undertake the capacity as statutory officer pursuant to California Corporation Code. . . ." The petitioner stated that the beneficiary's superiors would be the board of directors. In an organization chart of senior executives, which was also submitted in support of the Form I-140, the petitioner identified the beneficiary as corporate secretary and CFO and showed the company's chief executive officer as the beneficiary's immediate superior. The petitioner also provided the following breakdown of the beneficiary's proposed responsibilities:

Corporate Management Functions:

1. Provide leadership, management and control of business affairs and corporate management of operations in the United States.
2. Provide development and implementation of corporate goals, policies and business strategies and markets in [the] United States and within North America.
3. Undertake the role of statutory officer pursuant to the California Corporation Code in the capacity of [CFO} and [s]ecretary.

Investment and Financial Management Functions:

1. Directing and management of financial, investment, and accounting matters.
2. Review, development and implementation of financial policies.

Corporate Governance and Administrative Functions:

1. Directing and management of matters in relation to corporate governance, internal control and company secretarial [sic].
2. Review, development and implementation of administrative and information system policies.
3. Oversee and directing all legal and statutory matters.

On October 1, 2005, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation regarding the beneficiary's proposed employment in the United States: 1) the petitioner's organizational chart illustrating its managerial hierarchy and staffing levels as of the date the petition was filed, including the names and job titles of managerial and executive level employees as well as the number of employees within each department; 2) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty in order to indicate how much of the beneficiary's time would be devoted to each of the listed duties; 3) the job descriptions of the beneficiary's subordinates, if any; and 4) the petitioner's quarterly wage statements covering an 8-quarter time span, including the quarter during which the Form I-140 was filed.

In response, the petitioner provided the same chart of senior management as the one provided earlier in support of the petition. Based on the submitted information, the petitioner appears to have employed the beneficiary as CFO and corporate secretary and one other individual in the position of chief executive officer. There is no indication that the petitioner is subdivided into departments or that any other employees work for the petitioning entity. While the petitioner provided its tax returns for 2001-2004 as well as a single quarterly tax return for the fourth quarter of 2003, the petitioner failed to provide any of the requested quarterly tax *reports*, which would have named the individuals employed during the relevant time period. With regard to the RFE's request for a more detailed description of duties and coordinating percentage breakdown of time, the petitioner provided the exact same list of general responsibilities as provided in support of the Form I-140. The only indication of the amount of time allocated to the responsibilities appears next to the general headings. The petitioner merely stated that the beneficiary would perform corporate management functions daily, while investment and financial management functions as well as corporate governance and administrative functions would be performed periodically. No explanation was provided to indicate the approximate percentage equivalents of the terms "daily" and "periodically." 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).

The director denied the petition noting that the organizational chart showed no subordinate employees for the beneficiary and lacked a detailed description of the beneficiary's specific daily tasks.

On appeal, counsel asserts that the director's conclusion is erroneous, stating that the description of duties provided by the petitioner is detailed. Counsel also restates the job description provided by the petitioner in response to the RFE. However, contrary to counsel's insistence, the statements used to describe the beneficiary's prospective employment are broad and only succeed in conveying the beneficiary's level of discretionary authority. The description does not disclose the actual duties that would comprise the beneficiary's time at work. While job responsibilities are general and only provide a broad overview of the beneficiary's business objectives, specific duties reveal the means by which the beneficiary reaches those business objectives on a daily basis. Thus, 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). As properly stated by the director, there is no indication as to the specific duties involved in executing business strategies, executing and managing corporate affairs, or executing investment strategies. Nor is there an explanation as to how these responsibilities apply to the petitioner's specific business operation. The petitioner has indicated that the petitioner is engaged in marketing and business development. However, the record lacks any information to suggest who actually performs the marketing-related duties on a daily basis, what product is marketed, and what specific duties are involved in business development.

Furthermore, although the petitioner failed to provide the requested quarterly wage report that would have disclosed the petitioner's employees during the relevant time period, the record, including the petitioner's own Form I-140, suggests that the beneficiary has been and continues to be the petitioner's only employee. In fact, even if the petitioner were to establish the employment of a CEO, as suggested in the organizational chart provided, there is no information as to who would perform the petitioner's daily operational tasks since the CEO is illustrated as the beneficiary's direct superior. 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)).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a qualifying managerial or executive capacity. The fact that the beneficiary purportedly operates at the top of the petitioner's organizational hierarchy does not establish that the duties he would perform would be primarily of a qualifying nature. Rather, in order to establish that the beneficiary would be employed in a qualifying capacity, the petitioner must provide a detailed description of the beneficiary's proposed duties and determine that the petitioner is adequately staffed to relieve the beneficiary from having to primarily engage in the daily operational tasks, as 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). In the present matter, the petitioner has failed to provide a comprehensive description disclosing the beneficiary's daily tasks and has illustrated an organizational hierarchy that is devoid of employees to perform the petitioner's daily operational tasks, which the petitioner has failed to identify with any specificity. Thus, based on the evidence furnished, it cannot be found that the petitioner would employ the beneficiary in a primarily qualifying managerial or executive capacity under an approved petition.

The second issue in this proceeding is whether the petitioner has 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 May 18, 2005 "Statement of Confirmation" the petitioner stated that it is a wholly owed subsidiary of [REDACTED] located in Singapore. In a separate submission discussing the beneficiary's foreign employment, the petitioner stated that the beneficiary's foreign employer was A [REDACTED] which was described as the petitioner's holding company and the subsidiary of [REDACTED] of Singapore. The petitioner stated that the beneficiary held the position of executive officer during his employment abroad. In support of its ownership claim, the petitioner submitted the following documentation:

1. Stock certificate no. 1 showing the issuance of 25,000 shares of the petitioner's stock to [REDACTED], a British Virgin Islands corporation.
2. A Certificate of Incorporation dated May 21, 1992 for [REDACTED] a British Virgin Islands corporation.
3. A Certificate of Incorporation dated July 7, 1993 showing the above entity's name change to that of [REDACTED], a British Virgin Islands corporation.
4. A Certificate of Incorporation dated June 23, 1999 showing the above entity's name change to that of [REDACTED], a British Virgin Islands corporation.
5. The petitioner's tax return for 2003, including Schedules K and L and supplemental Form 5472. Schedule K identified [REDACTED] as its parent entity; Schedule L, item 22(b) indicated that the petitioner issued \$50,000 of common stock; and supplemental Form 5472 identified [REDACTED] c. as direct owner of the petitioner and [REDACTED] as the indirect owner by virtue of owning 88.71% of [REDACTED].

The director determined that additional documentation was necessary in order to corroborate the petitioner's ownership. Accordingly, the RFE included instructions for the submission of documentation establishing proof of the foreign entity's purchase of the petitioner's stock. The RFE specifically asked that the petitioner provide the following documentation: 1) copies of original wire transfer receipts; 2) a Notice of Transaction Pursuant to Corporations Code Section 25102(f); 3) the petitioner's annual report listing its affiliates; 4) the petitioner's minutes of the meeting that describe its ownership breakdown; 5) the petitioner's stock ledger showing all stock certificates issued, the total number of shares sold, and the recipients of the stock certificates; and 6) the petitioner's Articles of Incorporation.

In response to the director's request, the petitioner resubmitted the documents provided initially in support of the petition. However, none of the documents listed in nos. 1-6 above were provided. It is noted again that 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).

In the denial, the director noted the petitioner's failure to provide the requested documentation and concluded that the petitioner failed to provide sufficient evidence to establish the existence of a qualifying relationship with [REDACTED] of Singapore. While the AAO concurs with the director's general determination regarding the lack of documentation of a qualifying relationship, it is noted that the basis for the director's conclusion was flawed. While the director is correct regarding the petitioner's failure to document the claim regarding common ownership between the petitioner and [REDACTED], the latter was not identified as the beneficiary's foreign employer. Therefore, common ownership between ACMA, Ltd. and the petitioner is not necessary in order to establish the existence of a qualifying relationship in this matter.

In the present matter, the petitioner has maintained the claim that prior to his employment in the United States, the petitioner was employed by [REDACTED] c., which was incorporated in the British Virgin Islands and claimed to be doing business in Mexico, where the beneficiary was purportedly employed. Thus, in order to meet the requirements specified in 8 C.F.R. § 204.5(j)(3)(i)(C), the petitioner must establish

common ownership between itself and [REDACTED], the foreign entity that purportedly employed the beneficiary in a qualifying capacity for at least one year prior to his nonimmigrant entry to the United States. Despite the RFE, which specifically requested documentation that would corroborate the petitioner's claim, the petitioner's response was limited to documentation which had been previously provided and which had been deemed insufficient.

On appeal, counsel reasserts the petitioner's claim and refers to the petitioner's tax returns in which the petitioner's ownership is described. While the AAO takes note of the fact that the petitioner's tax returns are consistent with its claims regarding its ownership, tax returns cannot be deemed contemporaneous evidence of a [REDACTED] purchase of the petitioner's stock. Rather, a tax return merely contains the petitioner's own account of information relayed to the preparer of the document and, therefore, is only a reflection of the petitioner's claim. As previously stated, 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. 165. The fact that the information found in the petitioner's tax returns is consistent with the petitioner's claim cannot be deemed evidence to support that claim. Thus, the petitioner's failure to provide evidence establishing that [REDACTED] paid for 25,000 shares of the petitioner's stock and that no other shares were issued to other shareholders precludes the AAO from finding that the petitioner has properly established the existence of a qualifying relationship.

Furthermore, the record supports a finding of ineligibility 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 his entry into the United States. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. However, the description provided in response to the RFE consists primarily of general statements regarding the beneficiary's overall responsibilities rather than an account of the specific duties performed during his employment abroad. As such, the record lacks sufficient information to determine whether the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the 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." Although the petitioner provided its bank statements and other financial information, including tax returns and financial statements, these documents are not accurate indicators that establish whether and with what frequency the petitioner has carried on its business transactions. In fact, the AAO is entirely unable to determine the actual nature of the petitioner's business transactions based on the documentation provided. As such, the AAO cannot conclude that the petitioner has been conducting business on a "regular, systematic, and continuous" basis. *See id.*

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.

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, 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 approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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ORDER: The appeal is dismissed.