



U.S. Citizenship  
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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 28 2007  
WAC 05 246 51664

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, 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 claiming to be a distributor of handicrafts manufactured abroad. 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 beneficiary would not be employed by the U.S. petitioner in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions 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 is whether the petitioner established that it would employ the beneficiary 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 August 23, 2005, which contained the following percentage breakdown of the beneficiary's responsibilities:

- Plan and set goals for [the petitioner] in both Nepal and the U[.]S[.] so as to grow our company in size and profitability. Develop and regularly re-evaluate our marketing plan for North America specifically, [sic] based on changes in market conditions and [the petitioner]'s resources in Nepal and the U[.]S[.], and for exports worldwide. The current draft of our marketing plan forms part of our [b]usiness [p]lan . . . . 10%
- Lead management of our company—including both [the petitioner] and [the foreign parent entity]—in order to ensure continuity of quality production, marketing appropriateness and timely delivery of our goods. This requires contact with Dinesh and Niresh Shrestha several times per week. 15%

- Establish [the petitioner] as a wholesale distributorship and retail outlet by obtaining local contracted services[.] 5%
- Establish sale and tax procedures for [the petitioner], insuring [sic] compliance with import and tax regulations. Become familiar with the relevant regulations by working with 2 accountants . . . to ensure that we are fully advised and compliant. 5%
- Promote [the petitioner]'s business and products at trade shows to generate wholesale sales and enhance [the petitioner]'s customer base. 40%
- Gather customer demographics and other marketing data to focus our efforts efficiently (This is part of other duties, and is not counted as separate time).
- Enter into contracts with other wholesalers and retailers in the U[.]S. (this is exclusive of contracts made at trade shows)[.] 15%
- Negotiate with U[.]S[.] designers to inject new ideas and sophistication in [the petitioner]'s jewelry collection and marketing. 10%

The petitioner also provided a lengthy list of business decisions the beneficiary has made in an effort to illustrate the beneficiary's degree of discretionary authority with respect to all aspects of the business. The petitioner stated that the beneficiary has future plans to hire additional employees to assist with sales and order fulfillment, but currently supervises one director and one manager, both located abroad. The organizational chart submitted as a supporting document shows the beneficiary as the executive director of the U.S. petitioner and its claimed foreign affiliate. The chart indicates that, aside from the beneficiary, the U.S. petitioner employs two corporate officers. All other employees named in the chart are part of the personnel structure of the foreign entity over which the beneficiary purportedly continues to preside.

Additionally, the petitioner provided a list of trade shows that took place from January through December of 2005. The list is accompanied by agreements signed by the beneficiary for trade show space, suggesting that the beneficiary attended trade shows to sell the products manufactured abroad.

On February 24, 2006, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description the beneficiary's typical day of work. The petitioner was also asked to provide its quarterly wage statements. It is noted that the instructions did not specify which quarterly statements the petitioner was expected to provide. That being said, 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). Therefore, despite the RFE's lack of clarity regarding which quarterly wage reports to submit, precedent case law provides sufficient guidance, suggesting that only those documents that establish the petitioner's personnel structure at the time the Form I-140 was filed are relevant to a determination of the petitioner's eligibility to classify the beneficiary as a multinational manager or executive.

In response, counsel submitted a letter dated May 18, 2006, asserting that the number of employees supervised does not determine the petitioner's eligibility for the benefit sought and urged CIS to consider the

petitioner's reasonable needs. While counsel's statement is largely reflected in 8 C.F.R. § 204.5(j)(4)(ii), there is no statute or regulation that suggests the petitioner's reasonable needs supersede sections 101(a)(44)(A) and (B) of the Act, which require that the duties of the prospective multinational manager or executive be primarily within a qualifying managerial or executive capacity. In the present matter, counsel seemingly suggested that the beneficiary's performance of primarily non-qualifying operational tasks should be overlooked in light of the petitioner's current needs. Counsel provides no legal basis for this interpretation of the relevant regulation.

Counsel further stated that the petitioner's primary goal is to perform market research, contact prospective customers, negotiate contracts for the sale of the foreign affiliate's merchandise, and maintain both entities under the beneficiary's leadership. Counsel also stated that approximately 91% of the petitioner's work force is located abroad, including the beneficiary's two direct subordinates, one possessing an executive position title and the other possessing a managerial position title.

In a separate document, dated May 17, 2000, the beneficiary, on behalf of the petitioner, provided a breakdown of his typical day of work, claiming that his duties include negotiating contracts with wholesale companies by phone or by email. The beneficiary stated that he meets with three to five customers on average daily and that each meeting can take up to 30 minutes if done by phone. The beneficiary did not specify the frequency of in-person meetings or the length of such meetings. He also stated that he initially meets directly with potential customers at trade shows and that subsequent meetings take place for the purpose of negotiating with customers interested in placing orders for the petitioner's merchandise. Based on the trade show schedule submitted with the Form I-140, the petitioner is engaged in trade shows 2-3 times per month for days at a time. As such, it appears that the primary portion of the beneficiary's job is spent attending trade shows to advertise and market the petitioner's products, although the record lacks sufficient information to determine more precisely how many hours in an average week are spent at the trade shows. The beneficiary stated that a component of the negotiation involves meeting with an attorney who advises the beneficiary on various business matters.

The beneficiary stated that approximately one hour and fifteen minutes daily is spent communicating with his overseas subordinates. Another component of the beneficiary's job is researching promoters or trade shows. The beneficiary stated that he allots one hour every few days to such research and at least two hours daily, or 25% of his week, researching jewelry trends, which involves consulting a fashion designer, looking through catalogues, and visiting various web sites on the internet. An additional 10-30 minutes each day is spent checking the bookkeeper's entries to ensure accuracy with the petitioner's accounts and while the beneficiary also stated that he trains his overseas subordinates during their respective one-month visits to the United States, the beneficiary did not specify the frequency of such visits or the length of the actual training sessions. Therefore, it is impossible for the AAO to quantify how much time the beneficiary will spend on this task on a weekly or even monthly basis. Finally, the beneficiary explained that the petitioner has no tax withholding forms for its employees since they are located in Nepal, the site of the overseas business.

Regardless, based on information provided, the director issued a decision dated May 31, 2006 concluding that the information provided by the petitioner regarding the beneficiary's prospective job duties suggests that the beneficiary would not be employed in a qualifying managerial or executive capacity. The director further stated that the beneficiary would not only oversee, but would carry out the petitioner's operational tasks on a daily basis.

On appeal, counsel argues that the director's decision should be reversed because of his abuse of discretion. More specifically, counsel states that the director failed to provide the petitioner with a well-reasoned discussion of the factors that contributed to the adverse decision. Counsel further states that the director's failure to specifically address documentation provided by the petitioner throughout this proceeding suggests that the director failed to consider the relevant evidence. Counsel's argument, however, is without merit.

While the director's decision does not include a detailed discussion of the beneficiary's job description, it contains sufficient information adequately conveying the basis for the denial, i.e., the lack of a support staff to relieve the beneficiary from having to primarily perform non-qualifying duties on a daily basis. There is no evidence that the director did not consider the relevant information. Rather, the fact that the director specifically noted that the petitioner submitted a thorough job description for the beneficiary strongly suggests that the relevant information was considered.

Counsel further asserts that the director failed to comply with section 101(a)(44)(C) of the Act, which requires that the petitioner's reasonable needs be considered and proceeds to contrast the instant case from other cases where the AAO found deficient job descriptions and dismissed appeals on that basis. However, neither of counsel's points overcomes the director's denial. First, counsel's interpretation of the reasonable needs provision is erroneous. As previously stated, there is no statute, regulation, or precedent case law that suggests that the beneficiary's performance of primarily non-managerial or non-executive tasks is acceptable so long as the petitioner's reasonable needs require the beneficiary to do so. Rather, the reasonable needs provision provides guidelines so that adjudicators do not simply approve petitions based only on a petitioner's staffing levels. The AAO acknowledges the existence of petitioning organizations where an individual is relieved of having to primarily perform non-qualifying duties even if the petitioner has a small support staff. However, a determination of the petitioner's eligibility cannot be made without first considering the actual duties performed by the beneficiary.

Second, counsel's discussion of appeals previously dismissed by the AAO is irrelevant to the case at hand. Counsel suggests that the petitioner's compliance with CIS's request for a detailed job description sufficiently distinguishes the instant petitioner from those whose appeals had been dismissed. While there is clearly a distinction between this petitioner and others who failed to provide sufficient information, counsel's apparent assumption that providing an adequate job description merits approval of a petition is incorrect. Providing a detailed job description is crucial, as it enables the AAO to conduct a thorough analysis of the relevant information and ultimately make an informed decision regarding the petitioner's eligibility. 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). However, providing sufficient information in no way ensures a favorable outcome for the petitioner.

Both statute and case law suggest that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, the petitioner has provided a thorough description of the beneficiary's duties. However, the AAO cannot overlook the fact that the beneficiary is the petitioner's sole U.S. employee and that the primary portion of his time has been and would be spent carrying out the petitioner's essential function, i.e., selling the merchandise of its claimed overseas affiliate. Furthermore, the petitioner repeatedly stated that the beneficiary directly oversees the work of one executive and one

managerial employee each of whom supervises his own staff of subordinates. However, the petitioner has also maintained that its support staff is located abroad and is, in fact, employed by the foreign affiliate.

The record shows that the petitioner was established as a corporation in California. Thus it is a separate entity from the one located abroad, despite any parent-subsidary relationship. The fact that the beneficiary supervises employees who work for another entity indicates that a significant portion of the beneficiary's time is spent providing services for an entity other than the petitioner. Therefore, even if the petitioner were able to establish that the beneficiary's duties primarily involve supervising managerial or supervisory employees, such duties are not part of his proposed employment with the U.S. petitioner and would not be considered for the purpose of establishing the petitioner's eligibility. Contrary to counsel's assumption, the fact that the alleged support staff is located abroad does not contribute to an adverse finding. As stated above, the fact that the overseas staff is employed by an entity other than the petitioner precludes the AAO from considering the beneficiary's supervisory duties as part of his proposed employment with the U.S. petitioner.

While counsel clarifies the \$37,000 shown in the petitioner's 2004 tax return as payment of commission, counsel's assertions merely establish the beneficiary's employment with the petitioner, a fact that is not in contention and is not material either to the AAO's or the director's conclusions regarding the petitioner's eligibility. Despite counsel's interpretation of the denial, the director's statements concerning financial documentation submitted by the petitioner were merely observations and addressed the issue of a lacking support staff.

Counsel also alters the petitioner's initial claim, asserting that the beneficiary's prospective employment falls under the definition of executive capacity as well as managerial capacity. In support of these new assertions, counsel offers the professional opinion of a professor and management expert. However, regardless of the credentials of the expert's testimony, there is no evidence that the professor's expertise is in the area of immigration law and the specific statute and regulations relevant in the present matter. Moreover, there is no evidence that the professor's opinions are based upon his direct knowledge of the duties carried out by the beneficiary. His opinion appears to be primarily based on claims put forth by the petitioner and as such must be supported by documentary evidence much like the remainder of the petitioner's claim. *See 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)).

Despite counsel's claims that the beneficiary exercises a high degree of discretionary authority and manages an essential function, the fact remains that the beneficiary primarily performs the tasks that comprise the essential sales function. Regardless of the petitioner's need for the beneficiary to continue to carry out these tasks and despite his key role in the petitioner's continued existence, anyone who carries out the tasks of an essential function, by definition cannot be deemed as someone who primarily performs qualifying managerial or executive tasks. *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. at 604. As the petitioner has provided evidence establishing that the beneficiary does not primarily perform duties of a qualifying managerial or executive nature, this petition may not be approved.

Furthermore, the record supports a finding of ineligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 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." In the present matter, the petitioner describes itself as a sales-based enterprise. However, despite the fact that the petitioner purportedly derives its revenue from the sale of merchandise, the record lacks evidence to establish that the petitioner has engaged in sales transactions on a "regular, systematic, and continuous" basis. *See id.* While the petitioner has provided documentation to show its presence at various trade shows to advertise the business, there is little evidence to show that the petitioner has sold its merchandise during the requisite 12-month period. As previously indicated, 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. at 165.

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 ground of ineligibility as discussed above, this petition cannot be approved.

As a final note, service records show the petitioner's previously 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 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.