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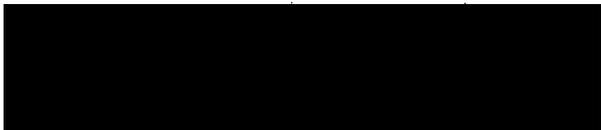
U.S. Department of Homeland Security
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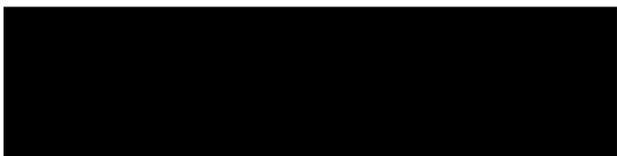


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAY 03 2007
SRC 06 008 50877

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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is engaged in the wholesale of computer equipment and parts. It seeks to employ the beneficiary as its 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 denied the petition based on the following independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 3) the petitioner failed to establish that it was doing business for one full year prior to filing the Form I-140; and 4) the petitioner failed to establish that the foreign entity continues to do business.

On appeal, counsel disputes the director's findings 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 first two issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the petitioner provided sufficient evidence to establish that it would employ the beneficiary in a managerial or executive capacity. The second issue is whether the petitioner established that the beneficiary was employed abroad 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 31, 2005 stating that the beneficiary has been employed in the United States in the position of general manager. The letter was accompanied by an organizational chart revised on June 30, 2005. The chart showed that the petitioner was comprised of six employees, including one contracted sales person and a company that provided drivers on a contractual basis. The beneficiary was shown at the top of the hierarchy directly supervising a certified public accountant, an administrative assistant, and a sales representative. The following list of the beneficiary's proposed job responsibilities was also submitted:

- Oversees the supervision of personnel, which includes work allocation, training, and problem resolution; evaluates performance and makes personnel actions; motivates employees to achieve peak productivity and performance.
- The [g]eneral [m]anager has full supervisory control over [the petitioner's] employees.
- Plans the technological and financial development of the business, seeking the equilibrium among the actions.
- Defines and/or revises the strategies, political and general plans of the business.
- Carry out the selection and purchase of the products that are offered, taking in consideration the information supplied by the area of store [sic], studies, and investigations of magazines, [and] exhibitions, [sic] among others.
- Representing the business before the institutions, agencies and/or other businesses and people, locally and international[ly], guaranteeing an adequate public image.
- Distribution channel analysis and development[.]
- New product development planning and management[.]
- Marketing, advertising and promotion planning[.]
- Sales team organization, planning and development[.]
- Manage product/service mix, pricing and margins according to agreed aims.
- Maintain and develop existing and new customers through appropriate propositions and ethical sales methods, and relevant internal liaison[s], to optimize quality of service, business growth and customer satisfaction.
- Attend and pr[ese]nt at external customer meetings and internal meetings with other company functions necessary to perform duties and aid business development.
- Attend training, [sic] to develop relevant knowledge, techniques and skills.

With respect to the beneficiary's employment with the claimed foreign affiliate, the petitioner provided an organizational chart comprised of five tiers of employees. The beneficiary's position as administrative and operations manager is shown in the third tier with an administrative supervisor and a technical service supervisor as the two direct subordinate positions. The beneficiary's position appears to have been subordinate to the company's president, who is at the top of the organizational hierarchy. A description of the beneficiary's foreign employment was not provided.

Accordingly, on December 6, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation regarding his foreign and proposed United States

employment: 1) a description of the beneficiary's foreign employment listing his day-to-day job duties, the percentage of time spent performing each listed duty and job descriptions of the beneficiary's subordinates; 2) evidence of the foreign entity's staffing levels listing the job titles and educational levels of all employees; 3) evidence establishing that the beneficiary meets the four criteria of managerial and/or executive capacity as listed in sections 101(a)(44)(A) and (B) of the Act; 4) the petitioner's 2004 tax return; and 5) the petitioner's quarterly tax reports for the third and fourth quarters of 2005.

In response, the petitioner provided an updated organizational chart for the foreign entity showing additional positions supervised by the operations and administration position previously occupied by the petitioner. It is noted that this organizational chart was revised to show the staffing structure as of December 2005 and therefore cannot be said to illustrate the company's hierarchy at the time of the beneficiary's employment nearly two years earlier. The petitioner also provided the following list of responsibilities and respective percentage breakdown regarding the beneficiary's foreign employment:

- 10% To receive general instructions for the [p]resident[.]
- 10% Meeting domestic and international suppliers. Select suppliers that are both reliable and beneficial to the company.
- 10% Planning the financial and technological development of the company[.]
- 12% Supervising the [a]ccounting[']s incumbent, review[ing] the cash flow, the credit and collections policies, and to [sic] give problem solving directions[.]
- 10% Keep the staff motivated in order to achieve maximum productivity. Evaluate or recommend personnel actions.
- 10% Supervise the incumbent of [t]echnical [s]ervice, facilitate problem solving, and ensure an excellent service to clients.
- 10% Represent the company before governmental organizations and financial institutions[.]
- 12% Evaluate and authorize equipment purchase[s], analyze needs in order to issue purchase orders[.]
- 10% Define and supervise rules and general policies in order to attain good functioning operations[.]
- 6% Other activities related to this position[.]

The petitioner also provided a similar breakdown with regard to the beneficiary's proposed position in the United States. As the breakdown has been incorporated into the director's denial, the AAO need not recite the list in this discussion. Additionally, the petitioner provided its altered organizational chart depicting its staffing levels as of December 2005. Although the updated chart shows a sales manager and one additional

independently contracted sales agent, neither position was included in the organizational chart, which illustrated the staffing structure at the time the Form I-140 was filed.

On March 22, 2006, the director denied the petition concluding that the petitioner failed to establish that either of the beneficiary's positions can be deemed as qualifying within a managerial or executive capacity. The director properly noted that the two sales agents to whom Form 1099s were issued to show miscellaneous income were employed sporadically and primarily performed work for the petitioner several months prior to the filing of the Form I-140 or several months after such filing. The director also noted that none of the petitioner's employees have been assigned marketing duties, which leads to the presumption that the non-qualifying marketing-related tasks are performed by the beneficiary. The director further found the petitioner's description of the beneficiary's prospective employment as lacking in detailed information discussing the beneficiary's specific day-to-day job duties. The director's analysis of the documentation regarding the foreign entity includes a discussion of the beneficiary's subordinates. The director found that based on the respective educational levels of the beneficiary's subordinates, the beneficiary was not managing professional employees. The AAO affirms the director's comments and ultimate conclusions regarding the petitioner's eligibility. However, the fact that the beneficiary's subordinates abroad may not have been professional employees does not determine ineligibility, as section 101(a)(44)(A)(ii) of the Act specifically allows for an individual employed in a managerial capacity who oversees the work of managerial or supervisory subordinates as well as professionals.

That being said, 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). As properly stated by the director, 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). Accordingly, the director properly focused on the need for detailed job descriptions when instructing the petitioner in the RFE. However, the lists of responsibilities provided to describe the beneficiary's foreign and proposed employment fail to primarily focus on the specific duties that comprised and would comprise the beneficiary's daily work. Specifically, with regard to the beneficiary's foreign employment, the petitioner stated that the beneficiary's responsibilities would include planning financial and technological development, keeping the staff motivated, supervising the accounting and technical service incumbents, and representing the company before government and financial institutions. Despite the fact that these responsibilities cumulatively comprised more than 50% of the beneficiary's time, the petitioner failed to cite specific duties indicating the means by which the said responsibilities were met. As such, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

With regard to the beneficiary's proposed employment in the United States, a list of general responsibilities and respective percentage breakdowns was provided. However, without specific duties describing how the beneficiary would plan the technological and financial development, supervise the work of subordinates, motivate employees, optimize service quality, and define and/or supervise business planning which cumulatively would comprise 67% of the beneficiary's time, the AAO is unable to determine the beneficiary's daily activities, that define the nature of his proposed employment. The petitioner indicated that 9% of the beneficiary's time would be consumed with "other activities" none of which were specifically named. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. Additionally, the petitioner indicated that the beneficiary's subordinates would include a sales manager. However, the organizational chart initially

submitted in support of the petition included only sales representatives, not a sales manager. While the petitioner's organizational hierarchy may have changed since the filing of the Form I-140, eligibility must be established 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). In the present matter, the record shows that at the time of filing, the petitioner did not employ a sales manager. Therefore, at the time of filing, the beneficiary supervised the work of an administrative assistant and a sales representative, the latter of which cannot be deemed to be managerial, supervisory, or professional. Moreover, counsel has failed to address the director's adverse finding regarding the sporadic employment of sales representatives neither of whom appears to have been doing work for the petitioner at the time the Form I-140 was filed.

Furthermore, the petitioner indicates that approximately 30% of the beneficiary's responsibilities focus on marketing. However, the petitioner's organizational chart at the time the Form I-140 was filed does not include any employees to whom marketing duties were assigned. As properly pointed out in the denial, this lack of marketing employees suggests that the beneficiary is likely to assume the non-qualifying tasks associated with marketing the petitioner's products. Since the petitioner must establish that the beneficiary would *primarily* perform qualifying duties, it must be determined that the beneficiary would not spend a majority of his time performing these and other non-qualifying duties. It is noted that 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. 593, 604 (Comm. 1988). In the instant case, the record lacks sufficient information to indicate what specific duties the beneficiary would primarily be performing. This lack of specific information coupled with the lack of evidence establishing that the petitioner has a sufficient support staff to relieve the beneficiary from having to primarily perform non-qualifying tasks precludes the AAO from finding that the beneficiary would be employed in the United States in a position that is within a managerial or executive capacity.

The third issue in this proceeding is whether the petitioner established that it was doing business for one year prior to filing the Form I-140 in compliance with 8 C.F.R. § 204.5(j)(3)(D). 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."

On appeal, counsel asserts that the necessary documentation had been previously submitted. He further argues that the director's adverse finding with regard to this issue suggests that the director failed to consider the submitted documentation. However, counsel's argument is based on the assumption that the unaudited balance sheets, bank statements, and a copy of the petitioner's 2004 tax return are sufficient to establish the petitioner's ongoing purchase and sales transactions from October 2004 to October 2005. Counsel's assumption that such documentation is an accurate portrayal of an entity engaged in the purchase and sale of goods and services on a "regular, systematic, and continuous" basis is erroneous. *See id.* In fact, the director's RFE clearly stated the type of evidence that would be deemed an appropriate indicator of an entity that is doing business within the parameters of 8 C.F.R. § 204.5(j)(3)(D). Such documents included invoices and bills of sale. The director also specifically identified the time period for which the petitioner did not submit sufficient evidence of doing business, thereby giving the petitioner ample guidance in providing a response. As properly pointed out in the denial, the petitioner apparently misconstrued the RFE with regard to the dates in question and, therefore, failed to supplement the record with the proper documentation. 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). Counsel's comments on appeal suggest a continued failure to heed the director's request for a specific type of

documentation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on the documentation submitted, the AAO cannot conclude that the petitioner was doing business from October through December 2004. Therefore, the petitioner has failed to establish that it has met the provisions cited in 8 C.F.R. § 204.5(j)(3)(D).

The fourth issue in this proceeding is whether the foreign entity, claimed to be the petitioner's affiliate, continues to do business. While the AAO concurs with the finding that the record lacks documentation to show that the foreign entity was doing business in 2004, this information is irrelevant to the question of the petitioner's overall eligibility for the immigration benefit sought in the present matter. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

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.

Based on the above definition, the petitioner, *at the time of filing*, must establish that the claimed foreign affiliate continues to do business. Since the Form I-140 was filed in October 2005, the documentation that is relevant in establishing the petitioner's eligibility must address the time period of October 2005 forward. Such documentation was submitted in response to the RFE. Therefore, the fourth ground for ineligibility as cited in the director's decision is hereby withdrawn.

Notwithstanding the AAO's favorable determination with regard to the last ground for denial, the petitioner remains ineligible for the immigration benefit sought based on the remaining grounds for ineligibility fully discussed above. Therefore, based on the foregoing, this petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. More specifically, 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 to have an affiliate relationship with the foreign entity. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of

possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the petitioner has failed to submit documentation establishing the ownership and control either for itself or for its claimed affiliate. 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)).

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.