



U.S. Citizenship  
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Services

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[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

NOV 01 2007

IN RE:

Petitioner:

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

The petitioner is a Florida corporation seeking 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a statement 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 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 performing in a capacity that is managerial or executive.

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 April 21, 2006, which contained the following description of the beneficiary's proposed employment:

[The beneficiary] has been working with [the petitioner] as [g]eneral [m]anager and [d]irector of [i]nternational [p]urchases. . . . He continues to direct the management of the [m]aintenance and [r]epair [d]epartment and the purchasing of airplane parts and combustibles. He deals directly with international vendors and is responsible for marketing the company's product in international markets. He watches the market and oversees quality control of merchandise and meeting of schedules. He has complete control over the personnel in the U.S. [c]ompany of which most are hired as independent contractors.

In the position of [g]eneral [m]anager and [d]irector of [i]nternational [p]urchases, [the beneficiary] has had and continues to have the authority to use his discretion in important

decision-making, and sole discretion in the operation of the U.S. [c]ompany. He determines and formulates policies and business strategies and provides overall direction of [sic] the company. He plans, directs and coordinates operational activities at the highest level of management including planning, developing and establishing policies and objectives of business, emphasizing long-term strategy. He reviews activity reports and financial statements to determine progress and status in attaining objectives and plans. He negotiates contracts, manages inventory and purchasing, insures the consistency of bookkeeping with company policies, and directs expansion. [He] exercises wide latitude in decision-making. He is the highest level of management and answers only to the majority shareholder and [p]resident of the company.

On July 6, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a list of its employees and their job titles.

In response, the petitioner provided a letter dated October 4, 2006 stating that it currently has four full-time employees and nine independently contracted employees. It is noted, however, that in Part 5, Item 3 of the Form I-140, the petitioner claimed to only have three employees. The petitioner did not specify which of the four employees listed in the response to the RFE were actually employed at the time the Form I-140 was filed. The petitioner also provided nine names and listed eight social security numbers of individuals claimed to be employed as independent contractors.

In a decision dated October 12, 2006 the director denied the petition noting that a majority of the full-time employees listed in response to the RFE possess managerial position titles, suggesting that they are managerial employees. The director concluded that the petitioner failed to establish that the beneficiary would be relieved from having to perform the daily operational tasks, thereby suggesting that the beneficiary would not primarily perform duties of a qualifying nature.

On appeal, counsel submits a letter dated November 13, 2006 in which she states that the beneficiary oversees the petitioner's daily operations, which include purchasing aircrafts and aircraft parts, repairing aircrafts, and marketing the company's services. Thus, counsel suggests that the beneficiary is a function manager by virtue of managing these various essential functions. Counsel also states that the beneficiary plans and directs the management of the company, thereby suggesting that the beneficiary is also employed in an executive capacity. It is noted, however, that a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. In the present matter, while counsel submits a separate undated statement in which she maintains that the beneficiary is both a manager and an executive, her statement primarily consists of paraphrased portions of the relevant statutory definitions. See sections 101(a)(44)(A) and (B) of the Act.

Additionally, the petitioner provides its own statement dated December 11, 2006 in which it includes a list of its permanent full-time employees and further states that it hired nine additional employees on a contractual basis. The petitioner also provides each full-time employee's respective salary and résumé.<sup>1</sup> However, with

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<sup>1</sup> The petitioner indicates that the individual previously employed as its office assistant was fired on October 15, 2006. Therefore, this individual's salary and résumé are not provided.

the exception of [REDACTED], the petitioner's claimed electric director, the petitioner provided no documentation to establish the exact dates of hire for the rest of its claimed full-time employees. Moreover, while the petitioner's quarterly federal tax return for the second quarter of 2006 indicates that the petitioner paid two employees, this document does not identify the individuals whom it paid during this relevant time period. The petitioner also provides a list of its contracted employees, including most employees' social security numbers, their respective hourly wages, and the services they purportedly provide. However, 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)). Information provided by the petitioner is not deemed supporting or corroborating documentary evidence. Thus, while the petitioner illustrates an organizational hierarchy consisting of permanent full-time employees and independent contractors, the petitioner has not provided quarterly wage reports, payroll documents, or additional tax documents, such as W-2 statements or Form 1099s, to establish whom it actually employed as of May 2006 when it filed the Form I-140.

The AAO acknowledges that the size of a petitioner's support staff cannot be the sole basis for consideration when determining eligibility to classify a beneficiary as a multinational manager or executive. However, this factor is highly relevant and should be considered for the purpose of determining who performs the petitioner's daily operational tasks and whether the petitioner is adequately staffed to meet its daily demands while allowing the beneficiary to primarily perform tasks of a qualifying managerial or executive nature. 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). That being said, documenting an adequate staffing structure alone is not sufficient. In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Thus, in complying with service regulations, the petitioner must do more than merely recite the beneficiary's vague job responsibilities or broadly-cast business objectives, as the actual duties themselves will 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). In the present matter, despite counsel's insistence that the beneficiary is both a multinational manager and executive, she fails to delineate which specific duties fit each of the statutory definitions.

Furthermore, the record is replete with broad job responsibilities generally addressing the beneficiary's level of authority. However, there is no comprehensive discussion explaining who actually carries out the tasks associated with the purchase of aircraft and the marketing of services offered by the petitioner. Merely stating that the beneficiary would oversee these essential functions is not sufficient without providing a detailed description of the beneficiary's actual daily tasks and a corresponding discussion of those individuals within the petitioner's organizational hierarchy who would perform the tasks associated with the essential function. The petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. For instance, the petitioner previously indicated that among the beneficiary's responsibilities is contract negotiation and dealing with international vendors. Without further specific information as to the duties to be performed, simply stating that the beneficiary negotiates contracts and deals with vendors strongly suggests that the beneficiary will actually carry out the duties associated with the purchasing and sales functions.

Additionally, the petitioner does not discuss how much of the beneficiary's time would be spent performing these seemingly non-qualifying tasks of the organization. Thus, not only has the petitioner provided a job description that lacks a comprehensive and detailed list of the duties to be performed on a daily basis, but the record is also silent as to the portion of time allotted to the non-qualifying duties. As such, the petitioner has failed to furnish the necessary evidence and information that would allow the AAO to conclude that the beneficiary would primarily perform tasks within a qualifying managerial and/or executive capacity.

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 his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the record contains the beneficiary's résumé, which has a brief description of his foreign employment. The description indicates that the beneficiary's responsibilities included dealing with vendors, sending and receiving fund transfers, and marketing. With a further, more detailed discussion of the beneficiary's daily tasks in the context of the foreign entity's business, the tasks specifically mentioned cannot be deemed qualifying. As the petitioner did not clarify the specific portion of the beneficiary's time that was attributed to these non-qualifying tasks, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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 record contains inconsistent documentation with regard to the petitioner's ownership. Specifically, while Schedule E of the petitioner's 2005 tax return indicates that the beneficiary owns 50% of the petitioner's stock, Schedule K, items 5 and 7 both indicate that an individual, partnership, or corporation owns 100% of the petitioner's stock. The tax return, in addition to being internally inconsistent, is also inconsistent with other documentation on record. First, the petitioner's Minutes of Annual Meeting of Shareholders, which was initially submitted in support of the Form I-140, indicates that the beneficiary owns 49 shares. Second, stock certificate No. 01 shows that the beneficiary owns 245 out of 500 shares (with a par value of \$1.00) with the remaining 255 shares issued to another individual. While the AAO is willing to interpret the petitioner's Minutes of Annual Meeting of Shareholders as indicating that the beneficiary owns 49% rather than 49 shares of stock, which would then correspond to the 245 shares of stock purportedly issued, neither document is consistent with Schedule L, item 22(b) of the petitioner's 2005 tax return, which indicates that the petitioner received \$1,000 in exchange for issuing its stock. If the most the petitioner was authorized to issue was 500 shares, as indicated in the stock certificates issued, the petitioner could not have received more than \$500 in exchange for issuing all of its authorized 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). In the present matter, the numerous inconsistencies discussed above have not been resolved.

Third, 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 provides two unsigned independent contractor agreements, one signed subcontractor agreement, and one subcontractor agreement which is dated but not signed by either party. All these agreements suggest the hiring party's intent to pay the petitioner for various services. However, regardless of whether these contracts have been properly executed with necessary dates and signatures, the petitioner has provided no actual invoices to show that the petitioner has received payment in exchange for services it has rendered. In other words, the record lacks evidence to show that any of the provided contracts have been carried out or are in the process of being carried out. Furthermore, the petitioner is required to establish that it has been doing business since May 2005, or one year prior to filing the instant Form I-140. With regard to the four contracts provided, the petitioner has failed to establish that it actually provided any services, and therefore carried on its business on a "regular, systematic, and continuous" basis. *See id.* Additionally, while the AAO acknowledges the petitioner's submission of its 2005 tax return, such a document is not an accurate indicator of ongoing business transactions and thus cannot be deemed sufficient to establish that the petitioner sold its products and services on a "regular, systematic, and continuous" basis during the relevant time period.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

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

Lastly, counsel makes a brief reference to 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 Citizenship and Immigration Services (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 petition 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.<sup>2</sup> 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. at 597. 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).

In conclusion, 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.

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<sup>2</sup> CIS records show that the petitioner's Form I-129 (with receipt number SRC 03 010 54545), seeking to classify the beneficiary as an L-1A nonimmigrant, was denied.