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U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: NEBRASKA SERVICE CENTER

Date: DEC 02 2008

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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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska 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 engaged in graphic design and the manufacture of clothing and accessories. It seeks to employ the beneficiary as its president and 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 that basis.

On appeal, counsel disputes the director's conclusion and underlying findings, pointing out that the petitioner has three previously approved L-1A petitions for the same beneficiary. Counsel's appellate brief and the director's findings will be addressed in full in the discussion below.

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The primary issue in this proceeding is whether the beneficiary would be employed by the U.S. petitioner in a managerial or executive capacity.

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

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

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

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

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

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

In support of the Form I-140, the petitioner submitted a letter dated October 10, 2006, stating that the beneficiary's position with the U.S. entity would include the following: establishing goals, policies, and objectives for the company; hiring and firing employees; negotiating contracts with service providers and with Walt Disney; seeking out new business ventures; and reviewing activity and financial reports. The petitioner also provided tax documentation from 2003, 2004, and 2005 in support of the Form I-140.

On July 31, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, a more detailed description of the beneficiary's proposed day-to-day duties with a percentage of time indicating how much of the beneficiary's time would be devoted to each of the listed duties and an organizational chart of the U.S. entity accompanied by an explanation of the job duties and levels of

authority of the beneficiary's subordinates. The petitioner was also instructed to explain its importing/exporting activity with its foreign counterpart.

In response, the petitioner provided a percentage breakdown of the beneficiary's overall job responsibilities. As the director has reiterated the job description in the denial, the AAO need not repeat this information at this time. The petitioner also provided an organizational chart, illustrating a three-tier organizational structure in which the beneficiary occupies the top-level position of general manager/art director. The beneficiary's direct subordinates include a graphic designer and production manager. The two employees shown at the bottom of the hierarchy, the production/outside installer and production, are depicted as the direct subordinates of the production manager. Although the petitioner provided job descriptions for the employees within the foreign entity's organizational hierarchy, the same was not provided for the subordinates within its own hierarchy, despite the director's express request for this information.

On December 14, 2007, the director denied the petition, noting that the petitioner failed to provide an adequate description of the beneficiary's proposed employment, using overly broad terminology that fails to establish how the beneficiary would achieve the company's goals and objectives. The director also pointed out the petitioner's failure to address the director's request for job descriptions and levels of authority of the beneficiary's subordinates. It is noted 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).

On appeal, counsel asserts that the beneficiary has been "executing essential executive and managerial duties" since the petitioner's inception, pointing out that three previously filed L-1A petitions were approved for the same beneficiary. Counsel's assertions, however, lack merit. First, counsel's reference to the nature of the beneficiary's job duties as being executive and managerial is confusing and contradictory to the petitioner's initial statements, which indicate that the beneficiary would be employed in an executive capacity. 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, with the general list of responsibilities provided by the petitioner, it is virtually impossible to determine within which category, executive or managerial, the beneficiary's duties would fall. Counsel's reference only furthers the confusion.

Second, with regard to the petitioner's prior approvals of nonimmigrant petitions for the same beneficiary, 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. As counsel readily acknowledges, Citizenship and Immigration Services (CIS) is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. 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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29-30 (D.D.C. 2003) (recognizing that CIS approves some petitions in error). In fact, 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.

Next, counsel argues that CIS issues boilerplate RFEs as a matter of standard practice and further contends that the director issues denials without reviewing previously submitted evidence. Again, these arguments lack merit and are entirely unsupported by the documentation on record in the present matter. First, boilerplate language in an RFE issued by a director does not indicate that an RFE was not warranted or that the record was not thoroughly reviewed prior to its issuance. Second, the mere fact that a boilerplate RFE preceded the denial of a petition does not indicate that documentation was not properly considered. In fact, in this case, the director specifically references to the current record's shortcomings, specifically pointing out the petitioner's failure to provide an adequate job description for the beneficiary or to provide any job descriptions at all for the beneficiary's subordinates. Even if the director issued an adverse decision without specific reference to the petitioner's submissions, the AAO would not have cause to withdraw such a decision unless it is determined that the decision was contrary to law or contrary to the evidence of record.

Counsel goes on to comment on the fact that the director made adverse findings only with regard to the beneficiary's job description with the U.S. entity, despite the fact that the description of the beneficiary's employment abroad used similar terminology. While it is acknowledged that the director failed to fully address the issue of the beneficiary's employment abroad, the AAO notes that any oversight by the director in failing to address all grounds for denial does not detract from the validity of the existing ground upon which the director based the current decision. In fact, the AAO can supplement the director's denial, *see infra*, as it is vested with the authority to base its decision on additional grounds that may not have been addressed by the director. *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).

Counsel also contends that the director erred in finding that the petitioner failed to provide job descriptions for the beneficiary's subordinates in the United States, claiming that such evidence was duly provided. Counsel also resubmits as part of exhibit B the organizational charts previously submitted along with the subordinate employee job descriptions and further states that the beneficiary oversees the work of an artistic director, an administrative director, and a general director. It is noted, however, that the positions cited by counsel appear on an organizational chart that confusingly contains the names of both the foreign and U.S. entities, thereby making it difficult to determine which entity the chart is meant to depict. This confusion is further perpetuated by a second organizational chart, which clearly contains only the name of the U.S. petitioner and illustrates the organizational hierarchy discussed earlier in this decision. Based on the organizational flow chart and accompanying list of employees and their job descriptions, the AAO finds that counsel relied on the organizational hierarchy of the foreign entity, not that of the U.S. petitioner. The AAO makes this determination after considering the employee job descriptions that accompany the flow chart and the organizational chart that contains the names of two entities. Specifically, only the job description of the beneficiary is specifically cited as being based in the United States. None of the other employees' job descriptions contain similar references. In fact, one of the tasks included in the job description of the general manager is to direct communication with the U.S. entity. It is illogical for this responsibility to be attributed to a U.S.- based employee. Similarly, in the flow chart that accompanies the employee job descriptions, only the beneficiary's position is clearly identified as being located in the United States, thereby implying that the remainder of the positions in the chart (and in the list of subordinate employees) are part of the foreign entity.

Moreover, the petitioner indicated in Part 5, No. 2 of its Form I-140 that it has a total of five employees. The organizational structure referenced by counsel named seven employees and provided their respective job descriptions in an accompanying document. The chart that most-likely meant to reflect the petitioner's organizational hierarchy, and which lists five employees (as indicated in the petition), was not accompanied by a description of the job duties of the employees listed in that chart. Thus, counsel's failure to address the director's valid comment appears to be the direct result of his own erroneous interpretation of the petitioner's supporting documents.

Counsel urges the AAO to look beyond the size of the petitioning entity and to give due consideration to the beneficiary's position within the organizational hierarchy, taking note of the three employees the beneficiary purportedly manages. However, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). As discussed above, counsel's claim that the beneficiary manages three employees is based on his review of the wrong organizational chart, thereby nullifying this portion of his argument. As indicated in the organizational chart that directly pertains to the U.S. entity, the beneficiary is depicted as the head of an organization that has three employees, two of whom appear to be the subordinates of the beneficiary. As the petitioner has failed to provide the job descriptions of either of these individuals, as requested by the director, the AAO is unable to determine how they will relieve the beneficiary from having to primarily perform operational tasks on a daily basis.

Furthermore, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

In the present matter, there are a number of factors that contributed to the AAO's adverse decision, one of which is the size of the beneficiary's support staff. This factor can and should be considered in this and similar matters, as it helps to determine who within the petitioner's organization is available to perform the entity's daily operational tasks. Even if the petitioner were able to provide an adequate description of the beneficiary's job duties, the AAO would have to review the petitioner's organizational structure in order to determine whether it can credibly accommodate the duties attributed to his position. Here, the petitioner illustrates an organizational structure that consists of only five employees. While it is not impossible for a five-employee enterprise to have a manager or executive who primarily performs managerial or executive tasks, the AAO cannot make a favorable conclusion without a detailed description of the beneficiary's specific daily job duties, a meaningful explanation as to who within the organization carries out the operational tasks on a daily basis, and evidence showing that the employees the petitioner identifies in its organizational chart were actually employed at the time the Form I-140 was filed. In the present matter, these key components are missing.

In the present matter, the director properly observed that the petitioner's description of the beneficiary's prospective employment consists of overly broad terms that convey a vague notion of someone in charge of a company, which is not necessarily synonymous with someone employed within a managerial or executive capacity as defined by the Act. The AAO does not dispute the beneficiary's overall discretionary authority over personnel and business matters. However, the beneficiary's daily job duties are entirely unclear. Case

law has firmly established that it is the beneficiary's actual duties themselves that 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). For instance, the petitioner stated that the beneficiary would spend 20% of his time establishing goals and objectives and 10% developing marketing strategies without specifying any goals, objectives, or marketing strategies and without explaining the specific tasks associated with these responsibilities. The petitioner stated that another 20% of the beneficiary's time would be spent supervising the graphic design area. Again, there is no indication as to the job duties the beneficiary would carry out in meeting this supervisory responsibility. Although the petitioner claimed that 10% of the beneficiary's time would be spent reviewing activity reports, no clear explanation was provided as to what type of activity the beneficiary would be monitoring and who would be composing the reports.

The petitioner has also failed to provide any information as to the tasks carried out by the four remaining employees. The AAO cannot determine their job duties by merely referring to their respective job titles. Furthermore, the petitioner has provided no documentation to establish exactly whom it employed at the time the Form I-140 was filed. 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)). While the petitioner provided its 2006 tax return, it shows that approximately \$28,000 was paid in wages and salaries with another \$47,000 going to the beneficiary as officer compensation. It is unclear, however, whom the petitioner paid the wages and salaries to and which employees were working for the petitioner in 2007 when the petition was filed. The AAO is therefore unable to determine the extent to which the petitioner was able to offer support to the beneficiary's position. 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 "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). Without evidence to corroborate the claim that the petitioner had a support staff to perform necessary operational tasks, it cannot be concluded that the primary portion of the beneficiary's time would be spent performing managerial or executive level duties. For this reason, the AAO will not withdraw the director's decision.

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, while the director did not make the specific finding, the record shows that the description of the beneficiary's foreign position is as lacking in specific job duties as the description for the beneficiary's proposed employment. For instance, the petitioner stated that the beneficiary developed new lines for companies. However, there is no explanation as to what is meant by the term "lines" and what types of job duties were involved in the development process. The petitioner also stated that the beneficiary supervised the production process without actually defining the tasks required for such supervision. Lastly, the petitioner claimed that the beneficiary would develop marketing strategies with a sales team. However, there is no indication that a sales team was in place within the foreign entity, leaving the AAO to wonder who, if not the beneficiary, carried out the marketing and sales tasks of the organization. With these crucial questions unanswered and with the

inadequate job description attributed to the beneficiary's position with the foreign entity, 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. Again, the RFE instructed the petitioner to provide evidence showing common ownership and control for the U.S. petitioner and the beneficiary's foreign employer. The documentation in the present matter contains inconsistent information with regard to the amount of stock issued, the value of that stock, and the owners of the stock. First, the supplement to Schedule E, Line 12 of the petitioner's federal tax return for 2006 indicates that ownership of the petitioner's stock is evenly distributed among four individuals, each owning 25% of the petitioner's stock. However, the petitioner, in its initial support letter, claimed that it is a wholly owned subsidiary of the foreign entity.

Second, Article V of the petitioner's Articles of Incorporation indicates that the petitioner is authorized to issue 2000 shares of stock at a par value of one cent per share for a net value not to exceed \$20. However, Schedule L, Item 22(b) of the petitioner's tax return for 2006 indicates that the petitioner received \$1,000 in exchange for the issuance of stock. This leaves the AAO to question the validity of the petitioner's articles of incorporation, which indicates that even if the petitioner issued all of its authorized shares, the most it could have received in return was \$20. 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).

Third, if in fact the petitioner is owned by four individuals rather than by the foreign entity as previously claimed, the definition of subsidiary as defined in 8 C.F.R. § 204.5(j)(2) would be inapplicable to the facts of the present matter. The petitioner would then need to provide evidence of the foreign entity's ownership to establish that it and the beneficiary's foreign employer are similarly owned and controlled. See *Matter of Church Scientology International*, 19 I&N Dec. 593; 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). It is noted that the record lacks evidence establishing the foreign entity's ownership. Thus, based on all of the above, the AAO finds that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

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 at 1043, *aff'd*, 345 F.3d 683; see also *Dor v. INS*, 891 F.2d at 1002. 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.

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.