

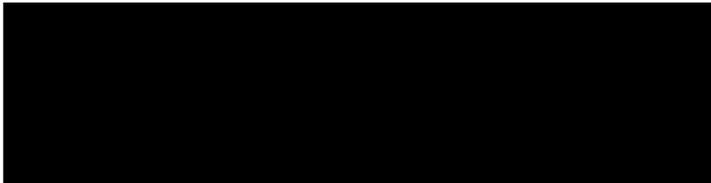
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B4



FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: FEB 01 2008
SRC 05 021 50352

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed. The petitioner subsequently filed a motion with the AAO seeking to reopen and reconsider the prior decision dismissing the appeal. The AAO granted the motion and, in a thorough analysis, affirmed its prior decision. The petitioner, through new counsel, has filed a second motion, again seeking to reopen the matter and reconsider the AAO's adverse decision. The AAO will grant the motion to reconsider and affirm its prior findings.

That being said, the AAO notes counsel's improper reference to the petitioner's current motion as an "appeal" of the AAO's previous adverse decision. The petitioner's present filing is a motion, not to be confused with an appeal over which the AAO has broad powers of *de novo* review. The AAO has already issued its decision in response to the petitioner's appeal. The petitioner cannot file a second appeal with regard to the same petition. Rather, the petitioner may file a motion seeking to reopen the matter and/or reconsider the prior adverse decision. In this type of proceeding, the scope of the AAO's review is limited pursuant to 8 C.F.R. § 103.5(a)(2), which describes the scope of review for a motion to reopen, and 8 C.F.R. § 103.5(a)(3), which describes the scope of review for a motion to reconsider. The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹ In the present matter, neither counsel's brief nor the petitioner's declaration presents previously unavailable facts or evidence. Therefore, the AAO will not grant the petitioner's motion to reopen.

With regard to the motion to reconsider, the AAO's review will be limited by the provisions cited in 8 C.F.R. § 103.5(a)(3), which states in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services] CIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner is a Florida corporation engaged in the distribution of fruits and vegetables. 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 denied the petition on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity; and 2) the petitioner failed to establish its ability to pay the beneficiary's proffered wage. In reviewing the record on appeal, the AAO withdrew the second ground for denial, but ultimately dismissed the appeal, citing the first ground as the primary basis for its adverse decision. In addition, the AAO concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

In response to the petitioner's motion, the AAO concluded that the petitioner failed to overcome the basis for the dismissal of the appeal. With regard to the beneficiary's proposed employment, the AAO found that the petitioner failed to provide credible evidence of a staffing structure sufficient to support the beneficiary in a qualifying managerial or executive position at the time of filing. The AAO stressed that all evidence must establish eligibility at the time the petition was filed and determined that no consideration would be given to evidence of additional staff hired after the petition was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Most importantly, the AAO determined that the petitioner offered overly broad and implausible job duties that were based on exaggerated staffing levels that did not exist at the time Form I-140 was filed.

Similarly, with regard to the beneficiary's employment abroad, the AAO determined that the beneficiary's job duties were inconsistent with the foreign entity's staffing structure. The AAO noted that the foreign entity had a very limited number of employees with each employee occupying a variety of different positions. The AAO concluded that the entity was not adequately staffed to relieve the beneficiary from having to primarily focus on tasks of a non-qualifying nature.

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.

On current motion, counsel asserts that the petitioner meets Florida's statutory law requirements, which rely heavily on a corporation's bylaws, stating that "[e]ach officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of any officer authorized . . . to prescribe the duties of other officers." Fla. Stat. § 607.0841. However, the petitioner's ability to meet Florida's statutory provisions is not indicative of its ability to meet the relevant sections of the Act and corresponding regulations. Further, the petitioner's bylaws are equally general in their requirements, stating only that "such duties, as may from time to time be assigned . . . by the board of directors, and as are incident to the offices of president and chief executive officer." There is no specific requirement either in the statute or the bylaws that the duties to be performed by these high offices must be within a certain capacity. To the contrary, 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.

Thus, unlike the Florida statutory provisions, the Act contains specific criteria that must be met by a petitioner seeking to classify an alien as a multinational manager or executive. These criteria must be applied both to the beneficiary's employment abroad and to the proposed employment with the U.S. petitioner. As discussed in the AAO's prior decisions, the petitioner must not only provide detailed descriptions of the beneficiary's foreign and U.S. employment, but it must also submit credible evidence of staffing structures capable of supporting the beneficiary as a manager or executive in the foreign and U.S. positions. Contrary to counsel's arguments, neither the petitioner's by-laws nor the dictionary definition of the beneficiary's position title establishes the nature of the duties primarily performed within either of the beneficiary's positions.

Furthermore, counsel's interpretation of the AAO's prior reference to *Matter of Katigbak* is erroneous, as the issue in the present matter is not whether the beneficiary was qualified for the proffered position at the time of filing. 14 I&N Dec. 45. Rather, the issue here is whether, at the time of filing, the petitioner was capable of employing the beneficiary in a qualifying managerial or executive capacity. Counsel improperly focused on

the specific facts in the precedent case, instead of the relevant legal principle established therein, i.e., that eligibility must be established at the time of filing. *Id.* This legal principle must be broadly applied to all of the filing requirements. Thus, just because the beneficiary was qualified for employment as a multinational manager or executive does not mean that the petitioner was able to employ him in that capacity. It is the petitioner's burden to provide a detailed description of the beneficiary's job duties and to establish, through proper documentation of the company's staffing structure, that the petitioner was able to employ the beneficiary in a qualifying capacity at the time the Form I-140 was filed.

In the present matter, counsel relies, in part, on the revenue generated by the petitioner at the time the Form I-140 was filed. However, this information is irrelevant for the purpose of determining the petitioner's ability to employ the beneficiary in a managerial or executive capacity. The mere fact that a company is able to remain financially viable and even successful in the presence of a small support staff may be relevant to its ability to employ its personnel, but it does not establish a petitioner's ability to employ the beneficiary in a qualifying capacity.

Counsel also asserts that the third party suppliers, who provide the company's products, and the drivers, who carry out the company's delivery services, perform the non-qualifying tasks, thereby leaving the beneficiary to perform the managerial and/or executive functions. The underlying implication of counsel's reasoning is that the beneficiary's qualifying functions are implied by virtue of having others within the petitioning organization perform the non-qualifying tasks. However, the AAO cannot assume that the beneficiary's tasks are primarily within a qualifying capacity based on a brief discussion of services provided by others. The regulation at 8 C.F.R. § 204.5(j)(5) explicitly requires that the petitioner clearly describe the duties to be performed by the beneficiary in his proposed position. The petitioner should be able to articulate this information with relative ease if, as counsel strongly asserts, the beneficiary primarily performs tasks of a qualifying nature. Meeting the regulatory criteria is a matter of articulating what specific duties the beneficiary would perform.

Moreover, counsel's attempt to distinguish the beneficiary in *Fedin Bros. Co., Ltd. v. Sava* from the beneficiary in the present matter is irrelevant. 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The mere fact that the petitioner in the present matter claims that the beneficiary would be employed as president does not establish that his duties would be within a qualifying capacity. As previously stated, the petitioner must provide a detailed description of the beneficiary's proposed employment, including the specific duties entailed therein, and submit documentation to establish that its staffing structure is sufficient to support the beneficiary in the proposed position whose tasks are primarily within a qualifying capacity. The AAO has devoted significant portions of its prior decisions specifically explaining which factors contributed to the denial of the petition and to the subsequent dismissal of the appeal. Merely disagreeing with the AAO's sound reasoning without providing evidence that the petitioner has met the statutory and regulatory requirements is not sufficient to warrant a favorable outcome, and it falls well short of what is required to show that both the director and the AAO erred in their decisions to deny the petition based on the record of proceeding that was before them at that time.

With regard to the beneficiary's foreign employment, counsel relies primarily on the beneficiary's position title in asserting that the employment abroad was within a qualifying managerial or executive capacity. While the beneficiary provides a supplemental "unsworn" declaration explaining the various functions carried out by the foreign entity's employees, his statement fails to establish that he primarily performed duties within a qualifying capacity. Moreover, none of the sources cited by counsel establishes that the AAO's adverse

findings with regard to the beneficiary's foreign employment were incorrect based on the evidence of record at the time of the initial decision.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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. Here, the petitioner has not sustained that burden.

ORDER: The prior findings are affirmed. The appeal is dismissed.