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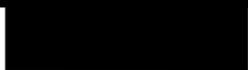
U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **JUL 09 2008**

SRC 04 186 51171

IN RE:

Petitioner:

Beneficiary:



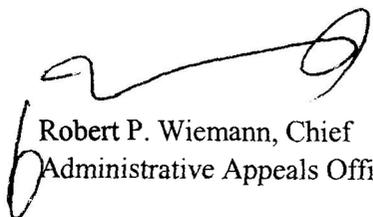
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

The petitioner is a Florida corporation engaged in the business of importing and exporting marble products. It seeks to employ the beneficiary as its executive engineer director. 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, basing his decision on two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity under an approved petition; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief 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 two key issues in this proceeding call for an analysis of the beneficiary's job duties during his employment abroad as well as his proposed job duties in his prospective position with the U.S. petitioner.

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 May 19, 2004, stating that the beneficiary was employed abroad as its claimed parent company's "Engineer Executive Director General Manager in charge of the development of the company." With regard to the beneficiary's proposed employment, the petitioner stated that the beneficiary will be employed in an executive capacity where he will "exercise the usual discretion in making judgements [sic], which ultimately affects the development of [the] organization." The petitioner further stated that the beneficiary will maintain his position as executive director, which requires the beneficiary to take charge of new developments, oversee the company's import and export division, and supervise other executive employees within the organization. The petitioner also submitted financial documentation and various invoices for both companies.

Upon reviewing the petitioner's initial submissions, the director determined that a favorable determination could not be made. Accordingly, the director issued a request for additional evidence (RFE) dated March 31, 2005, instructing the petitioner to provide documentation to assist Citizenship and Immigration Services (CIS) in determining whether the beneficiary's proposed employment and his employment abroad can be deemed managerial or executive. The petitioner was asked to submit detailed job descriptions for both of the beneficiary's positions, specifying the duties performed each day and the percentage of time attributed to each duty in the proposed and foreign positions. The petitioner was specifically instructed to explain how the primary portion of his job time has and would continue to consist of managerial or executive job duties. The petitioner was also asked to provide documentation to establish its and the foreign entity's respective ability to relieve the beneficiary from having to primarily perform non-qualifying job duties by discussing each company's subordinate employees. The petitioner was instructed to submit each company's organizational chart accompanied by job descriptions of the employees named in each chart.

In response, the petitioner provided both entities' organizational charts. The U.S. petitioner's chart illustrates a three-tier hierarchy in which the beneficiary is at the top of the organization as chief executive officer. The second tier of employees includes [REDACTED] in charge of import and sales; [REDACTED] in charge of sales and administration; and [REDACTED] in charge of production and warehouse. The bottom tier names four people under production and warehouse. The petitioner stated that these four individuals are responsible for production, packing, and maintenance. Despite the fact that the petitioner was specifically asked for a detailed description of job duties assigned to the beneficiary, the only statement addressing this factor states that the beneficiary "is responsible for the [p]lanning and [c]ontrol of administration, development of products, administration of systems and development and maintenance of activities in the [i]nternet." The petitioner did not list any specific job duties or the amount of time allotted to the performance of such duties. Although the petitioner provided its state quarterly report that shows the petitioner's employment of four people at the time the Form I-140 was filed, only two of the employees in the quarterly report were also identified in the organizational chart that was submitted in response to the RFE. Neither [REDACTED] nor [REDACTED] was included in the petitioner's organizational chart. That being said, the organizational chart submitted in response to the RFE named a total of eight employees. Of those eight employees, only two, i.e., the beneficiary and [REDACTED], the beneficiary's wife, were included in the quarterly report that named the individuals employed by the petitioner at the time the Form I-140 was filed. As such, the organization chart submitted by the petitioner does not appear to be an accurate illustration of the petitioner's staffing and hierarchy during the relevant time period. Rather, the employees named in the chart may have been hired after the petition was filed. It is noted, however, that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on the relevant quarterly report, it appears that the petitioner had a total of four employees at the time of filing. However, the petitioner did not provide a chart to illustrate each employee's position within the organization during the relevant time period or a separate description of the duties performed by the two employees whom the petitioner employed at the time of filing.

The petitioner also provided an organizational chart for the foreign entity, whose hierarchy was also illustrated as having three tiers. The beneficiary was shown as head of the company at the top tier; [REDACTED], the beneficiary's wife, and [REDACTED] were shown at the second tier as the company's importation manager and sales administrator, respectively; and the bottom tier consisted of a marketing research and programming employee as well as a production and warehouse employee, both supervised by [REDACTED], and production and design and an accountant supervised by [REDACTED]. The beneficiary's

overseas position description indicated that he was "responsible for the control, planning and developing of products, administrat[ion] of systems and development and maintenance of the [i]nternet activities." Again, the petitioner failed to provide the beneficiary's specific daily job duties and percentage of time allotted to such duties.

After reviewing the petitioner's submissions, the director issued a decision dated July 6, 2005, denying the Form I-140. The director reviewed the job descriptions provided for each of the employees listed in the petitioner's organizational chart, noting that the duties of some of the employees are not executive. The AAO notes, however, that the petitioner is under no statutory or regulatory obligation to establish that anyone other than the beneficiary would perform qualifying managerial or executive-level job duties. Rather, the petitioner must only establish that the beneficiary's subordinates are managerial, supervisory, or professional if the beneficiary's job duties primarily involve overseeing personnel. In the present matter, as the petitioner failed to provide the beneficiary's list of duties with a time breakdown, it cannot be concluded that the beneficiary spends the majority of his time overseeing personnel. As such, the record lacks sufficient information to establish whether the nature of job duties performed by the beneficiary's subordinates is a matter that is material to a determination of the petitioner's eligibility to classify the beneficiary as a multinational manager or executive.

With regard to the beneficiary's foreign employment, the director similarly found that the beneficiary was a first-line supervisor of non-managerial, non-professional, and non-supervisory employees. However, as found with regard to the U.S. petitioner, the record lacks sufficient information about the beneficiary's specific daily tasks. Without this crucial information, the AAO cannot affirm the director's finding.

Nevertheless, the AAO concurs with the finding that the beneficiary's responsibility of developing and maintaining activities on the internet within the U.S. and foreign entities implies the performance of non-qualifying tasks. The AAO also concurs with the director's overall conclusion that the petitioner's description of the beneficiary's job duties fails to establish eligibility to classify the beneficiary as a multinational manager or executive. Precedent case law has established that 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). In the absence of this crucial information, the AAO cannot make an accurate determination as to the nature of the beneficiary's foreign or proposed employment. As such, the AAO's adverse conclusion in the present matter is based primarily on the petitioner's failure to provide key information, not on the information that was, in fact, provided.

On appeal, counsel reviews the petitioner's prior submissions, including the organizational charts of the foreign and U.S. entities as well as the job descriptions of both companies' employees, and asserts that the beneficiary was employed abroad and would be employed by the U.S. petitioner in an executive capacity. Counsel claims that the beneficiary supervised two executive employees during his employment abroad and would supervise three executive employees in his proposed position with the U.S. entity. However, the director was clear in her request for a detailed description of specific job duties. 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 broad statement as to the beneficiary's general job responsibilities does not disclose the actual job duties the beneficiary would execute in the course of overseeing other employees. Further, there is nothing in the prior job descriptions that suggests that the majority of the beneficiary's time has been and would be spent overseeing other employees. Even if the petitioner were to establish that, indeed, the duties involved in supervising other employees are within an executive capacity, the petitioner must

nevertheless establish what portion of the beneficiary's time is devoted to such executive level tasks. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). As previously stated in the director's decision, 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). Despite counsel's repeated references to the beneficiary as an executive employee, whether or not either of his positions can be deemed executive, as claimed, turns on the nature of the job duties that consume the primary portion of the beneficiary's time. Although counsel asserts that regulations and precedent case law support the theory that "an employee with clearly [e]xecutive tittle [sic] . . . should generally not have a problem qualifying [as a multinational manager or executive]," counsel fails to cite to any legal authority to support this assertion.¹ Instead, counsel refers to portions of the statutory definition of executive capacity, stating that the beneficiary "exercises discretion in making goals or establishing policies."²

Counsel also asserts that the beneficiary primarily plans, organizes, directs and controls the development of the business. However, as with the descriptions previously offered by the petitioner, counsel's statements include a broad list of job responsibilities, which do not specifically identify the beneficiary's daily activities. Without the specific job duties, the petitioner fails to account for the beneficiary's time spent performing qualifying tasks versus those that are non-qualifying.

Additionally, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. As previously stated, an individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. In the present matter, the record does not establish that the petitioner had a subordinate level of managerial employees at the time the Form I-140 was filed. Despite the petitioner's submission of an organizational chart in response to the RFE, the petitioner's quarterly report for the period during which the petition was filed suggests that the chart is not an accurate illustration of the petitioner's staffing structure at the time of filing. Rather, the chart appears to be a depiction of the petitioner's more recent staffing structure that was in place at the time it submitted the response to the RFE. However, the relevant quarterly wage report shows that the petitioner had a total of four employees when the Form I-140 was filed and it is unclear whether all four individuals were drawing salaries commensurate with full-time employment. Thus, neither the description of the beneficiary's proposed job duties nor the petitioner's organizational hierarchy establish the petitioner's ability to employ the beneficiary in a qualifying capacity at the time of filing.

¹ Refer to p. 9, paragraph 5 of counsel's brief.

² *Id.*

Counsel asserts that the petitioner provided volumes of documents that should have taken the service center much more time to review prior to issuing an adverse determination, thereby implying that the director failed to consider relevant documentation. Counsel's argument, however, is without merit. In reviewing the petitioner's submissions, most of the petitioner's response consisted of documentation that established that a qualifying relationship exists between the U.S. and foreign entities and that both entities met the "doing business" standard during the requisite time periods. While the petitioner provided adequate responses to various portions of the director's RFE, it failed to do the same with regard to information concerning the beneficiary's foreign and U.S. job capacities. As stated above, the content of the petitioner's discussion of the beneficiary's job duties was deficient and failed to provide the information requested in the RFE. Neither the length of the beneficiary's employment nor the level of his position within either organization satisfied the director's request for a detailed description of the beneficiary's actual job duties.

Furthermore, counsel makes repeated references to the petitioner's current 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, 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).

Moreover, 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. 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).

Furthermore, 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary was employed abroad and would be employed by the U.S. petitioner in a primarily managerial or executive capacity. The fact that the beneficiary has been and would be at the top of an organizational hierarchy from which he derives high levels of discretionary authority does not necessarily establish eligibility for classification as a multinational managerial or executive within the meaning of section 101(a)(44) of the Act. The record does not include a detailed description of the beneficiary's past or proposed job duties. Therefore, the AAO cannot conclude that the beneficiary has spent and would continue to spend the majority of his time performing qualifying duties with a managerial or executive capacity. For this reason, the petition may not be approved.

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.