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Washington, DC 20536

U.S. Citizenship
and Immigration
Services

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MAR 11 2012

File:

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
 Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration
 and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

A handwritten signature in black ink, which appears to read 'Robert P. Wiemann'.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in December 1994. It provides courier and transportation services. 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 determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts the director erred in his decision.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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.

The petitioner stated the beneficiary's duties for the petitioner as:

Plans, develops and directs company policies, operations and practices of a courier and special delivery transportation company: Establishes the company's goals and policies and oversees that operations are being carried out in accordance with these goals and policies. Determines procedures and programs in scheduling drivers, establishing rates and determining vehicle requirements. Reviews, updates and analyzes policies, practices and procedures to ensure that the operations are profitable, at optimum efficiency and cost savings.

The petitioner also submitted an organizational chart showing the beneficiary as president. The chart identified a general manager and a secretary below the beneficiary's position on the chart. The chart included the positions of finance officer, dispatcher, and maintenance officer each reporting to the general manager; and, the organization's drivers reporting to the finance officer, dispatcher, and maintenance officer. The chart identified only the beneficiary and the general manager by name.

The petitioner's California Forms DE-6, Employer's Quarterly Wage and Tax Return, for the quarter ending March 31, 2002 showed eight individuals employed in February and March 2002. The June 30, 2002 California Form DE-6 listed a total of 16 employees but indicated that only 11 individuals were employed in May and June of the quarter. The California Form DE-6 showed that several individuals worked part-time.

The director observed that the petitioner failed to indicate on the I-140 Immigrant Petition for Alien Worker that it had filed two previous petitions seeking this beneficiary's classification as a manager or executive.¹ The director determined that the petitioner's organizational structure did not possess the organizational complexity to warrant an executive position, and that the petitioner's organization would necessarily require the beneficiary to assist in day-to-day non-qualifying duties because the organization only employed 16 individuals. The director concluded that the beneficiary would be, in essence, a first-line supervisor of non-professional and non-supervisory employees. Finally, the director determined that the petitioner had not established that the beneficiary would manage or direct a function of the petitioner but would primarily perform the petitioner's operational activities.

On appeal, counsel for the petitioner claims that neither the petitioner nor the beneficiary had knowledge of prior I-140 petitions being filed, noting that any previous petitions would have been submitted by a different attorney. Counsel asserts that in this matter, the director did not take into consideration the reasonable needs of the petitioner but instead looked strictly at its size when concluding that the beneficiary's assignment would not be in a managerial or executive capacity. Counsel also provides examples of the beneficiary's decision-making skills. Counsel states that the beneficiary planned the petitioner's expansion, decided whether to lease or purchase vehicles, established competitive rate structures, determined cost reducing areas in the business, determined advertising or marketing plans, negotiated loans, and reviewed the direction of the company to determine ways to improve the company's business. Counsel also indicates that the beneficiary maintains a flexible operation, reviewing, improving, and changing the company's services and expanding into new markets. Finally, counsel contends that the petitioner's general manager and finance officer positions require professionals with bachelor degrees.

¹ The previous petitions and supporting documents are included in this record of proceeding.

Counsel's claim that neither the petitioner nor the beneficiary had knowledge of previous I-140 petitions lacks credibility. The beneficiary signed both previously filed petitions on the petitioner's behalf. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel correctly points out that the director based his decision on the size of the petitioning enterprise and did not take into account the reasonable needs of the petitioner. Moreover, the director based his decision, in part, on an improper standard. The director's view that the beneficiary would necessarily assist in day-to-day non-qualifying duties because the petitioner only employed 16 individuals is undefined and unsupported. The director did not articulate a rational basis for finding the petitioner's staff or structure to be unreasonable. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act.

Despite the director's lack of an articulate and reasonable basis for his conclusion that the beneficiary's assignment would not be in a primarily managerial or executive capacity, the AAO cannot conclude that the totality of the record supports a managerial or executive classification for the beneficiary. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner provided a general description of the beneficiary's duties indicating that he developed, directed, established, reviewed, and updated the organization's goals, policies, operations, and programs. The description provided is not comprehensive and borrows liberally from the statutory definition of executive capacity. See 101(a)(44)(B)(ii). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

The lack of a detailed description necessarily required the director to scrutinize the petitioner's staffing, including its organizational chart and documents independently confirming the employment of those designated on the organizational chart. A thorough review of the petitioner's California Forms DE-6 and the petitioner's organizational chart reveal the petitioner's failure to establish that the beneficiary would perform primarily managerial or executive tasks. The organizational chart identifies only the beneficiary and the general manager by name. The general manager's name does not appear on the petitioner's California Forms DE-6. The California Forms DE-6 show that the petitioner only employed 11 individuals in May and June 2002, not 16 individuals. As noted above, several of the petitioner's employees worked part-time. The information in the record, when the director made his decision, was insufficient to substantiate that the beneficiary would perform the petitioner's managerial or executive services. The petitioner had not provided sufficient evidence to establish that it actually employed individuals in the positions of general manager, finance officer, dispatcher, and maintenance person, thus relieving the beneficiary from performing primarily non-qualifying duties.

Counsel's statement, on appeal, regarding decisions the beneficiary made appear to relate to decisions that any owner of a company would make. Many of the decisions are decisions necessary to continue the actual operation of the business. It is not clear from counsel's statement that the beneficiary implemented the

petitioner's plans and policies through the work of the petitioner's other employees. The record lacks evidence regarding the actual nature of the work the beneficiary's subordinates perform. The AAO can surmise that the petitioner employs some part-time and some full-time drivers. The AAO can speculate that the petitioner employs a dispatcher to coordinate the drivers. However, the petitioner has not provided sufficient evidence regarding the duties of the general manager, the finance officer, or the maintenance worker to conclude that these positions are professional, supervisory, managerial, or sufficiently relieve the beneficiary from performing primarily first-line supervisory duties. Furthermore, the AAO declines to speculate on or surmise the actual duties to be performed by the petitioner's employees. 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). The petitioner bears the burden of establishing eligibility.

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary directs the management or manages the organization or an essential function of the organization, rather than performs the petitioner's essential operational and administrative tasks. The petitioner has not provided evidence that the beneficiary supervises and controls other supervisory, professional, or managerial employees. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. See section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

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

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner claims that it is affiliated with the beneficiary's overseas employer. The petitioner asserts that the beneficiary's wife is the foreign entity's sole proprietor. The petitioner claims that the beneficiary's wife owns and controls 65 percent of the petitioner's outstanding shares and has been granted exclusive voting rights for all

the interest owned as community property with her husband. The petitioner provided a copy of share certificate number "1" showing that it had issued 350 shares of the 500 shares authorized to the beneficiary and his wife as community property.

The director determined that the petitioner had not provided sufficient evidence to demonstrate that it was affiliated with the foreign entity in this matter. On appeal, counsel for the petitioner asserts that the beneficiary's wife is the sole proprietor of the foreign entity and owns 70 percent of the petitioner's authorized stock. Counsel cites several unpublished decisions in support of his contention that stock certificates are sufficient to establish proof of stock ownership. Counsel contends that the director misapplied the term "affiliate" and has improperly concluded that the petitioner must submit evidence that the foreign "parent" company has purchased the interest in the petitioner. Counsel also observes that CIS has accepted the petitioner's affiliation with the overseas entity in past approvals of the beneficiary's I-1A intracompany transferee classification.

Counsel's assertions are not persuasive. The record contains the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return for the years 1997, 1999, 2000, and 2001. Each of the IRS Forms 1120 at Schedule L, Line 22 shows that the petitioner has not issued any common stock. The record thus, contains significant inconsistencies regarding the petitioner's actual ownership. 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, supra*.

In addition, although the petitioner has presented incorporation documents, it appears that the beneficiary and his wife treat the petitioner as a sole proprietorship. The petitioner's own evidence confirms that the beneficiary and his wife do not regard the petitioner as a legal entity separate and apart from its owner or owners. The AAO must conclude that the petitioner is a shell company created for the beneficiary and his family to transfer to the United States.

Further, in a previously submitted petition, the petitioner indicated that the beneficiary, not his wife, owned the overseas entity as a sole proprietorship. In addition to this inconsistency in the record, the claim by the beneficiary or his wife to be the owner and sole proprietor of the foreign business raises the question of whether the foreign business continues to do business abroad. The petitioner has submitted a number of invoices and payroll records for the foreign entity. However, the director in a previous decision questioned the authenticity of previously submitted invoices, noting that the invoices were non-sequential in date and number. The AAO takes note that the foreign entity's invoices provided with this petition are copies and appear sequential. However, evidence that the petitioner submits after CIS points out the deficiencies and inconsistencies in the petition cannot be considered independent and objective evidence. In this matter, with the inconsistencies previously observed, the AAO would require originals to substantiate that the foreign entity continues to do business as required at 8 C.F.R. § 204.5(j)(2). Also as the director observed in a previous decision, the minimal wages paid to the foreign workers and small income generated suggest that the foreign entity does not engage in systematic, continuous, and regular business.

Finally, counsel's citation to unpublished decisions carry little probative value and are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c). Moreover, counsel's reference to previously approved L-1A intracompany transferee petitions does not establish that the beneficiary's classification is approvable in this proceeding. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988).

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, that burden has not been met.

ORDER: The appeal is dismissed.