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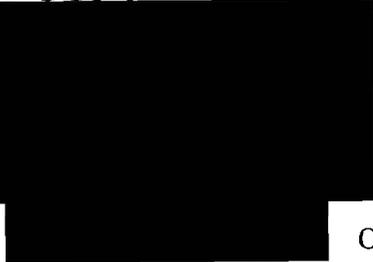


U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

MAR 21 2006

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IN RE:

Petitioner:

Beneficiary:



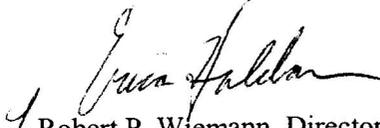
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Florida that is doing business as a broker of apparel and accessories. The petitioner seeks to employ the beneficiary as its operation manager.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director determined that the beneficiary would be performing the non-managerial and non-executive tasks of the petitioner's business rather than managing these tasks.

On appeal, counsel for the petitioner contends that the beneficiary would be supervising the petitioner's sales manager and therefore qualifies for the classification sought.

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 or 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, 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 issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

Counsel's response on appeal does not specifically address or overcome the director's finding that the beneficiary would be performing the non-managerial and non-executive tasks of the petitioner's business. Counsel, referencing the statutory requirements for a nonimmigrant intracompany transferee as opposed to those of the requested immigrant classification, states that the petitioner's "structure and activity" demonstrate that the beneficiary would supervise managerial personnel. As evidence of "managerial personnel," counsel notes the job duties to be performed by the petitioner's sales manager, an employee who counsel first identified on appeal.

Counsel's reliance on the purported employment of a new worker, who the petitioner has not demonstrated was employed at the time of filing, is misplaced and will not be considered herein. As the organizational chart submitted by the petitioner prior to the appeal does not identify the lower-level position of sales manager, it appears that counsel is attempting to overcome the director's finding that the beneficiary is personally performing tasks of the organization with new evidence that the company's purported sales manager is responsible for the petitioner's sales. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Here, counsel has not specially addressed the director's findings with evidence that existed at the time of filing. Nor has counsel provided additional evidence on appeal addressing the beneficiary's specific employment capacity in the United States. Rather, counsel merely restates the statutory definition of "managerial capacity," and notes that the statute permits the employment of an individual as a function manager. Counsel, however, has not demonstrated how the director erred in her analysis of these concepts with regard to the beneficiary's employment in the United States. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

The AAO notes that with regard to the documentary evidence previously submitted by the petitioner, several inconsistencies exist that would prevent a finding that the beneficiary would be employed by the United States entity in a primarily qualifying capacity. Specifically, the petitioner did not clarify which workers were employed by the petitioner at the time of filing. While the petitioner noted on Form I-140 a staff of three workers, its most recent quarterly wage report, ending June 30, 2004, identified two employees, the beneficiary and an employee of the purchases department. Two additional employees are identified on the organizational chart, yet their employment has not been confirmed with wage reports or payroll statements. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, based on the lack of evidence regarding the petitioner's staffing levels, the job description offered for the beneficiary is not credible. The petitioner stated in its August 11, 2004 letter submitted with the immigrant petition that the beneficiary would instruct lower-level management, supervise employment activities, and function at a senior level in the United States organization. As the petitioner has not accounted for the employment of lower-level management it is implausible that the beneficiary would be supervising and functioning at a senior level position. Furthermore, as noted by the petitioner in its July 16, 2004 letter, the beneficiary would represent the company to clients, negotiate contracts, and communicate with the petitioner's suppliers. Based on these representations, the beneficiary is clearly responsible for personally performing non-qualifying operational functions of the company. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

As discussed above, counsel failed to provide additional evidence on appeal demonstrating that at the time of filing, the beneficiary would be employed in a primarily managerial or executive capacity. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Additionally, the record as presently constituted demonstrates that the beneficiary would not be primarily employed as a manager or executive, but rather, would be performing non-qualifying tasks of the petitioner's business essential to its sales. As a result, the petitioner has failed to demonstrate that the beneficiary would be employed in a primarily qualifying capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner indicated in its July 16, 2004 letter that the beneficiary was employed overseas as the company's operation manager, the same position requested herein. The petitioner, however, has not offered a description of the job duties performed by the beneficiary with respect to the foreign corporation. The sole job description of an "operation manager" was provided in relation to the beneficiary's role in the United States company. Additionally, the organization chart for the foreign company fails to identify the beneficiary's former position or the employees supervised by the beneficiary. The beneficiary's specific role in the foreign company, as well as his position within the company's organizational hierarchy, are therefore unclear. 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)). Absent a detailed job description, the AAO cannot conclude that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

An additional issue is whether the foreign corporation has continued doing business abroad following the beneficiary's transfer to the United States. The term "multinational" dictates that the petitioner and a qualifying entity must be doing business "in two or more countries, one of which is the United States." *See* 8 C.F.R. § 204.5(j)(2)(A). While the petitioner presented documentary evidence of the foreign entity's business activity during 2003, it is questionable whether the foreign entity has continued its operations during 2004 and at the time of filing on September 3, 2004. Of particular importance is the fact that the foreign entity's general manager, who is identified as occupying the highest position in the company over the remaining three employees, is the beneficiary's wife. According to beneficiary's accompanying Form I-485, Application to Register Permanent Residence or Adjust Status, his wife is requesting that her status also be adjusted for permanent residence in the United States. In light of the purported request for permanent residency, the petitioner has not accounted for the performance of the general manager's job duties in the foreign entity. This information is essential to demonstrating that the foreign entity would continue to do business abroad, particularly following the departure of the company's only managerial or supervisory employee. Doubt cast on any aspect of the petitioner's proof may, of course, 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. at 591. The petition will be denied for this additional reason.

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

The AAO notes that at least two L-1A nonimmigrant petitions have previously been approved for the benefit of the beneficiary. 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, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. See 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing L-1 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 at 29-30 (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. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. See e.g. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 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 at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, 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 material 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). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001). In the instant matter, the director was justified in departing from the prior nonimmigrant approvals and denying the instant immigrant petition.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.