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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 01 211 56475 Office: CALIFORNIA SERVICE CENTER Date: [redacted] 2004

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:

[redacted]

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

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

The petitioner was incorporated in 1995 in the Territory of Guam and is claimed to be an affiliate of Matsumoto TV Shokai, Inc., located in Japan. The petitioner is a scuba dive shop, which provides tours, instruction, and rents and retails scuba diving equipment. It seeks to employ the beneficiary as its assistant 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 had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel submits a brief refuting the director's findings. Additional evidence is submitted.

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 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 has been and will be performing managerial or executive duties.

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 director previously restated the beneficiary's duties abroad and in the United States, verbatim, as they were provided by the petitioner in the initial filing. Therefore, the AAO does not need to repeat those descriptions in this decision.

On November 15, 2001 the director instructed the petitioner to submit organizational charts for both the foreign and U.S. entities. The petitioner was asked to identify the beneficiary's position in each organization, to provide a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and to submit a list of all of the employees under the beneficiary's supervision. The petitioner was also asked to provide brief job descriptions, education levels, and salaries/wages of all of the beneficiary's subordinates, as well as state quarterly wage reports for all employees for the last four quarters.

The petitioner provided CIS with both organizational charts. The foreign company's chart indicates that the company is headed by a president who supervises an accounting manager, an accounting director, an executive director, and a vice president. The beneficiary is shown as being one of four managers supervised by the executive director. Seven employees are named under the beneficiary's supervision. In a separate statement the petitioner states that the beneficiary's subordinates include an assistant manager, a store supervisor, and five sales representatives.

The petitioner's organizational chart shows that the general manager is at the top of the hierarchy. The beneficiary, in the position of assistant general manager, is shown to be the general manager's immediate subordinate. The beneficiary's immediate subordinates include an operations manager, a sales manager, and an accounting manager, each of whom supervises one other employee with a supervisory title.

The additional job descriptions for the beneficiary's positions abroad and in the United States, which the petitioner provided in response to the director's request, were restated by the director in the denial and therefore need not be repeated in the instant proceeding. The petitioner also submitted three of its quarterly wage reports and a number of Forms 1099, Miscellaneous Income statements for the year 2000. However, the petitioner failed to provide job descriptions or education levels for the beneficiary's subordinates abroad and in the United States. It is noted that failure to submit requested evidence which precludes a material line of inquiry, shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, CIS will not consider evidence submitted on appeal for any purpose. Rather, CIS will adjudicate the appeal based on the record of proceedings before the director. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit evidence requested in director's notice, any information submitted on appeal in regards to the job descriptions of the beneficiary's subordinates will not be considered.

The director denied the petition, noting that the petitioner failed to provide job descriptions of the beneficiary's subordinates. The director concluded that the petitioner failed to submit sufficient evidence to establish that the beneficiary's duties had been and would be within a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary managed a function, as well as personnel during his employment abroad. Counsel states that the beneficiary was "entirely responsible . . . for the function of selling and servicing electronic equipment, which was the essential function of the enterprise" and claims that the beneficiary maintained discretionary authority over store policies, budget, and personnel on a daily basis. In the response to the request for additional evidence, the petitioner stated that 30% of the beneficiary's time was devoted directly to managing personnel. However, the petitioner did not provide any information regarding the education levels or job duties of the beneficiary's subordinates; therefore, the AAO cannot conclude that the beneficiary managed subordinates who are managerial or professional. Nevertheless, where a petitioner can establish that a majority of the beneficiary's time (70% in the instant case) was spent managing the foreign entity's essential function, the possibility that 30% of the beneficiary's time was spent managing non-professional personnel would not preclude the beneficiary from qualifying as a multinational manager or executive.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case, the petitioner was asked to be specific about the beneficiary's duties and to describe what the beneficiary did to execute those duties on a daily basis. However, the petitioner's description is brief and states only that 40% of the beneficiary's time was spent creating and implementing a business plan and that another 30% of his time was spent "exercis[ing] discretionary authority in decision making, including administering the store's operating budget and executing contracts with suppliers." This description of duties is too vague and general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. Therefore, it cannot be concluded that the beneficiary's position abroad was primarily managerial or executive. 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).

In regard to the beneficiary's position with the U.S. entity, the petitioner stated that only 25% of the beneficiary's time is allocated to personnel matters; therefore the beneficiary's primary role can be best described as that of function manager. As previously stated, CIS will first look to the description of the beneficiary's duties to determine whether the beneficiary is primarily functioning in a managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(5). In the instant case, the petitioner stated that 50% of the beneficiary's time is allocated to devising and implementing policies and procedures and another 25% of his time is allocated to developing and presenting proposals to the general manager. This description is also vague and too broad to clarify what namely the beneficiary does on a daily basis. While the function manager is clearly meant to manage or oversee an essential function, he is not supposed to actually perform that function. Based on the brief description of the beneficiary's duties, it cannot be determined that he would refrain from performing the essential function. In fact, creating and making proposals suggests that at least 25% of the beneficiary's time would be spent performing, rather than managing the essential function. That 25% coupled with the 25% of time devoted to managing non-professional personnel suggests that at least half of the beneficiary's time is spent on non-qualifying tasks. Therefore, it cannot be concluded that the beneficiary's duties are *primarily* managerial or executive. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel asserts on appeal that the beneficiary's current position involves supervising three subordinate managers. However, as previously stated, the petitioner failed to provide any job descriptions for the beneficiary's subordinates. CIS cannot conclude, merely based on job titles, that the duties of the beneficiary's subordinates are, indeed, managerial, as the petitioner claims. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, counsel claims that the director abused his discretion by denying the instant petition and cites precedent case law, which prohibits the director from abusing his discretion. However, such case law is inapplicable in the instant case as counsel has yet to establish that an abuse of discretion has occurred. The fact that the director has denied the immigrant petition after granting a prior non-immigrant petition is not *prima facie* evidence that an abuse of discretion has occurred. The director's decision does not indicate whether he reviewed the prior approval of the nonimmigrant petition referred to by counsel. Nor does the record of proceeding contain copies of the visa petition that is claimed to have been previously approved. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are

contained in the current record, the approval would constitute clear and gross error on the part of the director. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. *See*, e.g. *Matter of Church Scientology International* 19 I&N Dec. at 597. 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).

The AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Contrary to counsel's apparent misconception, the director is not required to interpret the reasoning of a prior CIS decision that was part of a different proceeding.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a managerial or executive capacity.

Beyond the decision of the director, the record lacks sufficient evidence to determine that the petitioning enterprise has a qualifying relationship with the claimed foreign affiliate. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International* 19 I&N Dec. at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International* 19 I&N Dec. at 595.

In the instant case, the petitioner has provided an incorporation certificate, the petitioner's articles of incorporation, and a list of owners of the petitioner's stock, as well as the number of their respective shares. However the petitioner has not established who actually contributed the funds to purchase the majority shares of the petitioning enterprise. As previously noted, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. at 190. It is noted that 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). Therefore, based on the additional grounds discussed herein this petition cannot be approved.

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.