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Washington, DC 20536

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: WAC 02 285 53217 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2004

IN RE: Petitioner: [redacted]
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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 limited liability company organized in the State of California in March 1997. It provides language services. It seeks to employ the beneficiary as its managing 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 determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the beneficiary's duties are managerial and executive.

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 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 initially indicated that the beneficiary's responsibilities included:

Controlling and supervising the work of the staff, hiring and firing personnel; marketing and promotion of the program, negotiating with the agencies; developing the language programs; review[ing] financial reports.

The petitioner added that the beneficiary:

> Provides and supervises the students' placement at other colleges and universities and evaluates the results of the program. Homestay placement is one of the parts of this service. She has been [sic] already established and implemented company policies, developed and coordinated activities of the business, and developed long range goals and objectives for [the petitioner.]
>
> Will continue to review financial reports and administer policies to increase profits of our organization. She will be responsible in continuing her present duties and for developing marketing strategy to employment enrollment for the Center.

The petitioner also indicated that the beneficiary supervised four employees in the positions of program coordinator, ESL (English as a Second Language) instructor, homestay/activity coordinator, and accountant/payroll. The petitioner also submitted its organizational chart showing individuals in each of these positions. The petitioner provided copies of checks showing that it had paid $350 to its accountant in 2000 and $50 to its accountant in 2002.

The director requested additional evidence including:

> The petitioner's organizational chart describing its managerial hierarchy and staffing levels as of the date of filing the petition, including a list of all employees under the beneficiary's supervision by name, job title, brief description of job duties, educational level, and annual salary;
>
> A more detailed description of the beneficiary's duties in the United States; and,
>
> The petitioner's California Forms DE-6, Quarterly Wage Reports for the third and fourth quarters of 2002.

In response, the petitioner provided its organizational chart showing the beneficiary as managing director, a program coordinator, an English/Russian language instructor, a housing/activity coordinator, and an accountant. The petitioner also provided an example of the beneficiary's typical daily schedule. The schedule showed that the beneficiary checked class schedules, studied materials, answered phone calls, discussed class and students' matters with instructors, prepared the weekly schedule, ordered textbooks, checked on accounts receivable and payable, discussed the language program with potential clients, updated information for the brochure and web site publications, checked test results, adjusted the syllabus, reviewed students' progress, attended classes to evaluate instructors, wrote the Russian language syllabus and textbook for beginners, prepared Russian culture information, performed translation/interpretation work, made international phone calls to clients.

The petitioner also provided its California Form DE-6 for the third quarter 2002, the quarter in which the petition was filed. The Form DE-6 showed that the beneficiary was employed full-time and that the individuals in the positions of program coordinator, housing/activity coordinator, and instructor were

employed part-time. The petitioner's California Form DE-6 for the fourth quarter of 2002 showed that the beneficiary was the sole employee for the quarter.

The director determined that the description of the beneficiary's job duties did not establish that the beneficiary would be primarily directing the management of the organization, establishing the company's policies and goals, exercising wide latitude in discretionary decision-making and maintaining autonomy over the petitioner's operations. The director observed that the petitioner's California Form DE-6 for the quarter in which the petition was filed showed that the beneficiary was the only full-time employee. The director determined that it was reasonable to believe based on the petitioner's organizational structure that the beneficiary would be assisting with the organization's day-to-day non-supervisory duties. The director also, unnecessarily, commented on the petitioner's failure to establish that the beneficiary's subordinate employees held professional positions. Finally, the director determined that the petitioner had not established that the beneficiary would be primarily managing a function, rather than performing routine operational activities.

On appeal, counsel for the petitioner notes that the petitioner had not been represented by counsel in the previous proceedings and seeks to submit the detailed information that accurately reflects the beneficiary's duties in her capacity as managing director. Counsel also asserts that, in light of the previous five approvals classifying the beneficiary as the petitioner's manager or executive, the denial of this petition is an abuse of discretion. Counsel also claims that the denial is arbitrary, as the director did not elucidate why the previous approvals were erroneous and failed to articulate a rational connection between the facts found and the decision made. Counsel submits a lengthy discussion on the benefits of language institutes and a broad description of the beneficiary's duties broken down into small increments of the beneficiary's workweek.

Counsel's assertions are not persuasive. First, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The description of the beneficiary's duties submitted by counsel on appeal does not provide further detail and does not clarify the beneficiary's actual daily duties.

Second, counsel's iteration of the beneficiary's job duties borrows liberally from elements of the definition of executive capacity without providing concrete details of the beneficiary's actual duties. The petitioner's initial description of the beneficiary's duties and the description provided in response to the director's request for evidence provide a clearer understanding of the beneficiary's actual duties.

Third, the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, it must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, Citizenship and Immigration Services (CIS) is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). As the director properly reviewed the record before him, it is unnecessary for the director to provide the petitioner with an explanation as to why the prior approvals were erroneous.

However for clarity's sake, if the previous nonimmigrant petitions were approved based on the same evidence in the current record, the approvals would constitute clear and gross error on the part of the director. Moreover, 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).

Further, 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).

The director correctly determined that the record in this matter supports the conclusion that the beneficiary is performing the petitioner's day-to-day operational tasks. 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).

When 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. § 214.2(l)(3)(ii). 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) (Emphasis in original).

The beneficiary as the petitioner's sole full-time employee will necessarily be performing the petitioner's day-to-day operational tasks. The conclusion in this regard is substantiated by the petitioner's example of the beneficiary's typical day. The beneficiary checks class schedules, prepares the weekly schedule, orders textbooks, writes and adjusts the syllabus, checks test results and reviews student's progress, updates information in brochures and on the website, provides translations, and checks on accounts payable and receivable. This description shows the beneficiary performing primarily non-qualifying duties.

Furthermore, the petitioner's indication that the beneficiary meets with and evaluates instructors is not substantiated in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In the quarter in which the petition was filed, the petitioner paid $530 to the individual identified as the petitioner's instructor. In this same quarter, the petitioner paid only $180 to the individual identified as the housing/activity coordinator, and $1,056 to the program coordinator. The petitioner has not established that it has a sufficient number of employees to relieve the beneficiary from performing primarily the organization's operational tasks. The record also contains letters and emails between the beneficiary and third party individuals indicating that the beneficiary provides consulting services, in addition to providing translating services, to other businesses. The AAO cannot conclude that these duties are primarily managerial or executive duties.

Finally, the record does not support a determination that the beneficiary is a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Again, if the beneficiary is primarily performing the operational and administrative tasks of the organization, the beneficiary is not considered to be employed in a managerial or executive capacity. *See Matter of Church Scientology International, supra.* In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary manages and directs the organization rather than performing the essential operational and administrative tasks. The record demonstrates that the beneficiary primarily performs the specified responsibilities and spends a majority of her time on day-to-day functions.

Beyond the decision of the director, the petitioner has not provided sufficient evidence to establish a qualifying relationship between the petitioner and the foreign entity. The petitioner claims that it is affiliated with the foreign entity, in that the beneficiary and one other individual own and control the United States entity and the foreign entity. However, the record contains contradictory evidence of the foreign entity's ownership. The foreign entity was established as a limited partnership in 1992. Initially three individuals and a "contact society" held shares in the foreign entity in equal percentages. In 1994, the share percentages were amended. The beneficiary is shown holding 50 percent in the foreign entity along with two individuals holding the remaining 50 percent in equal shares. In 1996, the percentages revert to the initial contributions. 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,* 19 I&N Dec. 582, 591-92 (BIA 1988). Without clarification of the foreign entity's ownership and documentary evidence supporting the various transfers, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer.

For this additional reason, the petition will not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.