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

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 09 2005

EAC 03 141 51033

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: SELF-REPRESENTED

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

The petitioner is a New Jersey corporation that provides software products and services. It seeks to employ the beneficiary as its vice president (marketing and personnel). 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 failed to establish that the beneficiary had been employed abroad in a managerial or executive capacity during the requisite time period and denied the petition.

On appeal, the petitioner disputes the director's conclusions and submits a statement in support thereof.

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 issue in this proceeding is whether the beneficiary was employed abroad in a primarily managerial or executive capacity for the required time period.

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 petition, the petitioner submitted statements dated March 14, 2003 describing the beneficiary's current and proposed employment in the United States as well as his past employment in the United States under a different visa classification. The petitioner also briefly mentioned the beneficiary's "managerial experience in an executive capacity while working with a Multinational Bank of India" but did not describe the beneficiary's duties or address the issue of a qualifying relationship between the petitioner and the Multinational Bank of India.

Accordingly, the director issued a request for additional evidence dated July 29, 2003 focusing primarily on the petitioner's failure to provide evidence of the beneficiary's qualifying employment abroad during the relevant time period. The petitioner was instructed to describe the beneficiary's overseas job duties and to provide the qualifying foreign employer's organizational chart. The director also requested that the petitioner

submit evidence of a qualifying relationship between the beneficiary's U.S. employer and the foreign employer where the beneficiary claims to have held a managerial or executive position.

Although the petitioner responded with a statement dated September 12, 2003, the response did not include the requested organizational chart. In regard to the beneficiary's job overseas, the petitioner stated that the beneficiary was employed as an executive director at American Innovative Technology Ltd. in India from November 1999 to November 2000. Based on the similarity in the name of the foreign entity and the U.S. petitioner, the petitioner apparently implied that a qualifying relationship exists between the two entities. However, the petitioner did not provide any evidence of the alleged qualifying relationship, such as a copy of the petitioner's approved blanket L-1 petition, nor any specifics explaining how the two companies are affiliated. The petitioner also failed to provide any information as to the beneficiary's job duties with the alleged affiliate abroad. The only information regarding the beneficiary's job duties abroad was in regard to his employment with the State Bank of Patiala in India. However, contrary to the petitioner's inference, the fact that this banking institution is a multinational corporation is not enough to deem it a qualifying organization. In order to be deemed a qualifying organization, the U.S. petitioner must be "the same employer or a subsidiary or affiliate" of the foreign entity. 8 C.F.R. § 204.5(j)(3)(i)(C). In the instant case, the petitioner neither makes such a claim, nor does it provide any evidence to establish that the State Bank of Patiala, where the beneficiary was purportedly employed in a managerial or executive capacity, is an affiliate or subsidiary of the U.S. entity or vice versa. Therefore, the beneficiary's job duties with the non-qualifying organization need not be considered in this matter.

On March 31, 2004, the director denied the petition concluding that the petitioner failed to submit evidence that the beneficiary was employed abroad for a qualifying organization in a managerial or executive position for the relevant time period as prescribed in 8 C.F.R. §§ 204.5(j)(3)(i)(B) and (C).

On appeal, the petitioner asserts that the beneficiary was employed abroad as an executive director and was responsible for managing 17 employees. Based on the petitioner's prior submissions, this position was with the State Bank of Patiala. As stated previously, the petitioner provided absolutely no evidence to establish that the organization where the beneficiary held the qualifying position has had or currently has a qualifying relationship with the U.S. petitioner. Therefore, regardless of the qualifying nature of the beneficiary's job with the State Bank of Patiala, the beneficiary's position with that organization cannot be deemed qualifying. Furthermore, while there may be a qualifying relationship between the U.S. petitioner and American Innovative Technology Ltd., the petitioner submitted no documentation to establish that the beneficiary was actually employed by this organization overseas or any information discussing the beneficiary's job duties with the alleged employer. 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).

Moreover, it should be noted that the record indicates the beneficiary has been present in the United States in H-1B and L-1A status from 1998 through the present. This evidence directly contradicts the petitioner's statement that he was employed by the foreign company in India from November 1999 to November 2000. While it is possible that the beneficiary may have returned to India during that time, a visa stamp in his passport indicates that he reentered the U.S. in H-1B status on October 5, 2000 and was admitted until June 19, 2003 based on a "Notice of Action," which appears to have been an H-1B extension. Therefore, absent evidence to the contrary, it appears that the beneficiary may have been working in the United States during the period of time the petitioner claims he was employed in India. 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).

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 matter, the petitioner has failed to provide any information regarding the beneficiary's position with the petitioner's alleged foreign affiliate. 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). Based on the evidence of record, the AAO cannot affirmatively conclude that the beneficiary was employed abroad by a qualifying entity or that his overseas employment was of a qualifying nature. For this reason, this petition cannot be approved.

Beyond the director's decision, the petitioner failed to provide sufficient information to establish that the beneficiary's proposed position in the United States would be within a qualifying managerial or executive capacity.

In addition, while the director's decision does not indicate whether he reviewed the approval of the beneficiary's current L-1A petition (EAC-03-081-53999), valid until January 30, 2006, if it was approved based on the same deficient evidence contained in the current record of the immigrant petition, 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).

Furthermore, 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).

Even if the L-1A petition was properly approved, however, absent evidence of time spent abroad, it appears it was given a validity period of approximately seven months longer than permitted. According to 8 C.F.R. § 214.2(l)(12)(i), the maximum period allowed in H and/or L status is seven years. The submitted pages of the beneficiary's passport indicate that the beneficiary first entered the United States in H-1B status on June 29, 1998. Therefore, it appears that the L-1 petition, if properly approved, should only have been valid through June 28, 2005, not January 30, 2006 and, thus, the director may want to not only review the L-1A petition for possible revocation but also this additional issue to ensure the beneficiary is not permitted to remain in the United States in L-1A status beyond that permitted by the regulations.

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 ground discussed in the above paragraph, 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.