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U.S. Citizenship and Immigration Services

**PUBLIC COPY**

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 01 2006

SRC 06 022 51249

IN RE: Petitioner:
Beneficiary: [redacted]

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 BENEFICIARY:

[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, Chief
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. 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 Florida. It is engaged in the business of selling automobiles and seeks to employ the beneficiary as its president/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 beneficiary would not be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel[1] disputes the director's findings and submits a brief in support of his arguments.

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.

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[1] While the beneficiary does appear to have been an agent for the petitioner, there is no evidence in the record that the beneficiary authorized counsel to represent or otherwise enter his appearance on behalf of the petitioner in this proceeding. Specifically, the only signed Notice of Entry of Appearance as Attorney or Representative (Form G-28) submitted in this matter contains no reference to the petitioner. The signed Form G-28, dated October 19, 2005, only authorizes counsel to enter his appearance on behalf of the beneficiary, not the petitioner. As the beneficiary of a visa petition is not a recognized party in a proceeding, the attorney for the beneficiary may not be recognized. 8 C.F.R. § 103.2(a)(3); 8 C.F.R. § 103.2(a)(1)(iii)(B). Accordingly, while the assertions made by counsel may be addressed, they will not be given any weight in this proceeding.

The issue in this proceeding is whether the petitioner would employ the beneficiary 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.

In support of the petition, the petitioner provided an organizational chart depicting the beneficiary at the top of the hierarchy. The chart also included a vice president, branch manager, account manager/sales representative, and accountant as subordinates of the beneficiary. A brief position description was provided for each employee.

On November 3, 2005, the director issued a notice of intent to deny (NOID) the petitioner's Form I-140. The director indicated that the grounds for the intended denial may be overcome with the submission of certain additional evidence, including a detailed description of the beneficiary's day-to-day duties and the percentage of time that would be allotted to each duty. The petitioner was also instructed to provide evidence of miscellaneous income paid to contract employees and to provide descriptions of each employee's daily duties and educational level.

In response, the petitioner provided W-2 statements two miscellaneous income statements for 2003 as well as a 2003 fourth quarter wage statement identifying the two employees for whom the W-2 statements were submitted. The petitioner also resubmitted a previously provided job description for the beneficiary adding percentage breakdowns per the director's request in the NOID. The following was the list of duties provided:

- The [p]resident is primarily required to oversee the day[-]to[-]day operations of the two locations of the company. This involves regular visits to see to activities of staff and deal with clients that are being sought for major accounts. Approx 15% of time spent.

- Ensure that customers are seen promptly and dealt with in a manner that projects a good image for the company and bring satisfaction to the customers within the bounds of the company's rules and regulations. Approx 10% of time spent.

- Deal with budgetary allowances and all approving of related expenses on the company's behalf. The signing of checks to deal with company purchases and the payment of its' [sic] expenses. Approx 10% of time spent.

- Get the company registered with the relevant auction houses for the purpose of buying inventory for resale and special orders. The president does the direct purchasing of vehicles for the company's inventory. This includes weekly visits of auctions, wholesale dealers and all other relevant authorities associated with the sourcing of inventory for the company. Approx 20% of time spent.

- Planning and logistics of orders placed by our clients in the various [i]sland's [sic] and local market's [sic]. This specifically involves the liaising with [m]anufacturers and suppliers of [m]otor [v]ehicles for purposes of ordering of inventory and special orders from our Japan office and the liaising with our major clients in the region. Approx 15% of time spent.

- Ensuring the proper direction of the staff with the view that, proper billing and invoicing procedures are followed. The monitoring and double checking of sales, ensuring that all related tax returns are done and ensuring there [sic] filing on time. Approx 5% of time spent.

- Monitoring of all bank accounts balances information prepared by our accountant, and liaison with bank officers in ensuring the smooth running of the company's accounts. Approx 5% of time spent.

- Bimonthly sales meetings are held with the sales and admin[istrative] staff representatives to ensure focus and clarification of any issues. Approx 2.5% of time spent.

- [D]etermination of when bills of ladings and original titles are released to clients that are on credit terms. The monitoring of these credit limits, and the determination and implementation of collection procedures. Approx 5% of time spent.

- The vetting and approval of all loan applications submitted for our in[-]house financing program for the vehicles for sale locally. The week[-]to[-]week follow[-]up of the clients that have a loan balance with the company. Approx 5% of time spent.

- To chart and implement [the petitioner]'s business plan in Florida. In summary[,] this involves the setting up of major retail location in Broward County with hopes of expansion over the next several years to Palm beach and Dade County's [sic]. Approx 5% of time spent.

- Monitoring of all investments in real estate companies . . . . Approx 2.5% of time spent.

On December 16, 2005, the director denied the petition discussing the lack of evidence of salaries and wages paid by the petitioner in 2004. While the director's observations may be factually correct, the AAO notes that the Form I-140 that is the subject in the present matter was filed in October of 2005. Therefore, evidence of salaries and wages paid in 2004 does not have probative value in determining the petitioner's organizational structure during the relevant time period. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As such, the director's comments with regard to a time period prior the filing of the Form I-140 are hereby withdrawn.

Nevertheless, the director properly concluded that the petitioner failed to provide sufficient evidence to support the organizational hierarchy illustrated in the petitioner's organizational chart. The director also appropriately noted the lack of evidence of contract laborers to perform the non-managerial and non-executive duties.

On appeal, counsel discusses the personnel changes the petitioner has experienced since 2003 and claims that the petitioner has four full-time employees, including the beneficiary as president, his wife as vice president, a branch manager, and an accountant. Counsel further states that the petitioner has transitioned from the use of freelance auto detailers to contracting a company to provide the auto detailers. However, 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)). 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).

In the instant matter, the petitioner has not submitted documentary evidence to establish whom it was paying for services and the types of services such individuals provided. Counsel challenges the director's discussion of the size of the petitioner's support staff, citing two of the AAO's previously issued decisions. However, neither of the decisions was published and, therefore cannot be treated as binding precedent case law. *See*

8 C.F.R. § 103.3(c). Furthermore, while counsel is correct in stating that the size of the petitioner's support staff cannot be the sole consideration in determining the petitioner's eligibility to classify the beneficiary as a multinational manager or executive, this factor is relevant and should be considered for the purpose of determining who would perform the petitioner's daily operational tasks. The petitioner has admitted its need, at the very least, for auto detailers and sales support. Moreover, several of the beneficiary's duties directly refer to the oversight of sales and administrative employees, therefore implying the existence of employees who purportedly perform these functions. The petitioner cannot claim to employ these individuals, either directly or on a contract basis, without providing some documentation to corroborate it claims.

Additionally, the breakdown of duties provided by the petitioner in response to the NOID does not establish that the beneficiary would primarily perform in a qualifying managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(5). More specifically, the beneficiary's proposed list of duties includes customer service, purchasing the petitioner's automobile inventory, directly dealing with auto manufacturers and suppliers, and meeting or communicating with various clients. Based on the percentage breakdowns that accompanied the list of duties, approximately 60% of the beneficiary's time would be spent performing the petitioner's daily operational tasks. As noted in the director's decision, 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The record fails to establish that the petitioner has a support staff to relieve the beneficiary from having to primarily perform operational nonqualifying tasks. Nor does the record establish that the petitioner has reached a stage of development wherein the beneficiary's primary duties would be within a qualifying capacity. While the AAO does not dispute the beneficiary's overall discretionary authority with regard to the petitioner's business activities, the evidence furnished does not establish that a majority of the beneficiary's tasks would be managerial or executive as defined above. For this reason, the petition may not be approved.

Beyond the director's decision, the record lacks sufficient evidence to establish that the petitioner has met the provisions discussed in 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the beneficiary must have been employed by the qualifying foreign entity in a qualifying capacity for at least one year prior to entering the United States as a nonimmigrant. While the petitioner discussed the beneficiary's position with the foreign entity, the description is vague and fails to provide an understanding of the duties performed by the beneficiary on a daily basis. 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).

Additionally, 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and

> continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, while clearly instructed to provide the beneficiary's proffered wage in Part 6, Item 9 of the Form I-140, the petitioner failed to provide this relevant information. While the petitioner has indicated that the foreign entity provides a portion of the beneficiary's salary, the record contains no documentation to establish how much, if any, of the beneficiary's salary will be provided by the petitioner or if the petitioner will be able to compensate the beneficiary's wages at all. As previously stated, 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. at 165.

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). Accordingly, based on the additional grounds for ineligibility discussed above, this petition cannot be approved.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, 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, 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 immigrant 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 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).

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd,* 345 F.3d 683.

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. The petitioner has not sustained that burden.

**ORDER**: The appeal is dismissed.