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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 05 2007

SRC 05 099 52072

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 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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was ultimately dismissed. The matter is now before the AAO on motion to reopen and reconsider. The petitioner's motion to reopen will be dismissed due to the petitioner's failure to meet the requirements of 8 C.F.R. § 103.5(a)(2).[1] The motion to reconsider will be granted and counsel's arguments will be considered in a full discussion below. However, the underlying decision dismissing the appeal will be affirmed.

The petitioner is a Texas corporation engaged in the operation of a gas and convenience store and a laundromat. It seeks to employ the beneficiary as its president. 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.

On August 8, 2005, the director denied the petition. His decision was based on two grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

In the dismissal of the appeal, the AAO affirmed the director's grounds for denial and added another ground that had not been cited by the director. The AAO concluded that the petitioner failed to provide sufficient information to establish that the beneficiary was employed abroad in a managerial or executive capacity.

On motion, counsel submits a brief addressing all three of the issues cited by the AAO.

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.

[1] The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. The petitioner in the present matter does not present new facts supported by the required documentation. Therefore, reopening the matter on motion is not warranted.

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 first two issues in this proceeding require a discussion of the beneficiary's prospective duties as well as those he performed during his employment abroad.

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 its dismissal of the petitioner's appeal, the AAO cited the documentation submitted by the petitioner with regard to the beneficiary's proposed duties in the United States and concluded that the petitioner failed to provide a detailed description disclosing the actual duties to be performed by the beneficiary in his proposed position and did not provide sufficient evidence documenting whom it employed at the time the petition was filed.

The AAO also determined, beyond the director's decision, that the petitioner failed to provide an adequate description of the beneficiary's previously performed duties. The AAO noted that the petitioner's description of the beneficiary's employment abroad was the same vague and insufficient outline of job responsibilities as the one submitted to describe the beneficiary's proposed position in the United States. The AAO also noted that the petitioner failed to provide documentation indicating who was performing the foreign entity's non-qualifying operational tasks.

On motion, counsel contends that the AAO's analysis lacks any consideration for the petitioner's claimed financial growth. Counsel further distinguishes the petitioner in the instant matter from the petitioner in the case cited in the AAO's prior decision, claiming that *Fedin Bros. Co., Ltd. v. Sava,* 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990), "is premised on the absence of subordinates." Counsel's arguments, however, lack merit. With regard to the first assertion, there is no statute, regulation, or case law precedent that suggests a petitioner's financial growth is an accurate indicator of whether a beneficiary primarily performs or will perform duties of a qualifying nature in the future. Moreover, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, as stated in the AAO's prior decision, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The importance of a detailed description of the beneficiary's proposed job duties is reaffirmed in the New York district court case of *Fedin Bros. Co., Ltd. v. Sava.* 724 F. Supp. 1103. As such, counsel's second assertion regarding the AAO's reference to the precedent case is unfounded and ignores a significant portion of the court's finding. *Id.*

Additionally, counsel states that the *Fedin Bros.* case does not apply to the fact pattern in the instant matter because unlike the petitioner in the cited case, the petitioner here does not lack a subordinate staff to perform the necessary operational tasks. However, the AAO has already concluded that the petitioner failed to submit adequate documentation to establish who was actually employed at the time of the filing of the Form I-140. Counsel's unsupported assertions to the contrary are insufficient to overcome the AAO's detailed analysis, which is premised on the petitioner's own submissions. *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).

Counsel goes on to dissect the AAO's discussion of a function manager versus a personnel manager, suggesting that the AAO erred in its implication that the two types of management are mutually exclusive. However, counsel's criticism overlooks the key element in establishing whether the beneficiary would be

employed in a managerial capacity. Regardless of whether the beneficiary would oversee a subordinate staff or an essential function, the petitioner must submit a detailed description of the beneficiary's proposed job duties. In the instant matter, the AAO has determined that the petitioner did not provide such a description and specifically pointed to the deficiencies in the description that was submitted. Instead of assisting the petitioner by supplementing the record with a more detailed description, counsel places undue focus on his interpretation of the AAO's statements regarding the term function manager. Contrary to counsel's assessment, the AAO did not state that a function manager *cannot* manage employees; rather, the AAO properly notes that 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). The term "function manager" was designed to accommodate a different type of manager—one that does not necessarily supervise the employees, but rather monitors the various aspects of the function as it is performed by others and relies on these individuals to actually perform the duties necessary to carry out the essential function managed. Accordingly, the AAO properly stated that personnel management is generally not common in the role of a function manager. This is not to say that there are no exceptions to this generality. However, counsel's argument is primarily theoretical and is not accompanied by a detailed job description explaining how the beneficiary's specific job duties fit the statutory definition of managerial or executive capacity. *See id.* In determining the beneficiary's employment capacity, the ultimate goal is to determine that the beneficiary's duties are primarily of a qualifying nature, not to determine that the beneficiary is a personnel manager, a function manager, or a combination of the two.

Counsel also notes that a company in its early stages of development may not have a "formative" support staff and asserts that Citizenship and Immigration Services (CIS) should not deem the petitioner ineligible based on the size of its staff. However, there is no evidence on record that the AAO's determination was based on so basic an analysis. Rather, the record clearly shows that the size of the petitioner's support staff was only one of the factors considered. The petitioner's failure to provide a detailed job description weighed heavily on the AAO's ultimate conclusion.

Moreover, even in the presence of an adequate job description that includes qualifying tasks, the AAO can and should consider a petitioner's overall personnel structure in order to determine whether a petitioner is adequately staffed to permit a beneficiary to primarily perform these qualifying tasks. In the instant matter, the AAO examined the beneficiary's job description and the petitioner's personnel structure in light of the reasonable needs of the organization and determined that the information and evidence provided was insufficient to establish that the beneficiary would primarily perform duties of a qualifying nature. 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)).

With regard to the additional issue of the beneficiary's employment abroad, counsel raises the same arguments as discussed above and further asserts that the AAO made errors in its factual analysis. It is unclear exactly which part of the AAO's factual analysis counsel found erroneous. While the AAO understands counsel's obvious preference for the favorable findings of the service center with regard to the petitioner's previously filed L-1A petitions over the adverse findings of the AAO with regard to the present I-140 petition, his assertion that the service center's analysis was more accurate is simply not supported by the record in the present matter. As stated in the AAO's prior decision, 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 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). While the AAO is generally hesitant to speculate on the service center's analysis when issuing approvals of nonimmigrant petitions, the AAO deems the record in the instant matter as one lacking in sufficient evidence to warrant approval. Consequently, if the petitioner's records of prior nonimmigrant proceedings resembled the record in the instant matter, the prior approvals should be deemed erroneous and each matter should be reviewed for possible revocation.

Counsel also suggests that a discussion of issues that were not previously addressed by the director is indicative of the AAO second guessing the director's underlying decision. However, case law precedent has established that the AAO's *de novo* review on appeal can include issues that were not previously discussed by the director. 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). Whether the director's exclusion of the additional issue was the result of careful analysis or mere oversight is irrelevant, as the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. The AAO is not bound to follow the erroneous or incomplete 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).

As properly and thoroughly addressed in the AAO's prior decision, the petitioner has failed to provide sufficient evidence to support the claim that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Nor has counsel adequately addressed the lack of a detailed description of the beneficiary's duties abroad. Although counsel refers to a prior decision of the AAO in support of his assertions, the decision is unpublished and, therefore, does not serve as binding precedent on CIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). As such, the AAO will affirm its prior conclusion regarding the petitioner's failure to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

The remaining issue in this proceeding is whether the petitioner has overcome the AAO's prior conclusion with regard to the ability to pay the beneficiary's proffered wage.

The regulation at 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.

On motion, counsel cites *Matter of Sonegawa*, in which the Regional Commissioner considered an immigrant visa petition which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. 12 I&N Dec. 612 (Reg. Comm. 1967). The district director denied the petition after determining that the

beneficiary's annual wage of $6,240 was considerably in excess of the employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the instant matter, counsel urges the AAO to consider the petitioner's financial growth in order to determine its ability to pay. However, many of the relevant facts in *Matter of Sonegawa* are significantly different from those in the instant matter. More specifically, the petitioner in *Matter of Sonegawa* had been doing business for eleven years. *See* 12 I&N Dec. 612. It also had a business reputation, clientele, and a history of paying wages, which could be used to estimate future earnings and the ability to pay the proffered wage. *Id.* In the instant matter, while the petitioner may have been incorporated in March of 2001, the earliest sign of the petitioner doing business is 2004 invoices, the earliest of which dates back to June of 2004, less than one year prior to the filing of the petition.[2] More importantly, none of the petitioner's financial documents establish a prior ability to pay the beneficiary's proffered wage. As the petitioner does not have an established history of its ability to pay the proffered wage, its future ability to pay remains uncertain at best.

Furthermore, as stated in the AAO's prior decision, the 2004 CIS memorandum previously referenced by counsel provides for CIS's use of discretion in assessing which documents, aside from those explicitly cited in 8 C.F.R. § 204.5(g)(2), to consider in determining the petitioner's ability to pay. Memorandum from William R. Yates, Association Director for Operations, *Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)*, HQOPRD 90/16.45 (May 4, 2004). There is no evidence that the AAO abused that discretionary authority in making its prior determination with regard to the petitioner's appeal. Accordingly, the AAO concludes that the petitioner has failed to overcome the prior determination with regard to its ability to pay.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he/she shows that the AAO abused its discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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[2] 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Based on the petitioner's date of filing the Form I-140, the petitioner must establish that it had been doing business as of February 2004.

Accordingly, 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 AAO affirms its prior decision. The appeal is dismissed.