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U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 03 2007

EAC 06 086 51525

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, Chief
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 York corporation seeking to employ the beneficiary as its senior vice 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. The director determined that the beneficiary would not be employed in a managerial or executive capacity by the U.S. petitioner. On this basis, the director denied the petition.

On appeal, counsel disputes the director's conclusions 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.

The primary issue in this proceeding is whether the U.S. petitioner would employ the beneficiary in a qualifying 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 Form I-140, the petitioner submitted a letter dated January 26, 2006 in which it stated that it is staffed with six employees. The petitioner also provided the following statements regarding the beneficiary's prospective position with the U.S. petitioner:

> [The beneficiary] manages [the petitioner], facilitates business deals and cooperation and communication between major buyers . . . , find[s] business opportunities for [the foreign entity] for export and import, advise[s] budget activities to fund operations, maximize[s] investments, and increase[s] efficiency, monitor[s] businesses [sic] brokers and agencies to ensure that they efficiently and effectively provide needed services from [the foreign entity], [and] review[s] financial statements of the customers, sales and activity reports, plan[s] and directs sales promotion activities, and participate[s] in trade shows, and determines goods and services to be sold, and set[s] prices and credit terms for the customers. [The beneficiary] is

further assigned to develop the product ideas and research the trend of women's fashions in bags and accessory items.

The petitioner further stated that the beneficiary is vested with authority to hire and fire staff members, control the petitioner's budget, and establish and implement strategies to maximize revenue and minimize costs.

On June 8, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist Citizenship and Immigration Services (CIS) in determining the beneficiary's employment capacity in the proposed position in the United States: 1) a detailed description of the beneficiary's proposed day-to-day duties with an hourly breakdown of time assigned to each duty; 2) the job titles and job descriptions of the beneficiary's subordinates, if any; and 3) the petitioner's Form 941s for all four quarters of 2005 as well as all Form W-2s issued by the petitioner in 2005.

In response to the director's request, the petitioner provided the following hourly breakdown to account for the beneficiary's time with the U.S. entity:

| | | |
|---|---|---|
| Monday | 9:00 a.m.-10:00 a.m. (1hr) | Review communications such as fax, e-mails, letters, notes, phones, telexes and make decisions and tell workers and me to do things. |
| | 10:00 a[.]m[.]-12:00p[.]m[.] (2hrs) | Preside[s] [over] meetings with workers and assigns works [sic] to them and make[s] weekly planning [sic] for workers. |
| | 1:00 p[.]m[.]-5:00 p[.]m[.] (4 hrs) | **Review and analyze the reports of new[ly]** designed product[s] and allocates [sic] job roles to workers. |
| Tuesday | 9:00 a.m.-10:00 a.m. (1hr) | Review the reports from workers about their daily job duties and their performance and tell workers to do things. |
| | 10:00 a[.]m[.]-12:00p[.]m[.] (2hrs) | Review the report from workers about their daily job. |
| | 1:00 p[.]m[.]-6:00 p[.]m[.] (5 hrs) | Study the market and analyze new products such as materials, origins, designs and prices and other stores' display structures and origins so that the company can prepare itself for the next orders and change the product and develop new products for our buyers and factories. |

| | | |
|---|---|---|
| Wednesday | 9:00 a.m.-10:00 a.m. (1hr) | Review communications such as fax, e-mails, letters, notes, phones, telexes and make decisions and tell workers and me to do things. |
| | 10:00 a[.]m[.]-12:00p[.]m[.] (2hrs) | Review the purchase orders and scheduling shipments and select orders that should be turned down and should be adjusted in price and designs and materials. |
| | 1:00 p[.]m[.]-5:00 p[.]m[.] (4 hrs) | [C]onsult with customers[.] |
| Thursday | 9:00 a.m.-10:00 a.m. (1hr) | Review communications such as fax, e-mails, letters, notes, phones, telexes and make decisions and tell workers and me to do things. |
| | 10:00 a[.]m[.]-12:00p[.]m[.] (2hrs) | Develop new designs and materials[.] |
| | 1:00 p[.]m[.]-6:00 p[.]m[.] (5 hrs) | Meet potential customers, prepare the company for trade shows, meet with outside salesmen to check theirs compliance and performance. |
| Friday | 9:00 a.m.-10:00 a.m. (1hr) | Review communications such as fax, e-mails, letters, notes, phones, telexes and make decisions and tell workers and me to do things. |
| | 10:00 a[.]m[.]-6:00p[.]m[.] (8hrs) | Supervising administrative works such as banking, accountings [sic], legal business, and clerical works [sic] for workers' compliances. Wrap up the weekly plan and report the weekly things for compliances. |

The petitioner also provided an organizational chart, which illustrates an organizational hierarchy that is comprised of three positions—the beneficiary at the top of the hierarchy and two subordinate employees including a showroom manager and one employee who places and receives product orders. In compliance with the director's request, the petitioner provided a copy of the Form W-2 issued to the beneficiary in 2005 during which the beneficiary is shown to have received $9,000 in compensation. It is noted, however, that the petitioner's corresponding tax return for the same tax year shows that $4,500 was paid in compensation to officers, while no amount is indicated as having been paid in salaries and wages. Schedule E of the same tax return does not identify the officer to whom the $4,500 was paid. The petitioner also provided its fourth quarterly wage report for 2005, which indicates that it had zero employees during the three-month period that directly preceded the filing of the Form I-140.

On October 2, 2006, the director denied the petition noting the inconsistent information that has been provided with regard to the petitioner's organizational hierarchy. The director ultimately concluded that the staffing structure that has been illustrated suggests that the petitioner was not properly staffed to relieve the beneficiary from having to primarily perform the company's non-qualifying tasks at the time the Form I-140 was filed.

While the AAO affirms these findings as well as the director's conclusions, various comments made in the underlying discussion were inaccurate and must be further addressed. Namely, the director stated that the petitioner failed to comply with the director's request for an hourly breakdown of duties performed by the petitioner's employees. Contrary to the director's implication, a review of the RFE shows that while the director asked for an hourly breakdown of the beneficiary's job duties, he did not ask for the same information with regard to the duties of any other employees of the petitioner. The director merely indicated that listing the subordinate employees' job duties was one factor that may assist the petitioner in preparing its response with regard to the beneficiary's employment capacity. There is no indication that the petitioner was specifically instructed to provide detailed job descriptions in the form of hourly breakdowns for the beneficiary's subordinates. However, 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Therefore, a major component of establishing that the beneficiary would be employed in a qualifying managerial or executive capacity is being able to demonstrate the petitioner's ability to relieve the beneficiary from having to primarily perform daily operational tasks, which may be essential for the company's daily function but which are not deemed managerial or executive. As such, the petitioner's staffing structure is relevant.

In the present matter, the petitioner has provided inconsistent information regarding its support staff. Specifically, in Part 5, Item 2 of the Form I-140, the petitioner claimed a total of 1,200 employees. In the letter submitted in support of the initial Form I-140, the petitioner clearly claimed to employ six individuals. The petitioner further provided a statement of its profits and losses for the period January 1, 2005 through October 31, 2005, which claimed that the petitioner paid $24,000 in compensation to officers and an additional $29,700 in salaries and wages to staff. In response to the RFE, the petitioner submitted a tax return for 2005 that showed only $4,500 paid in officer compensation and no salaries and wages despite the fact that the beneficiary's 2005 W-2 was issued by the petitioner and showed that the beneficiary was compensated $9,000 during that tax period. While the AAO acknowledges that the petitioner did not file the Form I-140 until January of 2006, the fact that its financial documentation for 2005 fails to establish exactly whom the petitioner employed and the amount of compensation paid directly prior to filing gives rise to serious doubt as to the validity of the petitioner's overall claims. 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).

Furthermore, on appeal, the petitioner has provided statements from the two subordinate employees named in the latest organizational chart. Both individuals state in their respective statements that they commenced working for the petitioner in April of 2006. It is noted, however, that 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, in light of the

most recent revelation that the only two employees, aside from the beneficiary, that appear in the petitioner's organizational chart did not commence their employment with the petitioner until several months after the Form I-140 had been filed, the AAO questions the validity of the petitioner's claimed ability to employ the beneficiary in a primarily managerial or executive capacity. While the AAO acknowledges the relevance of the description of the beneficiary's job duties in determining his overall capacity as a manager or executive, a job description alone is not sufficient without further documentation to establish the petitioner's ability to relieve the beneficiary from having to primarily perform the daily operational tasks. 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)). In the present matter, the petitioner has provided CIS with an hourly breakdown of the beneficiary's proposed employment, which makes numerous references to a subordinate staff whose employment at the time of filing the Form I-140 has not been corroborated by documentary evidence.

Based on the evidence furnished, the AAO concludes that the petitioner has failed to explain and provide adequate documentation to support the claim that, at the time the Form I-140 was filed, the petitioner was adequately staffed to relieve the beneficiary from having to primarily perform the daily non-qualifying tasks of the organization. Therefore, regardless of the petitioner's uncorroborated claims, the AAO cannot conclude that the beneficiary would spend the primary portion of his time performing qualifying managerial or executive job duties. Based on this determination, this petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the present matter, the petitioner maintains the claim that it is a wholly-owned subsidiary of the beneficiary's employer abroad. In support of this claim, the petitioner has provided a certificate of incorporation showing that the petitioner is authorized to issue 200 shares of its stock with no par value assigned and stock certificate No. 1 showing that the foreign entity was issued 10 shares of the petitioner's stock. The petitioner also submitted its balance sheet showing its claimed financial status as of October 31, 2005. The balance sheet noted that the petitioner has $150,000 in stockholder equity as a result of issuing its stock. However, in response to the RFE, the petitioner provided its 2005 tax return containing Schedule L in which Item 22(b) indicated that the petitioner had only $50,000 in stockholder equity. Although the RFE specifically instructed the petitioner to provide a stock ledger disclosing all stock transactions, the requested document was not submitted. As such, the petitioner has failed to resolve the significant discrepancy between the amount of stockholder equity as indicated in its balance sheet and the amount of stockholder equity shown in the petitioner's 2005 tax return. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In addition, as previously stated, 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. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Second, 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." While the director affirmatively concluded that the petitioner had submitted sufficient evidence to show that it is actively doing business, the basis for this finding is not entirely clear. Moreover, there is no indication that the director contemplated the possibility that the petitioner has failed to provide sufficient evidence to show that it was doing business during the relevant one-year time period prior to filing the Form I-140. Although the petitioner describes itself as a sales-based enterprise, none of the documents submitted either in support of the petition or in response to the RFE suggests that any sales or purchase transactions took place between January 2005 and January 2006. The two commercial shipping invoices the petitioner did submit account for July and August of 2006 rather than the time period prior to the filing of the Form I-140. The AAO notes that photographs of the alleged business premises, bank statements, and tax returns are not indicators of ongoing business, as they do not establish that the petitioner had been engaged in the purchase and sale of products on a "regular, systematic, and continuous" basis during the required one-year time period. *See id.*

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 of ineligibility discussed above, this petition cannot be approved.

Lastly, counsel makes a brief reference to the petitioner's current 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 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 25, 29-30 (D.D.C. 2003) (recognizing that CIS approves some petitions in error); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals 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. 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).

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.