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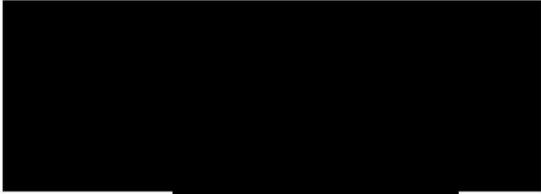
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED]
LIN 07 014 50073

OFFICE: NEBRASKA SERVICE CENTER

Date NOV 30 2009

IN RE: Petitioner: [REDACTED]
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)

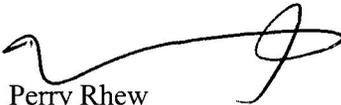
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Florida corporation engaged in the business of graphics design and consulting. The petitioner seeks to employ the beneficiary as its general manager. 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 it would employ the beneficiary in a managerial or executive capacity and denied the petition on that basis. On appeal, counsel disputes the director's conclusions and states that an appellate brief will be submitted within 30 days. It is noted that the appeal was received on January 9, 2008. To date, the record has not been supplemented with any further evidence or information. Accordingly, the AAO will consider the record complete as presently constituted.

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 beneficiary would be employed in the United States 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 August 28, 2006, which includes the following description of the beneficiary's proposed employment:

[T]he [b]eneficiary is responsible for creating and implementing corporate policies and procedures, and setting company goals and objectives, as well as monitoring compliance with said policies and determining their effectiveness in attaining objectives. He determines staffing requirements and directs the hiring, firing, and training of staff. He manages and directs the staff, setting work schedules and delegating tasks to employees. He directs and coordinates the company's financial and budget activities to fund operations, maximize investments, and increase efficiency. He confers with and reports to corporate executives

regarding the operations, productivity, and profitability of the company to ascertain areas needing improvement. He also formulates and implements strategies for improved efficiency and profitability.

The petitioner added that the company consists of six employees, including two professionals whom the beneficiary directly oversees.

On July 30, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide its organizational chart depicting the beneficiary's position and illustrating its staffing levels. The petitioner was also asked to provide a list of the beneficiary's subordinates as well as their position titles, job duties, and the weekly hours worked. The director specifically requested the employees' IRS Form W-2s for 2006 to show whom the petitioner paid during the year the petition was filed. Lastly, the petitioner was asked to provide a detailed description of the beneficiary's proposed day-to-day job duties and the percentage of time assigned to each job duty. In general, the petitioner was asked to provide a job description that would illustrate how much of the beneficiary's time would be spent performing qualifying tasks in comparison to the time spent performing non-qualifying tasks.

In response, the petitioner provided a statement dated September 1, 2007 in which the beneficiary's proposed employment was broken down as follows:

[The beneficiary] is responsible for creating and implementing company policies and procedures; he decides how the company should carry out its marketing and sales activities, i.e., what types of advertisements, what medium to utilize, and the style/format of the ad, based on samples/examples presented to him by staff [15%]. He decides what our customer service policies are, reviews and adjusts our product pricing as needed, and otherwise directs the operations of the company [10%]. He directs (and has full authority over) the hiring/firing of the staff, including managerial and/or professional staff members [5%]; he also sets employee/human resources policies (salaries, benefits, vacation, hours, etc.) which are implemented and monitored by our [a]dministrator, [REDACTED] [10%].

[The beneficiary] also monitors the company's budget and finances and reviews financial reports prepared by the [a]ccountant, making executive decisions regarding expenditures, investing in necessary equipment, etc. [25%]. He sets company goals and objectives, creating strategies to maximize profits, increase efficiency, and ultimately expand the business [10%]. [He] is responsible for the continued growth and profitability of the business; therefore, he explores opportunities to expand the graphic design services currently offered, and even to diversify into other markets, such as offering advertising and marketing services for other companies, in addition to providing the graphic designs utilized [25%]. [The beneficiary] is responsible for seeking out such opportunities and directing the staff successfully so as to attain those goals and objectives.

The petitioner also complied with the director's request for a list of employees, their job duties, and a copy of the petitioner's organizational chart. The chart shows a multi-tiered organization headed by the beneficiary, whose position is at the top of the organizational hierarchy. The chart shows the company's administrator as the beneficiary's only direct subordinate. The administrator in turn oversees the work of graphic designers, an account executive, and an outside contractor that provides accounting/financial services. The AAO notes that

while the petitioner identified four graphic designers in its organizational chart, the Form W-2s, which are part of the petitioner's response to the RFE, account for only two of the designers. Additionally, the petitioner provided a copy of its quarterly wage report for the fourth quarter of 2006, which encompasses the time period during which the Form I-140 was filed. The statement indicates that the petitioner had six employees during each of the three months within the fourth quarter reporting period. The form identified each employee by name and disclosed each employee's wages for the quarter. It is noted that, based on the information provided in the wage report, it appears that neither of the two designers was compensated a wage that is commensurate with that of a full-time employee.

After reviewing the record, the director determined that the petitioner failed to establish eligibility for the immigration benefit sought and therefore issued a decision dated December 6, 2007 denying the petition. The director observed that the wages paid to the petitioner's graphic designers indicated that these individuals worked limited hours. In light of this observation, the director questioned how the petitioner could have continued to carry on its business activities without the beneficiary's assistance in performing some of the key operational (though non-qualifying) tasks. Lastly, the director noted that while the record indicates that the petitioner's growth in 2007 may have resulted in the beneficiary assuming more qualifying tasks, the petitioner has the burden of establishing its eligibility at the time of filing, which took place in 2006, not 2007. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel explains that the salaries of the petitioner's graphic designers were temporarily reduced because the graphic design work was being outsourced to employees of the foreign company. 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)). It is noted that 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). As the record lacks evidence to establish that the petitioner's graphic design work was actually outsourced to employees of the foreign entity, the AAO is lead to question how the graphic designers' job duties were carried out without the beneficiary's direct involvement.

Additionally, the regulations expressly require the petitioner to provide a description of the job duties to be performed in the beneficiary's proposed position. *See* 8 C.F.R. § 204.5(j)(5). Case law further reiterates the need for a detailed job description, establishing that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the present matter, while the director expressly instructed the petitioner to provide a specific list of the beneficiary's proposed job duties, the petitioner responded with general statements that merely established the beneficiary's heightened degree of discretionary authority, but failed to state exactly what actual tasks the beneficiary would perform on a daily basis. For instance, the petitioner stated that 15% of the beneficiary's time would be consumed with making marketing decisions and that another 10% of his time would be consumed with making policies regarding human resources. However, it is unclear how either of these responsibilities translates into daily tasks. In other words, the petitioner fails to state what specific underlying tasks are associated with making marketing decisions, nor does the petitioner explain why marketing relating issues would arise on a daily basis, such that would require the beneficiary's attention approximately six hours out of a work week.

Similarly, it is unclear why employee salaries, benefits, vacations, and other personnel issues would consume approximately four hours of the beneficiary's time during any given work week, particularly in light of the petitioner's limited staffing size at the time of filing. The record is equally unclear as to the types of tasks the beneficiary would perform in his effort to set company goals and create strategies to maximize profits, a responsibility that would consume another 10% of the beneficiary's time. The petitioner did not explain what information the beneficiary would consider in reaching these broad objectives and who would provide the information that would form the basis for company policies and strategies. Lastly, the petitioner stated that 25% of the beneficiary's time spent performing non-qualifying tasks, such as seeking out opportunities to expand the business. Thus, based on the job description provided, at least 35% of the beneficiary's time would be spent performing tasks that the petitioner has failed to describe in sufficient detail and another 25% of his time would be consumed with tasks of a non-qualifying nature. In light of this analysis, the AAO cannot conclude that the beneficiary would be primarily involved in performing tasks within a qualifying managerial or executive capacity. On the basis of this conclusion, the AAO finds that the director's denial of the petition was warranted.

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)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the petitioner's description of the beneficiary's employment abroad is similarly lacking a list of specific daily job duties as the petitioner's description of the proposed employment. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. As the petitioner has failed to convey a meaningful understanding of the specific tasks the beneficiary performed during his employment abroad, the AAO cannot conclude that he was employed in a qualifying managerial or executive capacity.

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." Although the record contains documentary evidence establishing that the petitioner was doing business as far back as April 2006, the Form I-140 in the present matter was filed in October 2006. It is therefore the petitioner's burden to establish that it had been doing business as of October 2005. As stated earlier in this decision, 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. Here, the record lacks evidence to establish that the petitioner was doing business prior to April 2006. As such, the AAO cannot conclude that the petitioner was doing business during the requisite time period.

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.

As a final note, counsel makes a brief reference to the petitioner's current approved L-1 employment of the beneficiary. However, 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. U.S. Citizenship and Immigration Services (USCIS) is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS 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 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 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 USCIS 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).

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.