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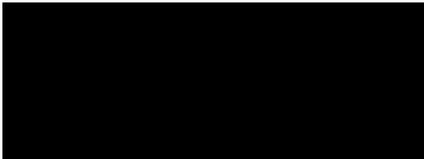
FILE: EAC 04 101 52077 Office: VERMONT SERVICE CENTER Date: DEC 01 2005

IN RE: Petitioner:  
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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner was organized as a limited liability company in the state of Nevada. It operates as a cosmetics importer and retailer and seeks to employ the beneficiary as its vice president of operations. 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 denied the petition based on the determination that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

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 issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted an undated letter, which provided the following description of the duties to be performed by the beneficiary:

She will be responsible to [sic] manage [sic] [the] U.S. operations[,] which involves planning the U.S. operations; managing the function of product marketing strategy in the U.S.[,] which involves the use of independent marketing representatives; the hiring and firing of personnel for retail operations in Las Vegas including [the] store manager; negotiating distribution contracts, preparing promotional and operational plans; and operating the U.S. business so that the organisation meets its financial goals. . . . In all positions she has managed a function in the organisation, in particular, the marketing operations in the Canada and/or the United States. She exercised full authority over the function with power to recommend personnel actions and used her full discretion in developing policy and goals for that particular function of the organisation.

On August 6, 2004, the director denied the petition noting that the petitioner failed to submit sufficient documentation "to clearly establish that the beneficiary's managerial experience and education qualifies him/her as an [e]xecutive/[m]anager while employed by your organization." While the director's reference to "managerial experience" is correct in the sense that a beneficiary must have been employed abroad in a qualifying capacity for the required time period, there is no statute or regulation that requires the petitioner to establish that the beneficiary has reached a certain educational level. Accordingly, this incorrect portion of the director's comment is hereby withdrawn. Ultimately, the director concluded that the petitioner failed to provide a comprehensive description of the beneficiary's duties and, therefore, precluded Citizenship and Immigration Services (CIS) from affirmatively concluding that the beneficiary would primarily perform managerial or executive duties.

On appeal, counsel submits a letter describing the beneficiary's most recent position with the petitioner's expanded business operation. Counsel states that while the petitioner's store is located in Las Vegas, the beneficiary works from the New York office, which is close in proximity to the affiliate headquarters in Canada. Counsel claims that the beneficiary manages the petitioner's business operation via computers, the Internet, and telecommunication, which do not require her physical presence.

Counsel explains that the beneficiary's job is to oversee the overall operation by occasionally visiting the Las Vegas store and hiring the manager, who will report to the beneficiary regarding the store's daily sales and staffing. The beneficiary is also responsible for hiring the warehouse manager for the Las Vegas store. The warehouse manager also reports to the beneficiary regarding the items shipped, received, and returned on a daily basis. Counsel states that the beneficiary oversees the daily sales by reviewing sales reports for the petitioner's Internet sales office.

Counsel claims that the beneficiary does not actually sell any of the petitioner's products. He states that the petitioner has sales employees and retains independent distributors with whom the beneficiary negotiates contracts regarding the sales territories they will cover. The beneficiary also sets the sales policy and hires companies to design the product packaging and package labels. Additionally, counsel states that the beneficiary oversees the intellectual property attorney, seeks out companies to do market studies, and decides which products will be part of the product line, where the products will be distributed, and how they will be marketed.

Counsel explains that many of the petitioner's employees are not on the payroll, as they are contracted from an outside 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)). In the instant matter, the petitioner has submitted no documentation to show that it had additional employees in the form of outside contractors to perform the essential sales task at the time the petition was filed. There is also no evidence documenting the employees who are claimed to have been working directly for the petitioner at the time the petition was filed. 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). Despite counsel's explanation of the staffing composition and the beneficiary's role with respect to the petitioner's sales function, the record lacks evidence that the petitioner had a sufficient support staff to relieve the beneficiary from having to meet the petitioner's sales needs.

Furthermore, in examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, counsel's broad overview of the petitioner's operation and the beneficiary's role within that operation lacks sufficient detail regarding the beneficiary's duties on a daily basis. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). While counsel has described the petitioner's organizational hierarchy in a manner that suggests that the beneficiary oversees an essential function, there is little detail describing the beneficiary's actual day-to-day activities. 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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient.

Additionally, counsel indicates that the beneficiary's primary duty is to oversee the sales function of products manufactured by the petitioner and by other cosmetics companies. According to the job description, the beneficiary's duties rely heavily on an adequate sales support staff. The record lacks sufficient evidence to establish that the petitioner had such a staff of individuals at the time the petition was filed. Despite counsel's statements describing the petitioner's expansion and hiring of additional staff *since* the filing of the petition, 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). The record in the instant matter lacks documentation to establish who was actually employed by or performing services for the petitioner in an effort to relieve the beneficiary from having to directly perform the sales function she was supposed to be overseeing. The AAO cannot assume facts that are not directly established by submitted evidence merely based on counsel's assertions. *See Matter of Obaighena*, 19 I&N Dec. at 534. As the petitioner has failed to adequately document its claims, the AAO cannot affirmatively conclude that the petitioner was properly staffed to ensure that the beneficiary would have primarily performed managerial or executive duties at the time the petition was filed. For this reason, the petition may not be approved.

Additionally, though not discussed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

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."

In the instant matter, the record lacks sufficient documentation to suggest that the petitioner had been selling its products on a "regular, systematic, and continuous" basis at the time the petition was filed. 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). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows 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 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683.

As a final note, counsel includes a copy of the petitioner's current approval notice for the L-1 nonimmigrant classification 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, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review.<sup>1</sup> *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

Moreover, 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 and contradictory 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,*

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<sup>1</sup> As CIS records indicate that the beneficiary was previously granted L-1 status for three years under her maiden name (EAC 00 210 53536), the L-1 approval notice submitted by counsel is technically considered a regular extension petition.

*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).

In addition, 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).

Finally, it should be noted that the petitioner indicated under penalty of perjury in Part 4 of the Form I-140 petition that an immigrant petition had never been filed by or on behalf of the beneficiary. This petition was filed on February 20, 2004. According to CIS records, however, the petitioner had previously filed an I-140 petition on behalf of the beneficiary, which was denied by the director on or about January 28, 2003 (WAC 02 098 53831). Thus, the denial of the present I-140 petition is not inconsistent with the previously undisclosed immigrant petition filed on behalf of the beneficiary. Furthermore, counsel's and the petitioner's failure to disclose the prior denial brings into question the credibility of any and all of the evidence submitted in support of the petition. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.