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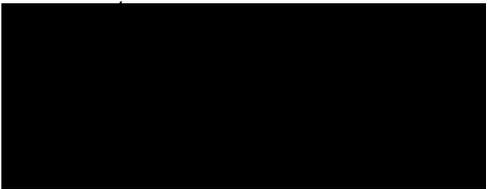


FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: NOV 25 2005
EAC 05 006 52668

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Pennsylvania in October 2001. It operates a food production plant. It seeks to employ the beneficiary as its 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 petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts that the offered position can be deemed managerial or executive, and claims that the director's analysis of the petitioner's staffing levels was incorrect. Counsel submits a brief and additional documentation in support of the appeal.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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.

On the October 4, 2004 Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that it employed "5+25" workers and that the beneficiary would establish policies, plan, direct, and coordinate the United States base operations of the company. Counsel for the petitioner requested approval of the petition for the beneficiary's visa classification as a multinational executive or manager.

On November 22, 2004, the director noted that the petitioner had not sufficiently described the beneficiary's duties to demonstrate that he would be employed in a qualifying capacity for the visa classification and requested additional evidence. The director requested: a detailed description of the beneficiary's proposed executive/managerial duties including a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; an organizational chart depicting the executive and management structure within the United States organization; copies of the petitioner's 2003 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, along with the petitioner's 2004 payroll roster; IRS Forms 941, Employer's Quarterly Federal Tax Return for the second and third quarters of 2004; evidence of the utilization of contract workers, if any; and, the petitioner's 2003 IRS Form 1120, U.S. Corporation Income Tax Return. The director also suggested that answering questions regarding the number of the beneficiary's subordinate supervisors, the job titles and duties of the employees managed, the time the beneficiary spent on managerial/executive duties and non-managerial/non-executive duties, and the beneficiary's degree of day-to-day discretionary authority over operations, would assist the petitioner in preparing its response.

On February 17, 2005, the petitioner provided its response including the following list of the beneficiary's duties for the petitioner:

1. Plans, develops, and establishes policies and objectives of [the petitioner] in accordance with board directives and corporation charter – 25%
2. Confers with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives – 10%
3. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions – 20%
4. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity – 15 %
5. Plans and develops industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public – 15%
6. Evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives- 15%

The petitioner also provided its organizational chart showing the beneficiary in the position of managing director over an operations manager, a chief accountant, and a financial and sales manager. The chart also depicted two drivers and four workmen reporting to the operations manager. The petitioner provided job descriptions for the positions of operations manager, chief accountant, and financial and sales manager. The

organizational chart identified two individuals, the beneficiary and the individual in the position of operations manager, by name on the organizational chart. The petitioner did not identify individuals by name in the remaining positions. The petitioner's 2003, IRS Form 1120 showed that the beneficiary had been paid \$10,520 in officer's compensation and that the petitioner's cost of labor had been \$19,276 plus contract labor in the amount of \$726. The petitioner provided the beneficiary's 2004 IRS Form W-2 in the amount of \$22,360; counsel stated that the IRS Forms W-2 for other employees were not available because the petitioner's employees declined to present them. The petitioner's 2004 IRS Form W-3, Transmittal of Wage and Tax Statement, showed \$76,960 had been paid in wages, tips, and other compensation. The petitioner's IRS Form 941 for the quarter ending December 31, 2004, the quarter in which the petition was filed, showed that the petitioner had paid \$20,660 in wages, tips, and other compensation for that quarter.

On April 13, 2005, the director denied the petition. The director observed that the petitioner had submitted IRS Forms 941 that were unsigned, incomplete, and did not aid in determining the number of individuals the petitioner employed. The director further observed that the petitioner's organizational chart did not include names for each position, suggesting the employment of only the beneficiary and the operations manager. The director determined that: (1) the description of the beneficiary's job duties was general and did not specify the managerial or executive duties the beneficiary would be performing; (2) the record did not establish that the petitioner employed salespersons or others to provide the petitioner's services; (3) it seemed likely that the beneficiary had been and would be primarily engaged in providing sales services to the organization's clients and not directing the organization; and, (4) the description of the petitioner's staff members' job duties did not establish that the positions would be managerial or executive but that they would be performing the mundane duties of the organization. The director concluded that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner provides: (1) a complete copy of the petitioner's IRS Form 941 for the first quarter of 2005 and the first page of the petitioner's IRS Form 941 for the quarter in which the petition was filed. The first page does not list the names of the employees employed in the quarter; (2) the petitioner's IRS Forms W-2 for 2004 show that one individual earned \$1,790, a second individual earned \$1,650, and a third individual earned \$14,890 in the 2004 year; (3) the petitioner's 2004 IRS Forms 1099, Miscellaneous Income, show monies paid to three individuals in the amounts of \$13,029.26, \$28,930, and \$1,115; and, (4) the petitioner's 2004 IRS Form 1120, which shows that the petitioner's cost of labor for the year was \$55,000.

Counsel asserts that the Citizenship and Immigration Services (CIS) unreasonably concluded that the company's employees' titles and responsibilities should be called into question, a conclusion unsupported by evidence and without foundation. Counsel also notes that the description of the beneficiary's job duties identifies general managerial functions, functions that are performed by the beneficiary. Counsel attaches "a more detailed description" and asserts that the description clearly shows the beneficiary's position is executive or managerial in nature.¹ Counsel claims that: the beneficiary is not a first-line supervisor; does not provide

¹ The petitioner's more detailed description of the beneficiary's duties consists of the previous description submitted with the addition that the beneficiary will meet frequently with subordinate executives to ensure that the petitioner's operations are conducted in accordance with policies the beneficiary has developed and that the beneficiary will oversee executives who direct the activities of various departments and implement

the petitioner's sales services; the records show that the petitioner employs individuals who actually provide the goods and services; and that the beneficiary is employed in an executive capacity. Counsel concludes that "[t]he beneficiary is managing professional [sic] and performing duties that are executive in nature."

Counsel's assertions are not persuasive. When 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, the director's determination that the description of the beneficiary's duties is general is correct. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include [p]lan[ning], develop[ing], and establish[ing] policies and objectives of [the petitioner] in accordance with board directives and corporation charter," "[d]irect[ing] and coordinat[ing] formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity," and "[r]eview[ing] activity reports and financial statements to determine progress and status in attaining objectives and revise[ing] objectives and plans in accordance with current conditions." The petitioner did not, however, define the petitioner's goals, policies, or adequately clarify who actually performs the day-to-day operational tasks of the organization. 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)). 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).

Likewise, the director's determination that the record did not provide substantiating evidence of the number of the petitioner's employees or the job duties that the employees performed is also correct. A critical analysis of the petitioner's organizational chart and documents submitted for the director's review do not substantiate that the petitioner employed individuals who would relieve the beneficiary from performing routine operational and administrative tasks. It is important to emphasize 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). In this matter, there is little

the organization's policies on a day-to-basis. Further, the AAO notes that the director had requested a detailed description of the beneficiary's duties and the petitioner failed to provide a more detailed description in response to the request for evidence. Thus the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the description of the beneficiary's duties before the director.

probative evidence that the petitioner employed individuals to perform the day-to-day functions necessary to operate the production plant, sell the petitioner's products, and perform the necessary administrative functions to distribute the product when the petition was filed. When the director made his decision, the record contained evidence that the petitioner had paid the beneficiary in the year 2004, a 2004 IRS Form W-3, showing that \$54,600 had been paid to other employees during the year, and the first page of an IRS Form 941 showing \$20,660 had been paid to all employees in the fourth quarter of 2004. As the director observed, the documentation submitted did not support the information on the petitioner's organizational chart and could not result in a finding that the beneficiary would be relieved from performing primarily non-qualifying duties. 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).

On appeal, counsel again submits the first page of the petitioner's IRS Form 941, for the quarter in which the petition was filed which does not include the names of the employees employed in the quarter. The 2004 IRS Forms W-2 do not indicate when the employees were paid in 2004 and do not show that the individuals were employed full-time. The 2004 IRS Forms 1099 do not indicate the services provided by the payees. Thus, the substantive evidence submitted on appeal for the quarter in which the petition was filed, fails to document the individuals employed in the quarter, the work they performed for the petitioning organization, and whether the individuals were employed full-time. Additionally, the petitioner has not explained how the services of its employees and independent contractors obviate the need for the beneficiary to primarily conduct the petitioner's business, either as a first-line supervisor or an individual performing the petitioner's operational and administrative tasks. The petitioner bears the burden of establishing the beneficiary's duties are *primarily* managerial or executive and 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; *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The record is insufficient to establish that the petitioner employs an adequate number of employees who would relieve the beneficiary from performing primarily non-qualifying duties.

Counsel's assertion that the beneficiary is not a first-line supervisor and does not provide the petitioner's sales services is not persuasive. In addition and contrary to counsel's assertion, the record does not substantiate the claim that the petitioner employed individuals who actually provided the petitioner's goods and services when the petition was filed. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer. The petitioner indicates that the beneficiary owns 100 percent of the petitioner and 50 percent of the foreign entity. The record contains an August 9, 2001 letter addressed to the beneficiary from certified public accountants indicating that the beneficiary owns 50 percent of the foreign

entity. The record also contains an undated document that does not identify the recipient from the same accountants indicating that the addressee is a 40 percent owner of the foreign entity. This document bears a facsimile date of January 8, 2003. The record does not explain the relevance of this document. However, it appears to be contrary to the evidence indicating that the foreign entity is a 50-50 partnership. 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). Moreover, the petitioner has not supplied evidence that the beneficiary as a 50 percent stockholder, even if substantiated, controls the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Without evidence that the beneficiary as a 50 percent stockholder exercises control of the foreign entity, the petitioner has not established a qualifying relationship. Although the definition of a subsidiary includes a provision for a parent company that owns 50 percent of a 50-50 joint venture, there are no provisions in statute, regulation, or case law that allow for the recognition of veto power of negative control in other than a 50-50 joint venture. For this additional reason, the petition will not be approved.

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).

The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, 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 general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions

are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 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).

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 approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, 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).

Further, 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 petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.