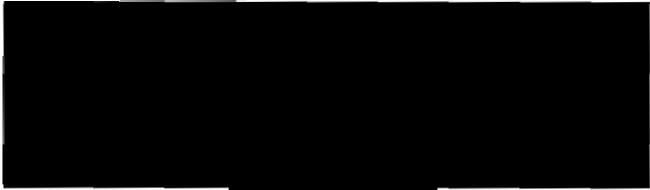




U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 24 2006
SRC 04 209 51198

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 preference visa petition was denied by the Director, Texas Service Center. The petitioner subsequently filed a motion with the service center seeking to have the matter reopened and reconsidered. The director dismissed the motion and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a North Carolina corporation operating in Texas as a retail and distribution business. It seeks to employ the beneficiary as its director and 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 the United States in a managerial or executive capacity and denied the petition. The director also concluded that the petitioner failed to resolve the perceived inconsistency between the petitioner's place of incorporation and its place of business.

On motion, counsel argued that the director's understanding was incorrect and claimed that the petitioner's incorporation in North Carolina and its doing business in the state of Texas are not mutually exclusive. The petitioner provided documentation in support of this claim.

Nevertheless, the director dismissed the motion, concluding that the petitioner failed to submit sufficient evidence to resolve the perceived inconsistency.

On appeal, counsel repeats the prior argument that the petitioner can be incorporated in one state while conducting business in another. Counsel disputes the director's decision not to grant the motion and points to the additional evidence that was submitted establishing that the petitioner was, in fact, incorporated in North Carolina while licensed to carry on business in Texas. Therefore, contrary to the director's most recent finding in the decision dismissing the motion, the petitioner was successful in overcoming the director's second ground for denying approval of the petition. However, it is noted that the petitioner addressed only one of the two grounds cited in the denial. Counsel failed to address the director's conclusion regarding the beneficiary's proposed employment in the United States.

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.

Accordingly, the remaining issue in this proceeding, one which the petitioner has not addressed since the director's initial finding, is whether the beneficiary would be employed in the United States in a 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 petition, the petitioner submitted a letter dated July 22, 2004, which provided the following list of job responsibilities associated with the beneficiary's employment in the United States:

- Provide leadership to the company regarding establishing key performance indicators; coordinate efforts to put measures into place and monitor the corporate performance against established targets.
- Lead corporate efforts to reach annual targets and develop clear action plans in response to issues identified in [the] company business plan.
- Coach the leadership team on methods and means to improve overall performance by unleashing the individual potential.
- Guide the leadership team in choices around a range of corporate issues like evolving a customer driven culture, forward planning, training[,] etc.

The petitioner also provided a number of documents including a lease agreement identifying the beneficiary doing business as [REDACTED] Article 1 of the agreement reiterates the same information and further specifies that the leased premises are only permitted for use as a pick-up/drop off cleaners. Although the petitioner provided a quarterly tax return for the quarter directly preceding the filing of the Form I-140, there is no documentation identifying the nine employees claimed on the form. Additionally, the Texas Sales and Use Tax Permit, the energy bill, and the telephone bills submitted in support of the petition are addressed to the [REDACTED] Thus, the evidence of record suggests that the petitioner is engaged in the business of dry cleaning. There is no indication that any goods are sold and distributed.

On March 24, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a detailed description of the beneficiary's prospective job duties in the United States as well as a percentage breakdown of time that would be spent performing each duty. The director requested the petitioner's organizational chart illustrating the petitioner's position within the organizational hierarchy. The petitioner also instructed the petitioner to identify the beneficiary's subordinates, including the subordinates' job titles, job descriptions, and educational levels.

The petitioner provided a written response dated June 16, 2005. The petitioner stated that the beneficiary's proposed employment would consist of the same duties the beneficiary performed during his employment abroad. The following statement was used to describe the beneficiary's proposed position:

[The beneficiary] spends 75% of his time supervising employees. The rest of the time he si [sic] engaged in what we would characterized [sic] as [e]xecutive functions such as budget and marketing planning and reporting to the company's plans and progress to our overseas affiliate.

Although the petitioner referred to an elaborate organizational chart comprised of eleven job positions for in-house employees and two positions for independent contractors, the only two employees who were actually identified by name were the beneficiary, who was shown as occupying two positions, and the company's vice president. None of the three managers depicted on the chart were identified by name and no job descriptions were provided for any of the positions, except that of the beneficiary.

On July 12, 2005, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would primarily perform managerial or executive duties.

As previously stated, the petitioner failed to address this ground for the director's denial either in the motion to reopen or in the appeal.

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The director clearly conveyed the importance of this information in the RFE, specifying the information needed in order to determine the beneficiary's eligibility. However, the brief statement regarding the beneficiary's proposed position consisted entirely of generalized job responsibilities without any indication as to the actual duties the beneficiary would perform on a daily basis. 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). Although the petitioner indicated that 75% of the beneficiary's time is spent managing personnel, it failed to describe the duties of the beneficiary's subordinates or to clearly establish that the subordinates are managerial, supervisory, or professional employees. *See* section 101(a)(44)(A)(ii). The lack of a detailed job description and the job descriptions and educational levels of the beneficiary's subordinates precludes CIS from making an informed decision as to the beneficiary's eligibility to be classified as a multinational manager or executive. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

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 petitioner has submitted two tax returns and several quarterly wage statements in order to establish that it has been doing business for the requisite time period. However, such documentation does not establish that the petitioner has been engaged in "the regular, systematic, and continuous" course of business. *See* 8 C.F.R. § 204.5(j)(2). Although the petitioner has repeatedly described itself as a retailer and distributor of goods, there is no evidence of any sales transactions or any shipping documentation to show distribution of the goods sold. 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)). Furthermore, the record is replete with evidence suggesting that the petitioner is a dry cleaning business, not a retailer and distributor of goods as claimed. Thus, while the petitioner may still qualify by providing services and not goods, 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).

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 for ineligibility discussed above, this petition cannot be approved.

As a final note, CIS records show that the petitioner has received three prior approvals of 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 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 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. 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).

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 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 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.