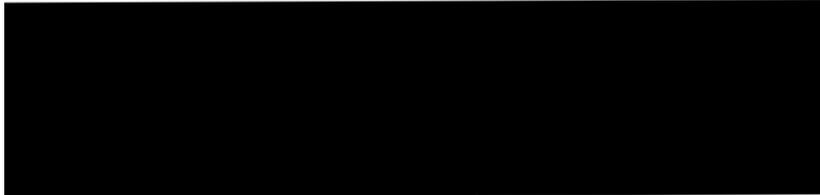


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FILE: [redacted]
SRC 05 217 51751

Office: TEXAS SERVICE CENTER

Date:

NOV 07 2006

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, Chief
Administrative Appeals Office

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

In order to properly file a motion, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a CIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the motion shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the director issued the decision on February 23, 2006. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The appeal was received by Citizenship and Immigration Services (CIS) on Wednesday, March 29, 2006, or 34 days after the decision was issued. Therefore, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly filed. Accordingly, the appeal in the instant case will be rejected as untimely filed.

Additionally, notwithstanding the petitioner's untimely filing, even if the appeal had been properly filed within the allowed time, it would have been summarily dismissed.

The petitioner is a branch office of a Venezuela-based entity. The petitioner is engaged in the business of freight shipping via ocean transportation. It 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.

On February 23, 2006, the director denied the petition based on two grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The denial addressed the relevant information and documents provided by the petitioner and responded with a well-reasoned analysis of the petitioner's submissions. More specifically, the director repeated the petitioner's descriptions of the beneficiary's foreign position and his proposed position in the United States. With regard to the latter position, the director accurately concluded that the description lacked "an accurate portrayal of the actual day-to-day duties of the petitioner at the petition[ing entity]." With regard to the beneficiary's position abroad, the director stated that the percentage breakdown provided in response to the request for evidence (RFE) was overly broad and failed to clearly define the beneficiary's role with the foreign entity.

Additionally, the director addressed counsel's discussion of *Matter of Tessel*, properly concluding that Acting Association Commissioner's finding in the precedent case does not dictate a favorable outcome in the instant matter. 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Specifically, the director observed that while the

finding in *Matter of Tessel* established that a member of the board of directors would qualify as an employee of the company, it did not establish that any individual, by virtue of establishing board membership, would automatically qualify as someone employed in a managerial or executive capacity as defined in sections 101(a)(44)(A) and (B) of the Act, respectively. *Id.* In fact, a thorough review of the case indicates that the issue of the beneficiary's duties was never addressed, as they were apparently not a disputed issue in that proceeding. *Id.* Moreover, the director in the instant matter has not issued a finding that the beneficiary, by virtue of his board membership, is not the petitioner's employee. As such, the case cited by counsel is entirely irrelevant to the issues that are in contention in here.

The petitioner submitted an appeal urging the AAO to reconsider the director's decision and discussed evidence and information that had been previously submitted. While counsel acknowledges the director's grounds for denial, he offers no additional information to cure the deficiencies regarding the insufficient descriptions of duties. In fact, counsel states that "the beneficiary has no specific duties in his position on the Board of Directors" and persists with the claim that the beneficiary manages the essential function of directing the petitioner's business. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In the instant matter, the petitioner fails to describe the essential function with any specificity and adds to ambiguity by failing to provide a detailed description of duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Precedent case law furthers the significance of a detailed job description noting that the actual duties themselves will 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 instant matter, the petitioner has failed to answer a critical question: What does the beneficiary primarily do on a daily basis? The same information is also lacking with regard to the beneficiary's foreign employment. Merely showing that the beneficiary was an active member of the foreign entity's board of directors is not an adequate substitute for the required description of daily duties. Nor can the AAO assume that the beneficiary's discretionary authority within the petitioning entity necessarily includes primarily qualifying duties. 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. Despite the director's comprehensive decision, which delineates the specific deficiencies, counsel has not supplemented the record with evidence or information specifically addressing the grounds for denial.

As a final note, 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 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 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).

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 regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

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. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. However, based on the petitioner's untimely filing of the Form I-290B, the appeal will be rejected.

ORDER: The appeal is rejected.