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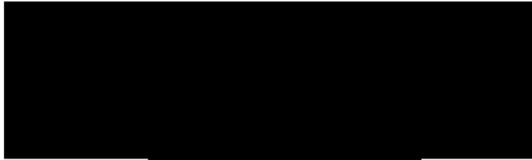
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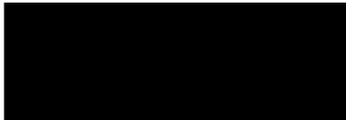
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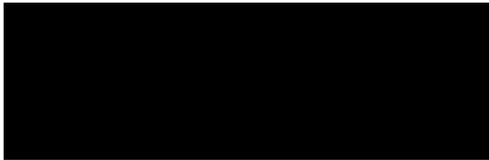
Petitioner:

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 Director, Vermont Service Center, denied the employment-based visa petition. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO). The AAO, affirming the findings of the director, dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The AAO will grant the motion. The prior decisions of the director and the AAO are affirmed.

The petitioner filed the instant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of New Jersey that is operating as a real estate development, interior design, and construction management company. The petitioner seeks to employ the beneficiary as its project manager.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary had been employed by the foreign entity or would be employed by the United States entity in a primarily managerial or executive capacity. In a July 10, 2006 decision, the AAO affirmed the director's findings and further observed that the petitioner had not established that the United States company had been doing business for at least one year prior to the filing of the instant petition.

On motion, counsel for the petitioner challenges Citizenship and Immigration Services (CIS) requirement that the petitioner demonstrate its ongoing business operations for at least one year prior to the instant filing, stating that the regulations do not require that the entire year of operations occur before the immigrant visa petition was filed. Counsel also contends that the record demonstrates the beneficiary's employment abroad in the United States in a primarily managerial or executive capacity. Counsel submits a brief and documentary evidence in support of the motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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 or 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, 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.

Two of the issues in the instant proceeding pertain to the nature of the beneficiary's employment. The first issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity, and the second issue is whether the petitioner demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity while employed as the project manager in 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 an attempt "to clarify matters," counsel for the petitioner submits on motion a list of the job duties performed by the beneficiary as the project manager of the foreign and United States entities that had not previously been provided for consideration by the director or the AAO. The AAO notes that in addition to the director's July 20, 2005 request for "the duties performed by each employee" of the United States entity and description of the positions held by each of the foreign entity's employees, the director discussed in his November 30, 2005 decision the petitioner's failure to provide a "formal internal job description of the duties" associated with the beneficiary's position. The director further rejected the petitioner's reliance on the description of the position of project manager provided for by the Department of Labor's *Occupational Outlook Handbook*. The director specifically noted that the job descriptions presented in the *Occupational Outlook Handbook*, while offering a "general reference for the labor market as a whole," can not be relied upon to satisfy the statutory requirements for "managerial capacity" and "executive capacity." See §§ 101(a)(44)(A) and (B) of the Act. On appeal, counsel referenced the same job descriptions previously provided by the petitioner as evidence that the petitioner had submitted a sufficient job description of the duties related to the position of project manager. Counsel did not provide on appeal additional evidence explaining the beneficiary's positions in the foreign and United States entities. Nor did she attempt to clarify or expound on the job descriptions previously offered.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, as well as before the appeal was reviewed by the AAO. The petitioner failed to submit a more comprehensive description of the beneficiary's job duties and now submits it on motion. The AAO, however, will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) (concluding that where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Moreover, pursuant to the regulation at 8 C.F.R. § 103.5(a)(3), the instant motion to *reconsider* must establish that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision, and is not based on

the review of new evidence. Accordingly, the appeal will be adjudicated based on the record of proceeding before the AAO.

Counsel challenges the AAO's acknowledgement of the beneficiary's position as being "at the top of each organization's managerial hierarchy" while failing to recognize the beneficiary's employment in a primarily managerial or executive capacity. Counsel states that the job descriptions provided as evidence of the beneficiary's position in the "managerial hierarchy" and his managerial authority were essentially the same, but that the AAO abused its discretion in failing to consider the beneficiary as a manager or executive in either the foreign or United States entity.

In its July 10, 2006 decision, the AAO conceded that the beneficiary's subordinate staff has been and would be comprised of supervisory, managerial, or professional employees. Based on this acknowledgment, the AAO concluded that the beneficiary has and would occupy a position "at the top of each organization's managerial hierarchy." The AAO clearly stated however, that despite the beneficiary's position in each company's organizational hierarchy, the petitioner is obligated to disclose the specific managerial or executive tasks that the beneficiary would perform on a daily basis, instructing that "general objectives of the beneficiary's job as project manager" are not sufficient to establish that his employment has been or would be primarily managerial or executive in nature. The beneficiary's position in the organizational hierarchy, by itself, is not sufficient to establish employment in a primarily managerial or executive capacity. The regulations specifically state the petitioner's obligated to "clearly describe the duties to be performed by the [beneficiary]." Moreover, the statutory definitions of "managerial capacity" and "executive capacity" mandate that the beneficiary meet all four elements in order to be considered a manager or executive. Again, a beneficiary's actual position in the organizational hierarchy merely suggests a position of managerial or executive authority, and, absent a description of the beneficiary's specific managerial or executive job duties, is not considered conclusive of the beneficiary's qualifying employment. *See 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) (instructing that a recitation of the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient to satisfy the regulatory requirement of a detailed job description, but that the beneficiary's actual duties will reveal the true nature of the employment).

Counsel further claims that the AAO ignored statements made by the petitioner in its brief on appeal with respect to the beneficiary's eligibility as both a manager and executive. Specifically, counsel references claims as to how the beneficiary's former and proposed employment satisfy each element of the statutory definitions of "managerial capacity" and "executive capacity." *See* §§ 101(a)(44)(A) and (B) of the Act. Reliance on these statements is misplaced, as in attempting to establish the beneficiary's classification as a manager or executive, they essentially restate the relevant statutory criteria. Without a description of the specific related job duties, the claims of the beneficiary's managerial or executive employment are circular and inadequate. 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. at 1108.

Counsel also contends that the AAO abused its discretion when it cited only a portion of a sentence offered in the petitioner's appellate brief as the entire job description offered by counsel. Counsel claims that the "partial quote" was taken out of context and represented as the complete job description for the beneficiary. In fact, in its July 10, 2006 decision, the AAO merely referenced the statement as having been offered by counsel to describe the "primary duties" of the beneficiary. A review of the AAO's decision demonstrates that

the AAO did not rely solely on this language in its analysis of the beneficiary's employment capacity, as suggested by counsel on motion. In addition to this statement, the AAO outlined the entire job descriptions initially offered by the petitioner for the beneficiary's foreign and United States employment, as well as the list of job responsibilities submitted by the petitioner in response to the director's request for additional evidence. As noted earlier, the evidence offered by counsel on appeal included essentially the same job descriptions as those previously submitted by the petitioner. It is clear that in its July 10, 2006 decision, the AAO considered more than just counsel's statement of the beneficiary's "primary duties" in determining that the petitioner had failed to demonstrate the beneficiary's employment in a primarily qualifying capacity.

In addition to the nonspecific job descriptions offered by the petitioner, the AAO notes that new evidence submitted on motion, specifically copies of February through July 2004 work proposals provided as proof of the petitioner's business operations at the time of filing, identify the beneficiary's position in the United States entity during this time as designer and project manager. Documentation submitted by the petitioner in response to the director's request for evidence indicated that sometime during the eight months after the Form I-140 was filed the petitioner incorporated a designer into its staff. This additional evidence, not previously available for review by the director or AAO, raises the question of whether at the time of filing the beneficiary was performing the interior designs services offered by the petitioner, which are not typically considered to be managerial or executive in nature. See §§ 101(a)(44)(A) and (B) of the Act. The AAO cannot further address this issue without additional information pertaining to the beneficiary's role as a designer, but notes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel also emphasizes on motion the similarities in the eligibility requirements for an L-1A nonimmigrant visa petition and an I-140 immigrant petition for a multinational manager or executive. 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). However, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. 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.

While CIS previously approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary, 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 approval does 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 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 petition was 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, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. 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). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

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 petition 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary was employed by the foreign entity or would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the previous decisions of the director and AAO are affirmed.

The AAO will next consider the issue of whether the petitioner was doing business in the United States for at least one year prior to the instant filing.

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he 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 its July 10, 2006 decision, the AAO concluded that the petitioner had not demonstrated that it had been doing business for at least one year prior to filing the petition on February 11, 2005 as the record did not contain business documentation dated earlier than July 2004.

On motion, counsel submits proposals and invoices for work performed by the petitioner during February through July 2004. The evidence submitted by counsel on motion demonstrates that the petitioner was doing business since February 2004, at least one year prior to the petition's filing date. Accordingly, the AAO's decision with respect to this issue only will be withdrawn.

Counsel challenges on motion that the AAO incorrectly required the petitioner to demonstrate it had been doing business for at least one year prior to filing the Form I-140. Counsel claims that neither the regulations nor statute imposes the requirement that the petitioner operate for the entire year prior to filing the immigrant visa petition, but rather that the petitioner has been doing business for one year irrespective of the filing date.

Counsel's analysis of the regulations and statute is misplaced. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states, in pertinent part, that "[a] petition for a multinational executive or manager must be accompanied by a statement . . . which demonstrates that . . . [t]he prospective United States employer has been doing business for at least one year." (Emphasis added). In other words, at the time the Form I-140 is filed, the petitioner

must submit evidence that it has been doing business in the United States for at least one year. The regulations do not allow the petitioner an infinite amount of time to demonstrate its one-year period of business operations, as suggested by counsel on motion. *See* 8 C.F.R. § 204.5(j)(3)(i)(D); *see also* *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (finding 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). Nonetheless, as determined above, counsel has demonstrated on motion that the petitioner was doing business for one year prior to the instant filing.

Counsel addresses on motion the standard of proof applicable to the AAO's review of the instant matter.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring).

Here, the submitted evidence, while relevant to establishing that the beneficiary's subordinate staff has been and would be comprised of professional, managerial or supervisory employees, one of the four elements of the statutory definition of "managerial capacity," is not sufficient to meet the petitioner's burden of proof. Based on the above discussion, the record does not demonstrate the beneficiary's eligibility for the requested immigrant visa classification.

Counsel also contends that the AAO ignored counsel's request on appeal that the beneficiary's Form I-485, Application to Register Permanent Resident or Adjust Status, be reinstated following the director's simultaneous denial of the application with the I-140 petition. The AAO notes that the visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. Jurisdiction over the beneficiary's application to adjust status remains with the director having jurisdiction over his or her place of residence. *See* 8 C.F.R. § 245.2(a).

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 AAO's July 10, 2006 decision is affirmed.