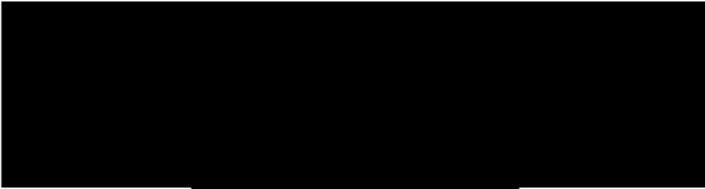


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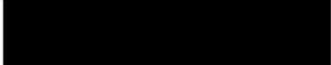
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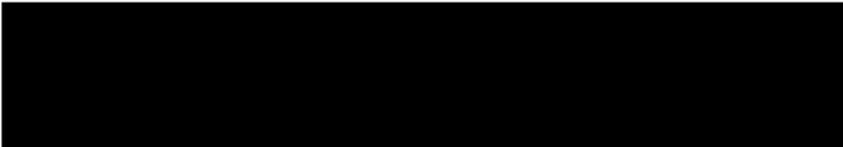
Petitioner:

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 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 dismissed.

The petitioner is a Texas corporation that is doing business as a restaurant. It seeks to employ the beneficiary as its president and chief executive officer (CEO). 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 following independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's employer abroad; and 2) the petitioner failed to establish that it would employ the beneficiary 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 first issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In a letter dated June 17, 2002 in support of the petition, the petitioner stated that it was established as the wholly owned subsidiary of [REDACTED] located in Pakistan.

The director determined that the petitioner failed to provide sufficient corroborating evidence of its claimed ownership. Accordingly, the director issued a request for additional evidence (RFE) dated July 13, 2004 instructing the petitioner to provide evidence establishing common ownership with that of the beneficiary's foreign employer.

In response, the petitioner provided the following documentation:

1. Evidence of licenses and permits allowing the petitioner to operate as a full service restaurant.
2. A copy of the petitioner's 2001 corporate tax return showing the issuance of \$100,000 worth of common shares.
3. Stock certificate No. 1 identifying the beneficiary's foreign employer as the owner of 1000 shares of the petitioner's stock.
4. An acknowledgement of the Harris County clerk's receipt of the petitioner's certificate of operation, which allows the petitioner to operate under an assumed name. The receipt, dated January 10, 2003, states that the certificate of operation identified the beneficiary as the petitioner's owner.

After reviewing the petitioner's submissions, the director determined that the petitioner provided inconsistent documentation regarding its ownership and denied the petition in a decision dated December 28, 2004.¹ More

¹ The petitioner claims it did not receive the denial when initially issued, which led to the filing of a number of motions. Citizenship and Immigration Services (CIS) reissued an identical decision dated July 5, 2006.

specifically, the director noted that the petitioner's claim and stock certificate are contradicted by the information noted in the receipt discussed in No. 4 above.

On appeal, counsel asserts that the assumed name certificate is filed voluntarily and is irrelevant for the purpose of proving the existence of a qualifying relationship between a U.S. and foreign entity. Counsel's argument, however, is without merit. Despite the optional filing of the assumed name certificate, the document can be used to draw adverse findings regarding the petitioner's credibility. While the assumed name certificate cannot be the petitioner's sole documentation for establishing its ownership, it can be used to determine how consistent the petitioner has remained with regard to its claim.

In the present matter, the petitioner has maintained the claim that it is a wholly owned subsidiary of the beneficiary's foreign employer. However, according to the receipt discussed in No. 4 above, the petitioner made an entirely different claim regarding the issue of its ownership in the assumed name certificate. And yet another claim was made regarding the petitioner's ownership in its 2005 corporate tax return, which identified the beneficiary as 100% owner of the company. The director properly made an adverse finding as a result of these inconsistencies.

Despite the opportunity provided to the petitioner to provide documentation to reconcile these inconsistencies on appeal, such documentation was not provided. Counsel merely resubmitted the petitioner's Articles of Incorporation and stock certificate No. 1. However, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

As properly noted by the director, 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). As the petitioner failed to provide evidence to reconcile the inconsistency regarding its ownership and control, the AAO cannot conclude that a qualifying relationship has been properly established.

The second issue in this proceeding is whether the petitioner would employ the beneficiary 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 the petitioner's June 17, 2002 letter provided in support of the Form I-140, the petitioner provided the following statement regarding the beneficiary's proposed position within its organization:

In the capacity of [p]resident and CEO, [the beneficiary] will continue to establish the goals and policies of our Houston subsidiary and exercise discretionary decision making authority. He will maintain responsibility for the establishment and maintenance of bank accounts and letters of credit, and for the hiring of lawyers and accountants. He will continue to possess the authority to hire, supervise and dismiss supervisory and other personal [sic] and will maintain sole responsibility for all discretionary decisions affecting the company and its commitments.

In the RFE, the director instructed the petitioner to provide a detailed list of the beneficiary's proposed daily duties and the percentage of time attributed to each of the listed duties. The director stated that the Form I-

140 showed three employees and asked the petitioner to provide an organizational chart identifying the employees by name and title, to include a brief description of each employee's duties, and to submit the relevant W-2 forms and quarterly tax returns. The petitioner's response included the following percentage breakdown:

- Back office: [t]o manage the corporation and its dba's by setting up goals to achievements[.] Planning for expansions by opening other locations or diversified business. Office management of staff and sales increases. To direct and negotiate policy matters and to adopt all decision makings [sic]. 35%
- Accounting & [i]nventory control[.] P & L targets and finances. 15%
- Marketing research & sales promotion. Customer service. 20%
- Staff coordination and development[.] 20%
- Misc [sic] supervision[,] etc. 10%

Additionally, the petitioner provided a letter dated September 12, 2004 stating that as of the date of the letter the company employed four individuals including the petitioner. The list of employees indicates that the petitioning entity was comprised of the following employees in 2004: the beneficiary at the top of the hierarchy as president and CEO, the restaurant manager, a kitchen chef, and a kitchen helper. The petitioner did not provide a list of the individuals employed at the time the Form I-140 was filed. The petitioner also provided its 2003 tax return and a number of its quarterly wage reports from 2004, which suggest that neither the restaurant cook nor the kitchen helper was employed on a full-time basis in 2004.

Accordingly, the denial of the petition was partly based on the petitioner's failure to substantiate the claim that the beneficiary would primarily perform duties of a qualifying nature as part of his proposed position in the United States. The director noted that at the time of filing the Form I-140, the petitioner employed three individuals.² Despite the confusing analysis of the "management to labor ratio" as discussed in the denial, the director's discussion of the petitioner's organizational structure was relevant and led to the proper conclusion.

On appeal, counsel disputes the director's reliance on the size of the beneficiary's support staff in reaching his conclusion, stating that the beneficiary can perform qualifying duties even if he has no subordinate employees. While counsel's assessment is correct with regard to a function manager or someone employed in an executive capacity, either claim requires that the petitioner furnish a written job offer that clearly describes the duties to be performed. With regard to a function manager, the duties must 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. Similarly, with regard to a beneficiary employed in an executive capacity, the petitioner must establish its ability to relieve the beneficiary from having to primarily perform the petitioner's daily operational tasks. An employee who primarily performs the tasks necessary to

² Although the numerical notation was correct on page five of the director's decision, the director erroneously stated that Part 5 of the petition showed the petitioner as employing four individuals.

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 present matter, the beneficiary's proposed position is described using broad terminology and fails to provide the required detailed account of the duties to be performed on a daily basis. While the petitioner admittedly complied with the request for a percentage breakdown, the breakdown was to be applied to specific tasks, not generalized job responsibilities, which only convey the level of discretionary authority without providing a comprehensive understanding of job duties. While the AAO acknowledges counsel's assertion that the beneficiary's proposed position is purportedly within an executive capacity, 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). In the present matter, the petitioner claims to be a full service restaurant, which at the time of the Form I-140's filing employed a total of three individuals. The director properly questioned the petitioner's ability to support a primarily managerial or executive position in the context of a restaurant business with only two employees (who may or may not have been employed on a full-time basis) to provide the daily operational tasks. Given the apparent lack of an adequate support staff coupled with the insufficient description of the beneficiary's proposed position and the apparent needs of the business at its stage of development, the director's decision was warranted.

Finally, counsel refers to the petitioner's previously approved L-1 employment of the beneficiary, suggesting that denying the petitioner's current Form I-140 is inconsistent with those prior approvals. 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, 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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

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).

On review, the record as presently constituted is not persuasive in demonstrating that the petitioner would employ the beneficiary in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for employment in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record lacks a detailed description explaining the duties to be performed by the beneficiary under an approved petition and, therefore, fails to establish that a majority of the beneficiary's duties would be primarily directing the management of the organization. Rather, based on the organizational structure at the time of filing the Form I-140, the petitioner was not properly staffed to relieve the beneficiary from having to primarily engage in its daily operational tasks. Thus, based on the evidence furnished, it cannot be found that the beneficiary would primarily perform duties of a qualifying managerial or executive nature.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.