



U.S. Citizenship
and Immigration
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FILE:

SRC 06 002 50369

Office: TEXAS SERVICE CENTER

Date: JUN 04 2007

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 dismissed.

The petitioner is a Texas corporation engaged in operating retail stores. It seeks to employ the beneficiary as its 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 petitioner is ineligible for the benefit sought based on two independent grounds: 1) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity; 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 her 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 primary issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity. The second issue is whether the petitioner established that it 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 support of the Form I-140, the petitioner submitted a letter dated September 12, 2005, which included the following breakdown of the beneficiary's position abroad:

Management of the Entire Organization and its Operation

- Controlled operations, administration, government related matters, contracts, statutory, and legal issues, reviewed corporate documents—10%;
- Oversaw the management and supervision of all employees at Classic Marketing's retail outlets, coordinated tasks between employees—5%;

- Made personnel decisions including the hiring and firing of employees including independent contractors—5%;
- Planned sales and marketing policies relating to the retail sale of the company's products; set market standards—5%;
- Made decisions relating to the purchase of consumer goods and products such as thermoware, plastic items, kitchen ware, health and beauty items, gifts and novelty items, luggage and outdoor furniture products—5%;
- Set pricing for individual customers—5%;
- Oversaw and made decisions in the financial, taxation and accounting areas—5%

(Average time spent: 40%)

Controlled, Developed and Managed the Retail Sale Functions

- Managed, developed and oversaw the [c]ompany's retail sale activities as the authorized dealer for products such as luggage and traveling goods, Milton brand thermo ware, Prince brand [p]lastic items and other kinds of kitchen wares, health and beauty items and gift and novelty items—30%;
- Oversaw the quality of the above stated products and ensured that the products conformed to customer demands and needs—10%;

(Average time spent: 40%)

Business Development, Sales and Marketing

- Surveyed the local, regional and international markets, assessed the requirements of the potential customers—10%;
- Negotiated with brokers and other sellers for the purchase of consumer products—5%;
- Represented and marketed the company in trade fairs and other promotional events to improve company image and prospect [sic] clients—5%.

(Average time spent: 20%)

The petitioner also provided the following statements regarding the beneficiary's prospective employment in the United States:

Corporate Planning:

Directing and coordinating activities of the affiliate organizations in the retail trade and investment business and formulating and administering company policies: [sic] In consultation with other members of the firm in India[,] developing long range goals and objectives of the company. Analyzing the corporation's past performance, evaluating the strengths and weaknesses of the corporation; forecasting and planning the future business activities of the affiliated corporations including the purchase and lease of new stores in different areas of Texas. Reviewing and signing new leases and contracts including earnest money contracts. Reviewing and analyzing activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. Discussing with management and employees to review achievements and discuss required changes in goals or objectives of the affiliate operations in India and the U.S. Making recommendations to other members of the management with regard to economic objectives and policies for the [sic] both the operations in India and the U[.]S.

(Average time spent: 30%)

General Administration:

Directing and coordinating activities of managers and employees in the purchasing, marketing, and sales departments of the corporation's retail trade and investment business. Directing the overall business activities of the organization to ensure smooth functioning of the corporations [sic] and compliance with statutory requirements. Employing staff to attend to miscellaneous functions of the corporations [sic]. Hiring and firing staff. Have managerial and supervisory employees report to him as the [p]resident.

(Average time spent 25%)

Marketing & Sales:

Directing the marketing policies of the company. Surveying the market, assessing the requirements of the customers and clients, and evaluating the market potential at various geographical locations as [sic] also within specific customer groups. Developing marketing strategies for effective sale of products and services. Researching the advertising and promotional activities of the company to promote sales of products and services and to attract more customers. Selecting pricing and packaging for products to attract potential buyers and to maintain a regular flow of clientele. Analyze competitors' data to forecast trends.

(Average time spent: 15%)

Financial:

Managing and overseeing the overall financial functions. Making decisions in the financial, taxation and accounting areas such as reviewing budgets, tax returns and accounting practices. Reviewing transactions with the banks and other financial institutions.

(Average time spent: 20%)

Purchasing:

Overseeing and directing the import and purchase of goods, services, materials and supplies required by the company. Comparing catalogue listings, examining samples, attending demonstrations of products and conventions, calling for quotations, negotiating prices and contract terms, evaluating alternative offers and making choices of suppliers, vendors and distributors.

(Average time spent: 10%)

On October 31, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide evidence of its staffing levels, including the position titles, job duties, and educational levels of each employee. The petitioner was also asked to provide the W-2 forms for 2004 issued to each of its employees.

Counsel responded with a letter dated January 18, 2005,¹ which contained a breakdown of all exhibits addressing the items discussed in the RFE. Among the exhibits submitted were organizational charts for the U.S. petitioner and for the beneficiary's foreign employer. Regarding the beneficiary's position with the foreign entity, the beneficiary is shown at the top of the hierarchy in the position of chief executive officer, whose direct subordinates included a vice president and a general manager. The general manager appears to have supervised an assistant manager. It is unclear whether the assistant manager or the general manager supervised the next tier of employees, which included a cashier, an accountant, three clerks, a typist, and a watchman. Regarding the petitioner's organizational chart, the beneficiary is again depicted at the top of the organization's hierarchy. His direct subordinates include a vice president, a purchase manager, a sales manager, who supervises the managers in charge of each of the petitioner's four retail operations, a finance manager, and an accountant.

The petitioner also provided position descriptions for each employee within the U.S. and foreign organizations. However, with regard to the beneficiary, the petitioner provided the same job descriptions that were provided initially in support of the Form I-140.

On January 31, 2006, the director denied the petition concluding that the petitioner failed to establish that either of the beneficiary's respective positions can be deemed to be of a primarily managerial or executive nature. While the AAO concurs with the director's ultimate conclusion, the underlying analysis is deficient, erroneously suggesting that staff recruitment and supervision are generally non-qualifying tasks. Moreover, the petitioner's breakdown of the beneficiary's foreign position indicates that only 10% of the beneficiary's time was spent on staff recruitment and supervision. Thus, even if the beneficiary recruited and supervised non-supervisory, non-professional, and non-managerial employees, the percentage breakdown suggests that the beneficiary only devoted 10% of his time to these tasks and thus cannot be deemed to be primarily performing non-qualifying tasks based on only this portion of the job description. *See* § 101(a)(44)(A)(ii) of the Act. Furthermore, there is no indication in the denial that the director considered the employment capacity of the subordinates the beneficiary supervised. Employee supervision is not automatically deemed a non-qualifying task unless the employees supervised are non-supervisory, non-professional, and non-

¹ Counsel's correspondence appears to have been erroneously dated, as it is factually impossible for counsel to respond in January 2005 to an October 2005 request. This error is immaterial and is merely noted for the record.

managerial. The director's suggestion to the contrary suggests a flawed interpretation of the relevant statutory provision. *See* section 101(a)(44)(A)(ii) of the Act.

Additionally, while the AAO agrees with the conclusion that business marketing tasks cannot be deemed qualifying, the description of the beneficiary's foreign employment suggests that only 20% of the beneficiary's job entailed the performance of marketing tasks. As such, the director's adverse conclusion requires a more comprehensive discussion of the job descriptions provided by the petitioner, particularly with regard to the beneficiary's proposed employment with the U.S. petitioner. While the director determined that the beneficiary's proposed employment would primarily include "daily productive tasks," she failed to include a discussion of the factors that led to this conclusion. Moreover, such a conclusion necessarily suggests that the petitioner's description of the beneficiary's proposed employment was sufficiently detailed such as to convey an understanding of the specific tasks the beneficiary would carry out on a daily basis. The petitioner's overly generalized description primarily cited broad responsibilities. Therefore, while the director's overall conclusion regarding the petitioner's ineligibility is correct, the basis for her conclusion is not. Notwithstanding the AAO's criticisms of the director's analysis, the AAO finds the petitioner to be ineligible for the benefit sought and will therefore affirm the director's conclusion.

On appeal, counsel asserts that the petitioner provided comprehensive descriptions for each of the beneficiary's positions and resubmits the same descriptions with their respective percentage breakdowns. Counsel firmly insists that the job descriptions clearly show the beneficiary's involvement in executive functions with respect to the foreign and U.S. entities. However, as previously stated, a thorough description of specific job duties is crucial to a determination of whether the beneficiary has been and would be employed in a primarily managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(5). As reiterated in precedent case law, 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 instant matter, the statements describing the beneficiary's past and proposed employment lack sufficient detail. Instead the job descriptions convey an overall sense of the beneficiary's discretionary authority by discussing general job responsibilities while revealing few actual job duties to convey an understanding of exactly what the beneficiary has been and would be doing on a daily basis.

With regard to the description of the employment abroad, the petitioner stated that 40% of the beneficiary's time was spent managing, developing, and overseeing the foreign entity's sales activity and overseeing the quality of the products sold to the company's clients. However, the petitioner does not state what actual duties are involved in this broad range of responsibilities. While the petitioner provided a more detailed account of the duties the beneficiary performed as part of his business development and sales and marketing responsibilities, such duties involve market research, contract negotiation, and marketing the foreign entity's products at trade shows. These are operational tasks necessary for the foreign entity's daily provision of goods and services and thus cannot be deemed to be qualifying. Therefore, based on the breakdown provided by the petitioner, at least 40% of the beneficiary's time was spent performing tasks that are entirely unknown and another 20% of his time was spent on non-qualifying duties. As at least 60% of the beneficiary's cannot be deemed qualifying, the petitioner has failed to show that the beneficiary's employment abroad was primarily comprised of qualifying managerial or executive tasks. It is noted that 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). While the lack of clearly defined job duties also precludes the determination that the beneficiary

primarily performed non-qualifying tasks during his employment abroad, the petitioner cannot circumvent an adverse determination merely by failing to provide the necessary information. The AAO notes that the petitioner has provided the foreign entity's organizational chart, which suggests a multi-tiered staffing hierarchy where the beneficiary is separated from the lower tier of employees and their non-qualifying tasks by at least one tier of managerial employees. However, the AAO cannot make assumptions as to the nature of the duties the beneficiary performed simply based on the entity's organizational composition. Precedent case law has firmly established that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Similarly, the petitioner's description of the beneficiary's proposed employment lacks a detailed account of the specific job duties the beneficiary would perform on a daily basis. Specifically, the petitioner stated that the beneficiary's general administration responsibility includes coordinating employees in the purchasing, marketing, and sales departments. However, the petitioner failed to reveal the duties involved in such coordination. Furthermore, the petitioner's organizational chart does not include a marketing department. That being said, the beneficiary's responsibilities include marketing and sales, which specifically require the beneficiary to develop marketing strategies in order to promote sales. Therefore, the petitioner's own statements suggest that the beneficiary's proposed employment would include marketing-related duties, which fit the category of daily operational tasks, not tasks within a qualifying managerial or executive capacity. Similarly, the proposed purchasing responsibility would require the beneficiary to attend product demonstrations and conventions and deal directly with product vendors in obtaining pricing and contract terms for the purchase of goods sold by the petitioner's retail outlets. Thus, at least 25% of the beneficiary's time would be devoted to performing the petitioner's daily operational tasks. Additionally, as discussed above, the petitioner failed to include an account of duties describing how the beneficiary would implement his general administration responsibility, which would consume another 25% of the beneficiary's time. As such, at least 50% of the beneficiary's time would be spent on duties that are either undefined or those that cannot be deemed as qualifying. This precludes the AAO from being able to conclude that the primary portion of the beneficiary's time would be spent performing tasks within a qualifying managerial or executive capacity.

Moreover, a review of the petitioner's organizational chart and quarterly wage statements for 2005 present further questions as to the petitioner's ability to support the beneficiary in a primarily managerial or executive position. More specifically, the chart suggests that the petitioner had a vice president and a cashier at the time the petition was filed. However, the relevant quarterly wage statement for the third quarter of 2005 does not include the individuals whom the organizational chart identified as the petitioner's vice president and cashier, respectively. Nor has any evidence been submitted to show who was performing the stocking duties, which, according to the organizational chart, are performed by contractors who are supervised by the purchasing manager. 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). In the present matter, these inconsistencies remain unresolved and lead the AAO to question whether the purchasing and finance managers are managerial employees in title only, as there is no evidence that they manage any subordinates. Furthermore, the chart shows that four different retail outlets are part of the petitioner's overall operation. However, each of the four stores employs a single individual, some receiving little more than minimum wage compensation. The AAO finds it questionable at best that a retail outlet can operate on a daily basis in the presence of a single employee, in fact the same employee, without involving considerable assistance of the beneficiary. As stated previously, 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. 604. In the present matter, in light of the significant lack of information regarding the beneficiary's proposed daily tasks and the discrepancies regarding the petitioner's staffing composition, the AAO finds that the petitioner has failed to establish that the beneficiary's proposed duties in the United States would be primarily within a qualifying managerial or executive capacity.

Further, while counsel asserts on appeal that the RFE did not request clarification of the beneficiary's proposed job, a closer review of item 3 of the RFE shows that the petitioner was asked to state the duties of each of its employees. As the beneficiary is an employee of the petitioner, the instruction clearly applied to the beneficiary. As the initial job description consisted primarily of general responsibilities, as discussed above, it is reasonable for the RFE to have requested further information on this relevant and crucial subject. Moreover, even if the director had committed a procedural error by failing to solicit further evidence on the subject of the beneficiary's proposed duties, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Counsel's numerous references to unpublished cases will be given no deference. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all employees of the Citizenship and Immigration Services (CIS) in the administration of the Act, unpublished decisions are not similarly binding.

Lastly, counsel suggests that the beneficiary's proposed position is both that of an executive and function manager. In furtherance of this claim, counsel states that the beneficiary manages the business development, sales, and marketing functions. 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. In the present matter, in light of the questionable organizational chart and deficient job description provided, it is impossible to conclude that the beneficiary would be relieved from actually performing the duties related to the various essential functions.

In summary, the AAO concludes that the petitioner has failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Therefore, the director's decision denying the petitioner's Form I-140 is affirmed.

As a final note, service records show the petitioner's previously 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 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 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).

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.