

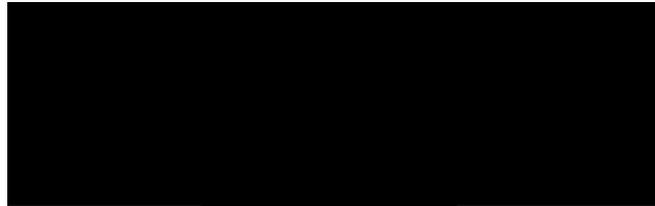
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

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IN RE:

Petitioner:

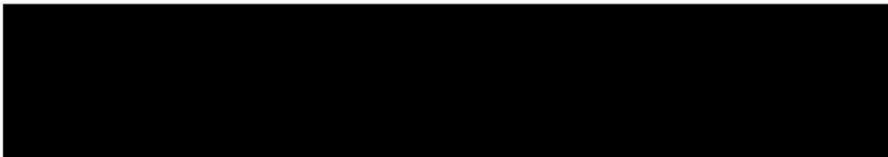
Beneficiary:



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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Maryland corporation engaged in the business of provided data entry services. It seeks to employ the beneficiary as prepress manager of production. 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 conclusion that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's findings 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 primary issue in this proceeding is whether the beneficiary would be employed by the U.S. petitioner 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 August 10, 2005 in which the following list of responsibilities was attributed to the beneficiary's proposed employment:

- Evaluate new equipment & software[.]
- Integrate new components. . . .
Hire, train and manage personnel.
Meet with clients to develop a strategy for producing complex [p]repress projects.
- Develop samples with detailed instructions and programs to produce the project.

- Review with clients for approval or modification.
- Prepare package[s] and send samples with instructions and programs to the Philippines.
- Communicate with [the] Philippines office on projects and their status.

On March 10, 2006, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, the following documentation to assist it in determining the beneficiary's employment capacity in the proposed position in the United States: 1) a detailed description of the beneficiary's proposed day-to-day job duties with an hourly breakdown of time assigned to each duty; 2) additional evidence illustrating the petitioner's management and personnel structure, including the number of supervisors under the beneficiary's control, as well as their position titles and job duties; and 3) the petitioner's tax documents and payroll information.

In response, the petitioner provided the following statement:

[The beneficiary] has been engaged with [the petitioner] in the position of [p]repress [m]anager-[p]roduction . . . [The beneficiary] is responsible for starting and setting up the [p]repress production department in the U.S., which will help support the operation in the Philippines. This process involves the creation of the development of DTD's (Document Type Definitions) which are documents that detail very specific coding instructions. These files allow multi-purposing of the data over each of the various components of the prepress process. . . . Once the information is preliminarily encoded, the validity of these documents must be verified.

* * *

[The beneficiary]'s primary duties for developing the XML Division include:

Evaluate and purchase new equipment and software[.]

- Integrate new components . . . into [the petitioner]'s Miles33 typesetting system[.]
- Hire, train and manage personnel[.]
- Meet with clients to develop strategy for producing complex [p]repress projects.
- Develop samples with detailed instructions and programs to produce the project.
- Review with clients for approval or modification[.]

Communicate with [the] Philippine office on projects and their status.

[The beneficiary] will continue to utilize his broad familiarity of Miles33 and the supporting computer programs for this system. He will share this familiarity of the product, policies and procedures as [the petitioner] expand[s].

Although the petitioner was specifically instructed to provide the beneficiary's job description within the scheme of an hourly breakdown listing the specific duties to be performed and the amount of time allotted to each duty, the petitioner only provided the hourly breakdown to describe the beneficiary's employment abroad. Additionally, while the director also asked for a discussion of the petitioner's management and personnel structure, no mention was made of any position other than the beneficiary's in the petitioner's response to the RFE. It is noted that 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).

In a decision dated July 3, 2006, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's employment in the United States would primarily entail the performance of tasks within a qualifying managerial or executive capacity. The director specifically noted the petitioner's failure to address the issue of its organizational hierarchy and the lack of a detailed job description, both of which were specifically requested in the RFE. The director also pointed out the fact that the petitioner's claim of having 155 employees, the number that appears in the Form I-140, does not match the payroll and tax documentation, which suggest that the petitioner employs a total of six individuals within its U.S. branch office. The director commented on the lack of detail and the petitioner's failure to provide specific job duties in its discussion of the beneficiary's proposed employment. The director ultimately found that the petitioner's current staffing arrangement lacks the ability to relieve the beneficiary from having to primarily perform the operational tasks that would inevitably consume the majority of the beneficiary's time.

On appeal, counsel repeats the job descriptions provided by the petitioner and disputes the director's conclusions regarding the petitioner's staff size. Further, he claims that the beneficiary would be a function manager, which does not require a subordinate staff. 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)). Therefore, while the beneficiary need not have a subordinate staff in order to qualify for classification as a multinational manager or executive, the petitioner must explain how its daily operational tasks are carried out without having the beneficiary primarily engage in such tasks. Given the size of the staff in the present matter, the director's concern was justified. The petitioner cannot claim that the beneficiary would primarily perform tasks of a qualifying nature without establishing who within its organization would perform the non-qualifying operational tasks. The petitioner's failure to discuss the position titles or job duties of any employee other than the beneficiary precludes the AAO from determining who performs the company's daily operational tasks.

Further, while the AAO concurs with the director's finding that the petitioner's description of the beneficiary's proposed employment was lacking in detail, the record indicates that the beneficiary would meet with clients, develop samples and instructions to further each project, review changes with the clients, and prepare packages with samples and instructions to be sent to the office in the Philippines. Thus, despite the general nature of this list, the petitioner provides enough information to suggest that the beneficiary's primary focus has been and would be providing the services necessary to produce the product purchased by the petitioner's

clients. Based on the description provided, the AAO cannot conclude that the beneficiary would be relieved from having to primarily engage in the performance of non-qualifying tasks. To the contrary, the job description strongly suggests that the beneficiary's efforts would primarily focus on client interaction and making a product according to client needs. Therefore, while the beneficiary's duties may be essential for the petitioner's daily function, the AAO cannot conclude that the beneficiary would primarily perform duties of a qualifying managerial or executive capacity.

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, because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29-30 (D.D.C. 2003) (recognizing that CIS approves some petitions in error).

Moreover, 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).

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.