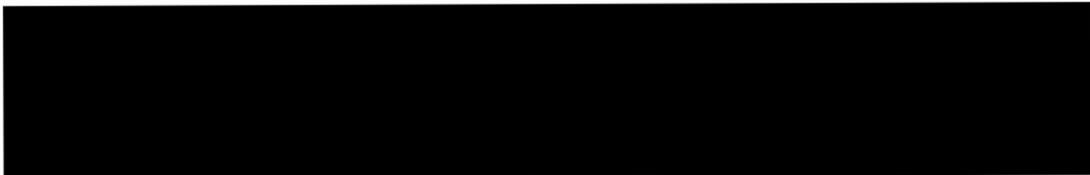




U.S. Citizenship
and Immigration
Services

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B4



FILE: [REDACTED]
SRC 06 043 50178

Office: TEXAS SERVICE CENTER Date: JUN 26 2007

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

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:



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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 Florida corporation operating as a wholesale distributor of upholstery fabrics. 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 failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition.

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 issue in this proceeding is whether the petitioner would employ the beneficiary in a capacity that is managerial or executive.

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 November 15, 2005, which included a general list of the beneficiary's proposed job responsibilities.¹ The petitioner also provided its organizational chart, which identifies six positions in addition to that of the beneficiary. It is noted that the administrative assistant and the sample arranger positions were both shown as vacant at the time the Form I-140 was filed. While the petitioner submitted a payroll document for a one-week period during the second quarter of 2005, this statement does not account for the time period during which the Form I-140 was filed. It is further noted that the payroll document indicates that three employee salaries were paid. While the beneficiary is identified as an employee, it does not appear that he was paid for week no. 6 of 2005.

Accordingly, on December 14, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist Citizenship and Immigration Services (CIS) in

¹ As the director has restated the list, verbatim, in the denial, the list need not be repeated in the present discussion.

determining the beneficiary's employment capacity in the proposed position in the United States: 1) the petitioner's organizational chart illustrating its staffing levels and identifying each employee by name, position title, and educational level; 2) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty; 3) the job descriptions of the beneficiary's subordinates, if any; and 4) one of the petitioner's 2005 quarterly wage statements.

Despite the director's comment specifically noting that the previously submitted description was overly vague, the petitioner resubmitted the same list of broad job responsibilities without adding any further details. Neither list was accompanied by an explanation of the beneficiary's specific daily activities or the percentage of time spent performing those activities. 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). The petitioner also resubmitted the organizational chart that originally accompanied the Form I-140 and provided its fourth quarterly wage report for 2005. A review of the latter indicates that the petitioner paid a wage or salary to only two employees—the management analyst and the sales and export manager. While the beneficiary and the warehouse and shipping supervisor were both named in a separate statement generated by a third party company, only the latter appears to have been paid, although he does not appear to have been employed during the fourth quarter when the Form I-140 was filed.

Based on the documentation submitted, the director determined that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity and issued a denial dated March 22, 2006. The director specifically noted the petitioner's failure to expand on the general list of job responsibilities previously provided and questioned the petitioner's overall ability to relieve the beneficiary from having to primarily perform non-qualifying tasks given the lack of an adequate support staff.

On appeal, counsel focuses on the petitioner's previously approved non-immigrant petitions filed on behalf of the same beneficiary, asserting that CIS "has consistently recognized that the beneficiary has been employed in *either a managerial or an executive capacity*."² It should be noted, however, that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Thus, while the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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). 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

² *See* page five of counsel's appellate brief (emphasis in original).

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).

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. 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).

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 examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the director specifically notified the petitioner that relevant information regarding the beneficiary's proposed job duties was missing and allowed the petitioner the opportunity to supplement the record. However, as previously stated, the petitioner failed to comply with the director's request and provided financial documents, which caused the director to further question the petitioner's ability to employ the beneficiary in a qualifying managerial or executive capacity. While it is acknowledged that the issue of the petitioner's eligibility cannot entirely rest on the size of the petitioner's support staff, this factor is relevant and should be explored for the purpose of determining who within the petitioning organization would perform the non-qualifying tasks necessary for the company's daily operation. In the present matter, the documentation submitted shows that the petitioner employed two full-time employees at the time the Form I-140 was filed. Although the director concluded that the petitioner also employed the beneficiary as well as several independent contractors, the petitioner did not provide either W-2 statements or Form 1099s for 2005 to account either for its purported employment of the beneficiary or its contract workers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel further asserts that the director's decision was arbitrary and has no merit. However, upon a thorough review of the record, the AAO finds that the petitioner has failed to provide sufficient documentation to warrant approval of the Form I-140. Not only has the petitioner failed to explain and document its employment of individuals who perform its daily operational tasks, but it has also failed to provide a comprehensive list of the beneficiary's day-to-day job duties, which are necessary in order to determine the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). The petitioner failed to identify duties associated with the beneficiary's broad job responsibilities, which include directing the management of the organization, establishing goals and policies, and maintaining discretionary authority over the decision-making and company hires. It is noted that these broad responsibilities merely restate portions of the statutory definition for executive capacity, yet provide no insight into the nature of the beneficiary's overall tasks. While the petitioner more specifically stated that the beneficiary would negotiate contracts, establish customer relations, and assist with marketing and advertising, without further explanation within the context of the petitioner's

daily operations, these responsibilities suggest the performance of non-qualifying tasks. Due to the petitioner's failure to assign a percentage of time to the listed duties, the AAO has no way of knowing how much of the beneficiary's time would be spent performing qualifying tasks versus non-qualifying ones. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Based on the information provided, the AAO cannot conclude that the petitioner is able to employ the beneficiary in a qualifying capacity wherein the primary portion of the duties carried on a daily basis are of a managerial or executive nature.

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.