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Office: TEXAS SERVICE CENTER

Date:

OCT 10 2007

IN RE:

Petitioner:

Beneficiary:

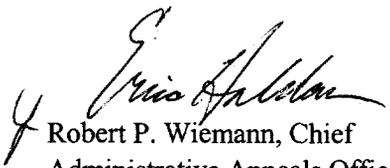
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the immigrant visa 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 Delaware that is engaged in the manufacturing, testing, and quality control of military automotive power train parts and is operating as the United States manufacturing facility for the beneficiary's foreign employer. The petitioner seeks to employ the beneficiary as its research and development manager.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The AAO notes that the director also made observations regarding the beneficiary's foreign employment, yet did not make a finding as to the capacity in which the beneficiary was employed by the foreign entity.

On appeal, the petitioner challenges the director's finding by submitting additional evidence "to elaborate on the value that the beneficiary adds to [the petitioner's] operations and to identify the beneficiary's capability in managing projects of the United States organization." The petitioner submits a brief in support of the appeal.

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.

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily 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) 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.

The petitioner filed the Form I-140 on November 2, 2006 noting the beneficiary's proposed employment as its research and development manager, during which the beneficiary "manages and designs prototypes from missions statements in coordination with engineering and design department." The petitioner noted that the beneficiary would also manage and train the company's technicians. In an appended October 23, 2006 letter, the petitioner restated the beneficiary's specialization "in the development of prototypes" and his performance of research and development activities in the United States manufacturing facility. The petitioner further

noted the importance of the beneficiary's "ability to develop and build the equipment necessary to manufacture [power train] components," "to [] build the component testing equipment," and to train technicians in the organization.

The petitioner attached the following additional description of the objectives related to the beneficiary's proposed position of research and development manager:

Research & Development Objectives:

- Work with in-house and contract engineers in the development and designing of testing equipment as required to effectively meet the performance standards of contract awards.
- Assist [research and development (R&D)] in developing engineering solutions and converting product related engineering concepts into prototypes for practical applications.
- Design and build manufacturing test equipment and assembly equipment for components and assemblies for power train assemblies and propulsion systems of armored and heavy-duty vehicle.
- Develop cost-effective upgrades to various power train components to enhance reliability and durability and reduce maintenance costs.

Manufacturing Objectives:

- Review, repair and correct assembly equipment that are functioning below standard or are faulty through practical knowledge of application and testing.
- Utilize the extensive company library, of technical specifications for combat vehicle maintenance spare parts, to manufacture specialized critical components.
- Must possess expertise in reverse-engineered parts production when drawings and specifications are not available.
- Work with suppliers in fabricating new or improved parts and verify the performance of such parts as defined by the requirements set out by engineering.

Training and Trouble Shooting Objectives:

- Work with inspectors and engineers to trouble shoot and develop solutions for assembly difficulties from component parts manufactured to approved third party drawings.
- Provide training to in-house technicians in manufacturing/production/retrofitting and overhaul services, as well as provide training to consumers on-site, when contract demands, to ensure clients can continue to manage their project independently.
- Possess ability to trouble-shoot technical problems on site, if necessary.
- Must be able to travel to international destinations to provide technical/instructional support to contract customers and to U.S. military and defense contractors. Valid passport necessary.
- Conduct machine safety inspections to ensure all company tooling machines operate safely and effectively.

Company Support Objective:

Work in cooperation with all level employees of [the petitioning entity] and [the foreign entity] to achieve customer satisfaction in all aspects of our business. To represent [the foreign and petitioning entities] in a professional and congenial manner when working or consulting with company clients.

On January 12, 2007, the director issued to the petitioner a request for evidence directing the petitioner to submit a statement describing the beneficiary's proposed employment "in greater detail," including "all goal-setting, policy-making, and discretionary decision-making duties," and the percentage of time the beneficiary would devote to performing any of the named job duties. The director asked that the petitioner describe the beneficiary's position in the company's organizational hierarchy and the supervision that the beneficiary would receive in his proposed position, as well as submit an explanation as to how the beneficiary would function in a primarily managerial or executive capacity in light of the company's reasonable needs and overall purpose and stage of development. The director further requested the job titles and job descriptions of the workers employed directly subordinate to the beneficiary.

The petitioner responded in a letter dated February 22, 2007. In an appended statement bearing the same date, the beneficiary was identified as being "currently engaged in designing a third dynamometer test equipment to accommodate the high volume of transmissions repair contracts that [the company] [has] received awards for the US Government." The petitioner explained that the beneficiary "is also designing and building a test stand" for a separate contract related to the supply of valve bodies. With respect to the beneficiary's specific areas of responsibility, the petitioner outlined the following:

Goal Setting

- The Beneficiary is called upon to provide solutions to facilitate the successful completion of contract performance – which is directed to military specifications.
- The Beneficiary['s] advice and recommendation is crucial to management decisions regarding the pursuit of new programs by the company.

Policy Making

- The executives of the company, being a small and privately owned company, perform policymaking. The Beneficiary's input in the areas of testing and prototype design is taken into consideration[.]
- The Beneficiary provides advice for tools, equipment and fixtures as well as required test equipment for the company's new products.

Discretionary decision-making duties

- [The] Beneficiary decides how the equipment is to be configured with existing work cells and advises engineering with design, fabrication required and functional proofing that will be undertaken.
- At local work site and abroad, the Beneficiary is empowered to make decisions in order to complete the required task[.]

Work team

- The Beneficiary works with trained technicians at the manufacturing facility, oversees the employees' performance on testing and assembly, and supervise test. He operates in this capacity [approximately] 30% of his time.
- The Beneficiary also works with qualified and certified engineers in developing life extension programs and his knowledge of the operation of the vehicle and the specifications and material used in their construction, provide the engineering team with an essential element for project competition. This activity is currently on a high momentum with the company and he operates in this capacity [approximately] 30% of his time. Recent work includes performance on a LAV C2 program with the US [government] and V150 life extension program for foreign Government.
- The remaining time is spent in designing, building and troubleshooting on test equipments [sic] and production tooling.

The petitioner explained its need to employ the beneficiary in order "to develop and build the test equipment necessary to fulfill our military specific contracts" and to train "in-house technicians in manufacturing, production, retrofitting and overhaul services as well as provide[] training to customers."

The petitioner stated that with respect to the beneficiary's position in the organizational hierarchy, the beneficiary would report to the company's vice-president of United States operations, who offers only minimal supervision to the beneficiary in the performance of his assignments. In an attached organizational chart, the beneficiary was depicted as a subordinate to the vice-president of U.S. operations. Based on the organizational chart, the beneficiary would not oversee or manage any lower-level employees.

In a decision dated March 22, 2007, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director referenced portions of the beneficiary's job description, concluding that they suggested that the beneficiary's job duties would be comprised of performing the day-to-day functions of the company. The director stated: "There is little or no evidence that the Beneficiary plans, organizes, and controls any of the company's major functions, or that he mainly works through other employees to achieve company goals." The director instructed that case law sets out a two-part requirement for classification as a manager or executive: (1) that the beneficiary performs high-level responsibilities specified in the statutory definitions of "managerial capacity" and "executive capacity"; and (2) that the beneficiary primarily performs the named responsibilities and does not spend the majority of time performing daily functions of the business. The director concluded that the record of proceeding did not establish that the beneficiary's "primary assignment" would be directing the management of the petitioning organization or that the beneficiary would primarily direct or supervise a subordinate staff or professional, managerial or supervisory employees who would relieve him from performing non-qualifying tasks of the United States organization. Consequently, the director denied the petition.

The petitioner filed this timely appeal on April 19, 2007. In a letter dated April 17, 2007, the petitioner emphasizes that the transfer of the beneficiary's knowledge to the petitioner's operations and staff is critical to maintaining its working relationship with the United States government and military. The petitioner specifically refers to the beneficiary's "ability to develop test systems and operational aids that add capabilities to the [company's] business activities," and his "expertise and knowledge . . . in developing and

creating systems to allow the Petitioner to enhance its offerings to the US Army." The petitioner states: "Due to his ability to design, [and] trouble shoot, and his experience of designing many test cells, [the beneficiary] is also a suitable candidate and his experience is a critical component of the company's success in the export market." As evidence of the "activity that the beneficiary developed, designed, and managed," the petitioner cites six contracts on which the beneficiary is working and notes the amount of time the beneficiary dedicated to the design of each.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

As explained by the director in her decision, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The record of proceeding does not establish that the beneficiary would primarily perform the high-level responsibilities specified in the statutory definitions of "managerial capacity" or "executive capacity." Rather, the job duties assigned to the beneficiary demonstrate that the beneficiary would be responsible for performing the daily operational tasks related to the petitioner's research and development function. For example, the beneficiary would design and build component testing equipment, assist "in developing engineering solutions and converting engineering concepts into prototypes," "[d]evelop cost-effective upgrades," "[r]eview, repair and correct assembly equipment," assist suppliers in manufacturing new parts, train in-house technicians, provide technical and instructional support at off-site locations, and conduct safety inspections on machinery. The AAO instructs that these tasks cannot be deemed to be managerial or executive in nature, as they specifically relate to the petitioner's day-to-day operations and the services offered by the company. *See* §§ 101(a)(44)(A) and (B) of the Act.

As noted by the director, none of the named job duties suggests that the beneficiary would possess managerial or executive authority over the organization, a related department, a subordinate managerial, supervisory, or professional staff, or a function of the petitioning organization. *See id.* In fact, the beneficiary is the only employee working in the petitioner's research and development department. Based on both the offered job duties and the organizational chart, the beneficiary would be solely responsible for performing the research and development department's related functions, rather than maintaining authority over the performance of the day-to-day operations. This finding is further supported by the petitioner's February 22, 2007 letter, in which the petitioner explained that the beneficiary spends thirty percent of his time working with engineers to develop life extension programs and the remaining seventy percent of time performing such non-qualifying tasks as "designing, building and troubleshooting on test equipments and production tooling." Clearly, the beneficiary is devoting his time to personally performing research and development functions of the petitioning entity, and is not engaged in performing primarily managerial or executive tasks. 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).

The petitioner's claims on appeal further support the findings made above. Specifically, the petitioner emphasizes its need to employ the beneficiary because of "his ability to develop test systems and operational aids" and to "design and trouble shoot." Moreover, the petitioner's reference to six tests currently being designed and built by the beneficiary, as well as his participation in "overseas assignments" and testing, establishes his role in personally researching and developing the tests contracted for by outside groups, such as the United States federal government and the military. The petitioner's additional representations on appeal confirm that the beneficiary is personally responsible for performing services offered by the petitioning entity. Again, an employee who "primarily" performs the tasks necessary 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).

The AAO acknowledges the petitioner's desire to employ the beneficiary due to the beneficiary's prior experience in the company's research and development activities. However, it is because of the beneficiary's day-to-day performance of the operational tasks associated with the petitioner's research and development function, without the suggestion of managerial or executive authority, that the beneficiary cannot be deemed to be employed in a primarily managerial or executive capacity. 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)). Accordingly, the appeal will be dismissed.

As noted previously, in her March 22, 2007 decision, the director noted several observations with respect to the beneficiary's employment in the foreign entity. The petitioner did not specifically address on appeal the capacity in which the beneficiary was employed by the foreign entity. Nonetheless, the record demonstrates that the beneficiary did not occupy a primarily managerial or executive position in the Canadian company.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The record is devoid of a sufficient description of the job duties performed by the beneficiary while employed by the foreign entity. In its October 23, 2006 letter, the petitioner only mentioned the beneficiary's prior employment in the Canadian corporation, stating that in both the United States and foreign entities, the beneficiary "specializes in the development of prototypes." Although the director requested a detailed description of the beneficiary's assignment in the foreign entity, including his job duties and the amount of time spent on each, the petitioner neglected to describe the beneficiary's former foreign employment, stating only that he was employed as a senior technician in the research and development department. The limited statements made with respect to the beneficiary's employment in the foreign entity restrict the analysis of whether the beneficiary was employed by the foreign company in a primarily managerial or executive capacity. The actual duties themselves reveal the true nature of the 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).

Nonetheless, based solely on the petitioner's brief representations, it appears that the beneficiary, as the foreign entity's senior technician, was primarily performing non-managerial and non-executive tasks related to the research and development function of the company, and was not employed as the foreign company's

manager or executive. Again, an employee who "primarily" performs the tasks necessary 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). Accordingly, the petition will be denied for this additional reason.

The AAO recognizes that CIS previously approved four L-1A immigrant petitions filed by the petitioner on behalf of the beneficiary. 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. See 8 C.F.R. § 103.8(d). 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.

Moreover, 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). 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 approvals 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 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. 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); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 appeal is dismissed.