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U.S. Citizenship
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Services

B4



FILE: EAC 06 053 52836 Office: NEBRASKA SERVICE CENTER Date: **AUG 01 2008**

IN RE: Petitioner: 
Beneficiary: 

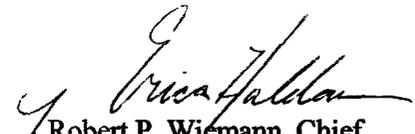
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Virginia corporation claiming to operate as a real estate and retail industry investment company. 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 beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The 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 December 7, 2005, which includes the following description of the duties to be performed by the beneficiary under an approved petition:

[The beneficiary] directs the management and oversees the operations of the U.S. company and the beauty salon that it owns and operates. He will do for the U.S. company that which he has done for [the foreign entity]—he will, among other things, review activity reports and financial statements to ascertain the company's fiscal progress, hire and fire personnel as appropriate, and direct and coordinate the formulation of financial plans to provide funding for the company's continued business operations. As the company's [p]resident, he will exercise the widest possible latitude in discretionary decision-making. [The beneficiary] also spends a great deal of time exploring additional real estate and retail industry investment opportunities in the United States

On December 8, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a letter from an authorized official from the petitioning entity describing the beneficiary's prospective employment, including his specific job duties, the types of employees to be supervised, if any, and a discussion of the beneficiary's level of authority, including information about the beneficiary's supervisor, if any. The petitioner was also asked to provide its organizational chart illustrating the beneficiary's position within the entity in relation to other employees. Among other documents, the petitioner was also asked to provide its 2005 federal tax return.

The petitioner's response included a letter dated February 26, 2007 signed by the director of the petitioner's beauty salon. The beneficiary's proposed employment was described as follows:

Since the company was founded and the beauty salon established, [the beneficiary] has been in constant contact with [d]irector [REDACTED] via telephone from Ethiopia and periodically visits the U.S in order to direct the management and oversee the operations of the U.S. company and the beauty salon that it owns and operations. The business could not run without [the beneficiary]'s direction and oversight. [The beneficiary] is the titular head of the company and directly supervises the company's [v]ice [p]resident, the beauty salon [d]irector, and the [s]alon [m]anager. [REDACTED] and [REDACTED] are the day-to-day managers of the beauty salon and are in charge of purchasing, marketing, and the management of employees. The rest of the employees are beauticians . . . and directly provide the salon's services.

* * *

Since the corporation was established, [the beneficiary] has focused his energy on monitoring business growth, customer service, management training/coaching, and business expansion opportunities.

The petitioner added that in establishing the beauty salon, the petitioner's first U.S. business venture, the beneficiary supervised the architectural design and construction of the salon; acquired necessary business licenses and permits, recruited and trained employees; provided one-on-one training for the beauty salon director; set up financial processes and acquired accounting and payroll services; and selected goods for sale.

The petitioner also complied with the director's request for a copy of its 2005 federal tax return in which Schedule A showed that the petitioner paid \$122,860 in employee salaries and wages. It is noted that

Schedule K of the tax return identified the petitioner's business activity as a beauty salon, not as a real estate investment enterprise as previously stated in the petitioner's Form I-140. Despite that, the petitioner submitted an organizational chart that included a vice president of real estate, thereby indicating that the nature of its business was not limited to operating a beauty salon. It is noted that the vice president of real estate was shown as having no subordinate employees. The chart also included a director of the beauty salon, whose subordinate is a salon manager. Both the vice president of real estate and the director of the beauty salon are depicted as subordinate to the beneficiary's position of president, which is shown as the top-most position within the company's hierarchy. It is noted, however, that the vice president of real estate was not named in the petitioner's quarterly payroll report that reflected the petitioner's staffing as of the fourth quarter of 2005 during which the Form I-140 was filed. As such, the record lacks evidence to show that the petitioner actually employed a vice president of real estate at the time the petition was filed.

After reviewing the documentation submitted, the director issued a decision dated April 27, 2007 denying the petition. The AAO notes that while the director reviewed the petitioner's organizational chart, he did not acknowledge that a vice president of real estate was part of the hierarchy. This minor oversight, however, is not critical, as the petitioner has not provided any documentary evidence to establish its employment of a vice president of real estate at the time the Form I-140 was filed. *See 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)). The director also reviewed the beneficiary's job description, which was provided in the response to the RFE, focusing on the petitioner's reference to the beneficiary as "the titular head of the company." The director focused on the dictionary definition of "titular," finding that the definition suggests that the beneficiary would be president of the petitioning entity in title only, having no duties or powers. The director found it unlikely that the beneficiary would come to the United States to oversee a hair salon and determined that, instead, the beneficiary would likely come to the United States to explore further real estate investment opportunities.

The AAO notes that the director's speculations as to the beneficiary's true purpose for coming to the United States cannot be confirmed based on the evidence of record. That being said, the petitioner's supporting documentation does not establish that the petitioner would employ the beneficiary as a multinational manager or executive under an approved petition.

On appeal, counsel asserts that the director misinterpreted the term "titular," asserting that the beneficiary would not be the company's president in name only, but rather that he would perform duties common to an executive position. In support of his argument, counsel restates the various job descriptions previously provided by the petitioner in its effort to convey the beneficiary's role within the U.S. entity. Counsel also restates the petitioner's prior assertion that the beneficiary is a multinational executive who assumes the responsibility of overseeing "the top level of employees who in turn manage the day-to-day work of [the petitioning entity]." However, the beneficiary's job responsibilities and the petitioner's staffing at the time the Form I-140 was filed fail to corroborate counsel's assertions.

First, in order to determine that the beneficiary would be employed in a qualifying capacity, the petitioner must provide a detailed description of the job duties the beneficiary would perform under an approved visa petition. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the petitioner has provided overly broad statements to describe the beneficiary's prospective employment and has failed to convey a meaningful

understanding of the beneficiary's day-to-day job duties in the context of the petitioner's organizational structure at the time the Form I-140 was filed. Case law has firmly established that it is the actual duties themselves that 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). As such, a petitioner must go beyond merely providing a beneficiary's general job responsibilities by specifying the tasks the beneficiary would perform on a daily basis and by explaining how the petitioner's organizational structure at the time the Form I-140 was filed would allow the beneficiary to focus primarily on the performance of qualifying job duties rather than the operational tasks that are necessary for the petitioner's daily function. Here, the petitioner has indicated that the beneficiary intends to spend more time in the United States, after the petition is approved, in order to further the petitioner's development. However, the petitioner does not specify exactly what duties the beneficiary would perform.

Second, counsel repeatedly refers to the duties and responsibilities the beneficiary assumed in setting up the beauty salon owned by the petitioning entity. However, these duties and responsibilities reflect the needs of a company in its initial stage of development and are presumably different from the duties the beneficiary would be expected to perform after the company commences doing business. Thus, counsel's references to any job duties other than those the beneficiary would perform under an approved petition are irrelevant for purposes of establishing the petitioner's eligibility for the immigration benefit. That being said, the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the present matter, the petitioner has indicated that the beneficiary's role would include overseeing top-level employees, who are presumably the salon director and vice president of real estate development, both of whom are depicted in the petitioner's organizational chart. However, as previously noted, the record does not show that the petitioner employed a vice president of real estate investment when the Form I-140 was filed. Rather, the record shows that the only employees the petitioner had at the time of filing were those working at the beauty salon. As stated above, the beneficiary's specific job duties with respect to oversight of the beauty salon have not been clarified. Therefore, even if the beneficiary will maintain discretionary authority over matters concerning the U.S. petitioner, thereby assuming a more active role in the petitioner's operation than is suggested by the petitioner's use of the term "titular," the evidence of record strongly indicates that the petitioner, at the time the Form I-140 was filed, was not ready and able to employ the beneficiary in a primarily managerial or executive capacity. Rather, evidence suggests that at the time of filing, the petitioner's only business venture was a single beauty salon that was run by an independent staff without the beneficiary's daily intervention. There is no indication that real estate investment was more than a mere business objective at the time the Form I-140 was filed. Thus, the organizational chart that was submitted in response to the RFE was not an accurate depiction of the petitioner's business organization during the relevant time period.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The fact that the beneficiary has assumed the highest position within the petitioning entity does not establish that the primary portion of the beneficiary's time would be consumed with duties of a qualifying nature. Despite counsel's assertions, the petitioner has not demonstrated that the beneficiary would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that the petitioner was otherwise prepared to relieve the beneficiary

from performing non-qualifying duties at the time the Form I-140 was filed. In fact, with an independently functioning beauty salon as the petitioner's only business venture at the time the Form I-140 was filed, it is unclear what duties could be assigned to the beneficiary at all. In light of these numerous adverse findings, the AAO cannot conclude that the petitioner established that it would employ the beneficiary in a managerial or executive capacity. For this reason, the petition may not be approved.

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. CIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. 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 petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.