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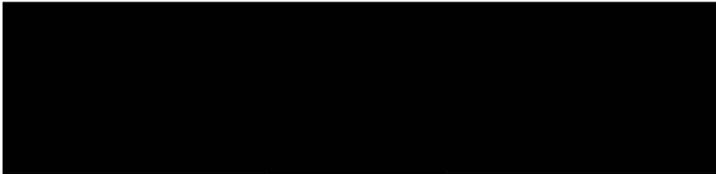


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B4

APR 24 2009



FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN 07 085 53367

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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner filed the instant immigrant 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, a Texas corporation, operates a freight forwarding and logistics business. It seeks to employ the beneficiary as its president.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that "the status of the company has improved dramatically since the filing of the petition." Counsel asserts that the projected improvements were mentioned in the initial filing and requests that the petitioner's new clients and personnel be taken into consideration in determining whether the beneficiary will be employed in a primarily managerial or executive capacity. Counsel submits a brief and additional documentary evidence 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 sole issue addressed by the director is whether the petitioner established that 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), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 immigrant visa petition was filed on January 26, 2007. The petitioner indicated on Form I-140 that the beneficiary would be employed as president of the U.S. company, which states that it employs two people. The petitioner attached a lengthy position description for the beneficiary, noting that the beneficiary's responsibilities have been divided into four "phases" according to the company's plans for the United States office. The beneficiary's "endeavors" are described as follows:

- a) To implement a Service Center at [the petitioner], Laredo, TX. (Phase one) and start operation with Global Companies. Time frame for Phase one: 10 to 14 months

- b) To launch Laredo, TX as the base Service Center to expand into USA, Canada, and Mexico (Phase two). Time frame for phase two: 12 to 24 months
- c) To stabilize the operation with a yearly growing ratio of 5% per year (Phase three) Time frame for phase three: 12 to 24 months
- d) To complement Nuevo Laredo operation Center with Laredo, TX Logistic Center to Laredo, Texas (Phase four) Time frame for phase four: 6 to 12 months.

The petitioner provided a list of job duties that the beneficiary has performed or will perform during each phase of the petitioner's plan. The petitioner indicated that most of the "phase one" duties are completed while some are "in process" or part of a continuous effort. The duties that are identified as "in process" or continuous are as follows:

- Overview and detail of the financial structure (10% of beneficiary's time)
- Establish systems and process (10% of beneficiary's time)
- Identify and hire the initial workforce (10% of the beneficiary's time)
- Marketing effort (new clients) originally for phase two (continuous effort)

The petitioner indicated that a main objective during phase one is "the selling effort of [the petitioner] as a Logistic Center at the same time of adjusting and implementing the operation." The petitioner stated that the U.S. operation is now financially stronger, with global logistics clients, and noted that the beneficiary will perform the following duties as the company enters "phase two":

- Consolidate phase one (20%)
- Identify and hire the work force (25%)
- Training programs for new personnel (30%)
- Establish the sales force an office in Laredo, to promote Mexican Custom dispatch and logistic services in the area. (no percentage assigned)
- Consolidate and run the day-to-day operation (50%)
- Detail the financial structure of the project (10%)

Finally the petitioner indicated that the beneficiary would perform the following duties during phases three and four:

Phase Three: Foundations for Growth

- Consolidate phase one and two (15%)
- Enter into a rotating offices training program (15%)
- Identify and hire a general manager for [the petitioner] (25%)
- Make a market study to determine two cities within continental USA to establish sale offices to promote Mexican Custom dispatch and logistic services (15%)
- Make a study to consider enter into an strategic alliance with a Hong Kong or Asian Logistic Company (10%)
- Consolidate and Run the day to day operation (40%)

Phase Four: Full Integration

- Make to [sic] study to decide close Nuevo Laredo Logistic Service an [sic] integrate it to Laredo, TX center (40%)
- Identify and hire the additional personnel (20%)
- Implement an [sic] strategic alliance with an Asian Logistic Company with offices in USA (40%)
- Run the day to day operation (0%)
- Supervise the day to day operation (10%)

The petitioner submitted an organizational chart showing the combined operations of the U.S. entity and its Mexican affiliate, Soluciones Aduanales. The beneficiary is identified as chief executive officer of the entire operation. With respect to the U.S. company, the beneficiary is listed as "general coordinator" supervising a warehouse manager and an accounting and financial advisor. The chart does not identify the warehouse manager by name and it was unclear whether the position was filled at the time of filing.

The director found the initial evidence insufficient to establish the beneficiary's employment in a primarily managerial or executive capacity. Accordingly, the director issued a request for evidence (RFE) on August 13, 2007. In the RFE, the director acknowledged the four-phase position description submitted and requested additional explanation regarding the beneficiary's "permanent role and job duties." The director also requested additional evidence regarding the petitioner's organizational structure, including a more detailed organizational chart for the U.S. entity, a brief summary of the job duties and educational requirements for each position the beneficiary will supervise, and copies of all Forms W-2, Wage And Tax Statement, issued in 2006. Finally, the director requested that the petitioner provide more detailed information regarding the scope and nature of the U.S. petitioner's business operations, including a photocopy of a recent duty schedule or roster indicating which employees are scheduled to work during which hours.

In its response to the RFE, received on November 5, 2007, the petitioner submitted a revised organizational chart on which it included employees to be hired during "phase two" of operations, specifically, three logistics coordinators and customs dispatchers. The chart indicates that these employees will report to the beneficiary along with the warehouse manager and accounting/financial advisor. The only subordinate employee identified by name was the accounting and financial advisor.

The petitioner attached descriptions for the warehouse manager, customs dispatcher and logistic coordinator positions. The petitioner indicated that the warehouse manager and two to three customs dispatchers would work in the freight forwarding services department, which will provide such services as loading/unloading products; inventory control; and forwarding products from and to the United States. The petitioner indicated that two to four logistics coordinators will: "offer logistic services to our Customers; "deliver Logistic Solutions, creating value added and efficiencies to our Customers"; "supervise the appropriate response and information to customers"; "coordinate freight forwarding services"; and "coordinate pick up, freight – either ground, maritime or air – transfer trucks to the point of delivery to our customers." Finally, the petitioner stated that it will require custom specialists for "the end of phase two or phase three."

In response to the director's request for additional evidence regarding the nature and scope of the petitioner's business, the petitioner submitted a statement explaining that the petitioner was originally established in 2001 as strictly a freight forwarding business, but is currently implementing its four-phase business plan to

restructure the U.S. business and to use it as a platform to enter the global logistics sector. The petitioner explained that as part of "phase one" of its U.S. business plan, it initiated a "selling effort," specifically in South America. The petitioner noted that phase one took a considerable amount of time, but resulted in success, particularly in the Chilean market. The petitioner further described the state of its operations as follows:

So [the petitioner] today is providing freight-forwarding services, using an outsourced warehouse and as part of phase two, their own facility, and logistic services to Chilean and Chinese companies. Phase one has given the financial stability and the structure to continue with phase two.

* * *

[The petitioner] is in the process of changing from phase one to phase two. This means that, as stated in the activities of Phase two it is time to "...identify and hire the work force..." as the growth path demands it. Accordingly, phase two is starting to be implemented.

[The petitioner] does not use a rooster [sic]. But the warehouse supervisors work full time, and [the beneficiary] is providing the logistic services, supported by the sister companies and foreign trade service companies suppliers, -such as Custom House Broker, Trucking companies, LTL and LCL companies-, as considered for phase one and the beginning of phase two.

Finally, with respect to the beneficiary's "permanent job duties" the petitioner explained that once the petitioning company becomes the logistic center for the full Mexican and U.S. operations (i.e., at the completion of "phase four," the beneficiary's main role will be supervising all operations, will supervise office managers at each Mexican, U.S. and foreign locations, and will "structure the long term strategic planning and strategies." The petitioner listed the beneficiary's proposed permanent duties as follows:

- a) Strategic Planning
- b) Overall supervision
- c) Delivery continuous growth
- d) New offices growth
- e) Manage business risk
- f) Deliver profits to the future shareholders
- g) Target selling to specific companies

The petitioner did not submit copies of its Forms W-2 for 2006, although its 2006 IRS Form 1120, U.S. Corporation Income Tax Return, shows that the company paid \$45,340 in salaries and wages for the year.

The director denied the petition on May 9, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director observed that the petitioner provided no specific start and end dates for the four phases listed and determined that "the fact that the beneficiary's projected job duties will be significantly altered as each successive phase is completed makes it difficult for the USCIS to ascertain whether the duties of the proffered

position conform to those of an executive or a manager." The director also found that certain duties articulated for each one of the four phases "appear to be at variance with the definitions of executive and managerial responsibilities."

The director stated that performing the day-to-day duties involved in the running of a small business is . . . not necessarily a managerial or an executive function. The director noted that the petitioner did not clearly indicate who the beneficiary will be supervising, and observed that the petitioner appears to be still in the process of starting up its U.S. operations and hiring staff. Citing *Matter of Katigbak*, 14 I&N Dec. 45, 49, the director noted that the petitioner must establish eligibility at the time of filing the petition. The director concluded "the petitioner may well be in the process of hiring staff for their U.S. operation, and the beneficiary may well be capable of directing them; but, as of the priority date of the instant petition, the staff whom the beneficiary would have been expected to manage do not appear to have been in place."

On appeal, counsel for the petitioner provides the following statement on Form I-290B, Notice of Appeal or Motion:

The status of the company has improved dramatically since the filing of the petition, and certainly since the issuance of the denial by your agency. The company is now in Phase II (of the projected four phases). The company has now numerous clients and more personnel. This projected improvements [*sic*] were mentioned in his application and we wish your office would have given us the opportunity to show him before issuing the denial.

The evidence submitted on appeal includes: (1) a detailed monthly general ledger and other financial information dating from October 1, 2007 until March 31, 2008; (2) a Form 941, Employer's Quarterly Federal Income Tax Return, for the first quarter of 2008, indicating that the petitioner paid \$20,200 to the beneficiary and \$2,808 to [REDACTED] (3) copies of IRS Forms W-2 for 2007 showing that the petitioner paid \$54,000 to the beneficiary and \$2,808 to [REDACTED] (4) the petitioner's 2007 Form 1120; (5) an updated organizational chart dated June 2008 which shows that the U.S. company employs [REDACTED] as Logistic Manager and [REDACTED] as Logistic Coordinator, with vacancies for a general manager, a warehouse manager, and a second logistics coordinator; (6) information regarding the company's new clients, excerpted from the clients' public web sites; and (7) a revised, updated job description for the beneficiary.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

Prior to addressing this issue, the AAO must emphasize that the critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If the petitioner or beneficiary becomes eligible under a new set of facts, the proper course of action is to file a new petition. Despite the previous denial, there is no bar to the petitioner's filing of a new petition supported by new evidence of eligibility.

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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In addition, the definitions of executive and managerial capacity have two separate parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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).

The petitioner's descriptions of the beneficiary's duties offer little insight into what he does on a day-to-day basis. Moreover, the majority of the position description provided is speculative in nature, as the petitioner appears to have been nearing the end of "phase one" of its business plan and perhaps beginning the transition to "phase two" at the time of filing. Based on the evidence of record, the petitioner has not progressed beyond phase two as of the date the appeal was filed, so the AAO will not consider any future responsibilities attributed to the beneficiary during "phase three" and beyond. Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. at 49.

There is also uncertainty in the record as to whether the petitioner had progressed past phase one of its proposed plan as of January 2007 when the petition was filed. During phase two, the beneficiary is expected to allocate a significant portion of his time to identifying and hiring a work force, establishing training programs for new personnel, and establishing the sales force, while running the day-to-day operation of the company. The petitioner did not claim that the beneficiary had hired any subordinate employees as of November 2007 when it responded to the director's RFE. Therefore, it is unclear how much, if any, of the beneficiary's time was being devoted to "phase two" responsibilities at the time the petition was filed.

The beneficiary's "phase one" duties, as described by the petitioner, have not been shown to be primarily managerial or executive in nature. At the time of filing, the petitioner indicated that the beneficiary was still in the process of establishing "systems and process[es]" for the company, undertaking marketing efforts to obtain new clients, identifying and hiring an initial workforce, detailing the financial structure of the company, and running the "day-to-day operation." Based on this brief description, the beneficiary's exact role in marketing, selling and providing the petitioner's logistic and freight forwarding services cannot be discerned. The petitioner did not indicate how the beneficiary would carry out his responsibilities or clearly indicate that subordinate employees would relieve him from performing non-qualifying duties associated with his assigned functions. 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)).

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties

themselves will 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).

Moreover, in response to the RFE, the petitioner stated that the beneficiary "is providing the logistic services, supported by the sister companies and foreign trade service companies suppliers, -such as Custom House Broker, Trucking companies, LTL and LCL companies-, as considered for phase one and the beginning of phase two." The petitioner did not elaborate as to how other companies are assisting the beneficiary to provide the petitioner's logistics services or relieving him from performing non-managerial duties associated with this function, nor did it provide documentation related to these outside and other service providers, such as the claimed outsourced warehouse. Again, 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).

The evidence of record demonstrates that the petitioner had not yet hired any of the proposed logistics coordinators at the time the petition was filed, or at the time the petitioner responded to the RFE, nor is there evidence that the beneficiary had established a sales force for the company. At the same time, the record shows that the petitioner was in fact doing business as a freight forwarder and logistics services provider in 2006 and 2007, and gaining new clients, with the beneficiary as its sole employee. Therefore, it is reasonable to conclude, and has not been proven otherwise, that the beneficiary himself was primarily responsible for both marketing and selling the petitioner's services and providing logistics coordination services at the time the petition was filed, and throughout 2007. 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 statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). Although the AAO is satisfied that the beneficiary has the authority to hire personnel at all levels, the petitioner has not established that the beneficiary had hired any employees as of the date of filing, or that he was supervising any employees within the U.S. company as of January 2007.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. 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 in managing the essential function, 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. *See* 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. Here, the petitioner has not identified a function to be managed by the beneficiary or identified the qualifying duties to be performed in managing the function. Furthermore, although a function manager need not directly supervise employees, it is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. Here, the petitioner has neither clearly explained nor documented how the petitioner is able to operate as a one-person freight forwarder and logistics services provider without the beneficiary's regular participation in the non-managerial, day-to-day services of the company. Accordingly, the petitioner has not established that the beneficiary will serve as a function manager.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, an executive's duties must be the critical factor. However, if USCIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the lack of a subordinate staff to provide the services of the U.S. company brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. 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). The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. *See Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003) (holding that the INS' finding that the beneficiary did not work in a primarily managerial or executive capacity was "bolstered by the absence of evidence that a sufficient 'subordinate staff' will 'relieve her from performing non-qualifying duties'").

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In this matter, the petitioner has not adequately described the nature of the beneficiary's duties, nor has it corroborated the employment of any workers besides the beneficiary and a contracted accountant/financial advisor at the time the petition was filed. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations and has the appropriate level of authority, the petitioner has failed to demonstrate that his duties would be in a primarily managerial or executive capacity as of the date of filing.

The AAO also acknowledges that the beneficiary continues to serve as chief executive officer of the petitioner's Mexican affiliates according to the organizational charts submitted. The beneficiary's employment

capacity with the foreign entity is not in question. However, the beneficiary's position with the foreign entities and any duties performed in his role as chief executive officer are irrelevant to a determination regarding whether his role within the U.S. entity will be in a primarily managerial or executive capacity. The petitioner has not submitted persuasive evidence that the foreign entity's employees relieve the beneficiary from marketing, selling, coordinating or providing the U.S. company's services, such that he can focus his attention primarily on managerial or executive duties in the United States. The petitioner must establish that the duties the beneficiary performs on a day-to-day basis for the U.S. entity are primarily managerial or executive in nature.

Finally, the AAO notes that, on appeal, counsel for the petitioner does not specifically object to the director's findings, but merely expresses his disappointment that the director did not allow the petitioner to submit evidence that the company is making progress in implementing its business plan in the United States. The petitioner submits evidence of its current staffing, financial status, and the beneficiary's current job duties. None of the evidence submitted on appeal is relevant to the issue of whether the beneficiary would be employed in a primarily managerial or executive capacity as of the date of filing. Again, a 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. at 49. If the beneficiary was not performing primarily managerial or executive duties at the time the petition was filed, then the petition is not approvable regardless of any subsequent growth achieved by the petitioner while the petition was pending adjudication, or after the denial of the petition.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The remaining issue in this matter regards the previous approval of an L-1A nonimmigrant intracompany transferee petition filed on behalf of the beneficiary. The AAO has consistently determined that prior nonimmigrant approvals do not preclude USCIS from denying an extension or a separate immigrant petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity and on similar definitions of qualifying relationship/organization. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44) and 8 C.F.R. § 204.5(j)(2) and 8 C.F.R. § 214.2(l)(1)(ii). Although the statutory definitions for managerial and executive capacity are the same and the definitions of qualifying relationship/organization are similar, the question of overall eligibility requires a comprehensive review of all of the provisions, not just these definitions. 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 general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *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). Because USCIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions

are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

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. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition does not guarantee that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from the previous nonimmigrant approval by denying approval of the immigrant petition.

In addition, if any previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, such 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).

Further, 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 any nonimmigrant petitions on behalf of a 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 petitioner has not provided evidence or argument for the record that is sufficient to overcome the director's decision in this matter.

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.