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U.S. Citizenship
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Services

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[Redacted]

FILE: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: JAN 14 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

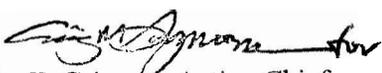
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:
[Redacted]

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 preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reopen and reconsider seeking to overcome the director's findings. The director determined that the petitioner failed to meet the provisions specified at 8 C.F.R. § 103.5(a)(3) and therefore dismissed the motion to reconsider. Although the director granted the petitioner's motion to reopen, he found that the additional documentation submitted did not overcome the adverse findings cited in the denial and therefore affirmed his initial decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner was organized in North Carolina as a limited liability company intended to function as a tour operating entity. 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 denied the petition based on three independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; 2) the director found the beneficiary to be a majority owner of the petitioning entity and concluded that in light of this ownership interest, the petitioner does not have the requisite employer/employee relationship with the beneficiary; and 3) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

In response to the director's findings, counsel filed a combined motion to reopen and reconsider on the petitioner's behalf. In support of the motion to reopen, counsel submitted evidence showing that three prior Form I-129 petitions had been approved on the beneficiary's behalf, thereby allowing the petitioner to employ the beneficiary in the United States in the classification of an intracompany transferee. Counsel also introduced documentation establishing that neither the foreign nor U.S. entity is majority owned by the beneficiary.

On motion to reconsider, counsel disputed the director's finding regarding the petitioner's ability to pay the beneficiary's proffered wage. More specifically, counsel argued that the director mischaracterized and dismissed the importance of the documentation submitted to establish the petitioner's ability to pay the beneficiary's proffered wage, urging the director to use his discretion to consider documents that are not specified in the applicable regulatory provisions. *See* 8 C.F.R. § 204.5(g)(2).

The director reviewed the petitioner's motion to reopen and reconsider and determined that the petitioner failed to meet the provisions specified at 8 C.F.R. § 103.5(a)(3), which state in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an

¹ As the petitioner chose not to appeal the initial denial when it was initially issued, the scope of the AAO's appellate review in the present matter is limited to the director's dismissal of the motion to reconsider and the affirmation of the initial denial itself.

incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The director found that counsel failed to cite any precedent decisions to support his arguments and did not establish that the director's decision was incorrect based on the evidence of record at the time the decision was issued. Upon reviewing the petitioner's submissions in support of the motion to reconsider, the AAO affirms the director's decision dismissing the motion. Therefore, the petitioner's failure to establish its ability to pay the proffered wage remains one of two grounds for the petitioner's ineligibility to classify the beneficiary as a multinational manager or executive.

The director did, however, grant the petitioner's motion to reopen and gave full consideration to the additional documents provided in support of the motion, which addressed the two remaining grounds of ineligibility. After reviewing the documents that pertained to the ownership of the U.S. and foreign entities, the director withdrew the portion of his decision that directly addressed the issue of the beneficiary's employee relationship with the U.S. entity based upon the finding that the beneficiary does not have controlling interest of the petitioning entity. Nevertheless, the director affirmed the denial, finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying 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.

With regard to the issue of the beneficiary's employment capacity in his prospective position with the U.S. petitioner, the director rejected counsel's argument that the three prior approvals of the petitioner's L-1A visa petitions suggest that the issue of the beneficiary's employment in a managerial or executive capacity has been considered and that the prior favorable determinations should guide the results in the present matter.

On appeal from the director's latest findings, counsel points out that the issue in the present matter deals solely with the definitions for managerial and executive capacity, which are identical for the non-immigrant L-1A intracompany and the immigrant multinational manager or executive. Based on this line of reasoning, counsel argues that the director's most recent decision is inconsistent with the prior L-1A approvals, which imply that the petitioner has adequately met the criteria outlined in the above statutory definitions. However, counsel is reminded that USCIS 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). Therefore, even if the AAO were to interpret USCIS's prior approvals of the petitioner's L-1A petitions as favorable reviews of the beneficiary's job description, the director in the present matter was not bound by those earlier approvals.

As previously pointed out by the director, while an approval of a Form I-140 results in an alien's permanent residence and, potentially, U.S. citizenship, approval of a Form I-129 allows an alien to obtain only temporary lawful status in the United States. It therefore stands to reason that USCIS may spend less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, which may result in erroneous approvals of some nonimmigrant L-1 petitions. *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). In light of these factors, the director was correct in relying solely on the evidence before him in determining the petitioner's eligibility for an immigrant petition.

That being said, the record in the present matter does not warrant an approval of the Form I-140. As properly pointed out by the director, at the time of filing the petitioner's staff consisted of a total of two employees. While this factor is not the only one to be considered in determining whether the

beneficiary would be employed in a qualifying managerial or executive capacity, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, the AAO cannot overlook the beneficiary's job description, which suggests that the beneficiary's time would primarily be spent carrying out such daily operational tasks as representing the petitioner at trade shows; finalizing clients' arrangements by contacting booking and travel agents; traveling to various tour destinations to assess suitability for clients; and maintaining communications with safari operations. It is noted that 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. at 604. While the petitioner did not assign a percentage of time to any of the above non-qualifying tasks, the AAO cannot assume, given the organizational structure at the time of the petition's filing, that these key tasks would not consume the majority of the beneficiary's time.

That being said, despite the job descriptions provided for a marketing manager and an administration manager, the petitioner stated that "the natural expansion of the company" will result in the petitioner's need for these two positions, indicating that the expansion and additional personnel are planned for in the future. This statement suggests that until such a need arises, the beneficiary would continue to engage in all tasks necessary to ensure the petitioner's daily operation. However, 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. 45, 49 (Comm. 1971). As the petitioner has not established that it was ready and able to relieve the beneficiary from having to primarily perform the non-qualifying operational tasks at the time the Form I-140 was filed, the AAO cannot conclude that the beneficiary would be primarily employed within a qualifying managerial or executive capacity.

In summary, the record shows that the petitioner failed to overcome two of the three grounds cited in support of the director's adverse decision. First, because the petitioner failed to meet the requirements for a motion to reconsider, the AAO upholds the director's finding that the petitioner failed to establish its ability to pay the beneficiary's proffered wage. Second, after reviewing the petitioner's organizational composition and the beneficiary's proposed job duties at the time the Form I-140 was filed, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Accordingly, based on these two independent grounds of ineligibility, the petition in the present matter cannot be approved.

When a director denies a petition on multiple alternative grounds, a petitioner can succeed on a challenge only if it is shown that the director abused his or her discretion with respect to all of the enumerated grounds. Cf. *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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.