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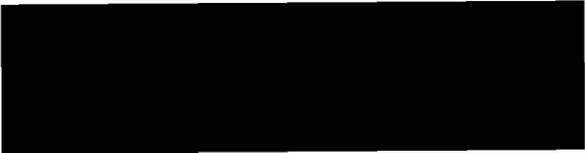
Date **MAR 03 2009**

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.

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida for the purpose of operating as a bakery, pastry shop, and delicatessen. The petitioner seeks to employ the beneficiary as its bakery general manager. 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 was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes all three grounds for denial and further addresses the issue of the petitioner's ability to pay. The AAO hereby notes that while the director addressed the petitioner's ability to pay, he made a favorable determination with regard thereto, finding that the record does not warrant an adverse finding. As such, counsel's arguments with regard to this issue will not be addressed further. The AAO also finds that the petitioner has provided sufficient evidence and information to establish that the beneficiary was more likely than not employed abroad in a qualifying managerial or executive. Therefore, the AAO hereby withdraws this issue as a basis for ineligibility and will limit the current discussion to the two remaining issues—the beneficiary's employment capacity in his proposed position with the U.S. entity and the petitioner's qualifying relationship with the beneficiary's foreign employer.

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 first issue in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States 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.

In support of the Form I-140, the petitioner submitted a letter dated April 30, 2007, which includes the following description of the beneficiary's proposed employment with the U.S. petitioner:

He will direct and coordinate activities involved with the production, sale, and distribution of bakery products. He will manage and direct subordinate managers and personnel. He will determine the variety and quantity of bakery products to be produced, [sic] according to orders and sales projections. He will develop budget for the bakery operation, utilizing experience and knowledge of current market conditions. He will direct sales activities, following standard business practices. He will plan product distribution to customers, and will negotiate with suppliers to arrange [the] purchase and delivery of bakery supplies. He will implement, through his subordinate managerial personnel, policies to utilize human resources, machines, and materials productively. He [will] train subordinates in all phases of bakery activities and will hire and discharge employees. He will confer with [the] chief administrative officer and other administrative personnel to review achievements and discuss required changes in goals or objectives resulting from current status and conditions. He will have wide discretionary [sic] authority over decision[-]making, and full authority to manage.

On September 6, 2007, the director issued a request for additional evidence (RFE) informing the petitioner that the beneficiary's proposed job description that was initially submitted was insufficient to establish eligibility. Accordingly, the petitioner was instructed to provide another job description using plain language when listing the beneficiary's proposed job duties in much greater detail. The petitioner was asked to allocate the percentage of time to be spent on each duty. The director cautioned the petitioner against lumping tasks together when estimating the time spent on each. Additionally, the director asked the petitioner to provide an organizational chart illustrating its staffing structure and the beneficiary's placement therein, as well as a job description of each employee named in the chart.

In response to the above, the petitioner provided a letter dated October 10, 2007, which included a supplemental description of the beneficiary's proposed U.S. employment, which he divided into two main areas of concentration—directing and coordinating activities regarding production, sale, and distribution of bakery products to which approximately 20% of the beneficiary's time would be allotted, and managing and directing subordinate managers and personnel to which approximately 80% of the beneficiary's time was allotted. Each category was further subdivided into job duties to which a more specific percentage of time was assigned. As the director provided this job description in its entirety in his decision, this information has been incorporated into the record and need not be

restated in the present decision. A full discussion of the stated duties and the director's findings with regard thereto will be provided below.

The petitioner also provided two organizational charts—one illustrating the organizational hierarchy of the entire U.S. operation including six store locations, and the other illustrating the organizational hierarchy of the specific bakery location where the beneficiary would assume one of three claimed general manager positions. The latter depicts the beneficiary at the top of the organization with two bakery general managers as his direct subordinates, both of whom are shown as overseeing the work of an operations manager. The operations manager is shown as overseeing the production manager, who oversees the bakery staff, consisting of a master baker, baker, and assistant baker, as well as a customer service staff, consisting of seven customer service leads.

On May 2, 2008, the director issued a notice denying the petition, issuing several findings, one of which was that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director restated the beneficiary's job description and discussed the organizational chart, both of which were provided in response to the RFE. It is noted that in his discussion of the organizational chart, the director stated that the beneficiary oversees bakery general manager #2, who oversees bakery general manager #3. The AAO notes that the organizational hierarchy illustrated in the chart that was submitted in response to the RFE shows bakery general managers #2 and #3 as being at the same level within the organizational hierarchy. With the exception of the beneficiary's position as bakery general manager, there is no indication that either of the other two general managers is at a higher placement within the hierarchy than the other. As such, the erroneous comment is hereby withdrawn. The AAO has conducted its own, independent review of the petitioner's organizational chart and all other supporting evidence prior to making its final determination.

That being said, the director made other valid observations that contributed to his overall conclusion. Namely, the director observed a disproportionate number of managerial versus staff employees within the petitioner's personnel structure. The director also noted the overlapping job duties attributed to members of the management staff and further speculated on the likelihood of the beneficiary having to primarily perform non-qualifying job duties and supervising non-professional employees in light of the need to spread out the management staff among the various shifts during the store's hours of operation. Lastly, the director questioned the validity of the job description submitted in response to the RFE, noting that several of the job duties are vague and fail to convey an understanding of the specific tasks the beneficiary would actually perform. The director specifically noted the generality of the petitioner's responsibility to implement policies regarding the productive distribution of human resources, machines, and materials to which the petitioner attributed 20-25% of the beneficiary's time.

The AAO concurs with the director's observation and finds that other job duties in the description were equally vague. Namely, the petitioner attributed 5-10% of the beneficiary's time to directing sales activities and customer service, and another 20-25% of the beneficiary's time to supervising the managerial and other subordinate personnel. However, neither duty conveys what specific tasks the beneficiary would perform. In other words, how exactly would the beneficiary direct sales and customer service and how would he supervise subordinates. Neither set of responsibilities is defined with specific tasks. Specifics are clearly an important indication of whether a beneficiary's duties

are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.*

Additionally, the beneficiary's job description includes a number of job duties that cannot be readily identified as being within a qualifying capacity. Specifically, it is unclear how developing the bakery's budget, which would consume 5-10% of the beneficiary's time, is a qualifying managerial or executive task. Similarly, negotiating purchases and deliveries of bakery supplies, which would also consume 5-10% of the beneficiary's time, is indicative of a daily operational task rather than a task within a qualifying capacity. Next, the petitioner attributed 15-20% of the beneficiary's time to training, hiring, and firing bakery employees. There is no evidence, however, that the staff to be trained would be comprised of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. The same amount of time was also attributed to conferring with a chief administrative officer, a position that is not identified in either of the organizational charts submitted, and with other administrative personnel.

Therefore, it appears that, between 40% and 60% of the beneficiary's time would be spent performing non-qualifying, operational tasks with another 25-35% percent of the beneficiary's time attributed to general job responsibilities whose specific tasks have not been identified. The AAO notes 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. 593, 604 (Comm. 1988). Based on the above assessment of the beneficiary's time allocation, the AAO cannot conclude that the beneficiary would spend the primary portion of his time performing tasks within a qualifying managerial or executive capacity.

Counsel addresses the issue of the beneficiary's proposed employment in her appellate brief, where she cited *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989), and *Mars Jewelers v. I.N.S.*, 702 F. Supp. 1570 (N.D. GA 1988), in support of the contention that the number of subordinates to be supervised by the beneficiary should not be a factor in determining whether the beneficiary's position fits the definition of managerial and/or executive capacity. However, in accordance with the holding in *National Hand Tool Corp. v. Pasquarell*, the director did not deny the petition based on the size of the petitioning organization. In addition, there is no indication that the director's decision was based on the number of employees the beneficiary would oversee. Rather, the director's more immediate concern deals with the nature of the prospective duties the beneficiary would perform and his supervision of non-professional employees, both of which are issues that the AAO has specifically addressed in this decision. Furthermore, counsel's reliance on *Mars Jewelers v. I.N.S.* is misplaced. The court clearly states in its decision that the error made by the legacy Immigration and Naturalization Service (INS) was applying the 1987 regulations instead of the 1983 regulations to a petition filed in 1986. *Mars Jewelers v. I.N.S.*, 702 F. Supp. 1570, 1575. Thus while the court found that the beneficiary in that matter was not a first-line supervisor under the 1983 regulations, it implied that this would have been the case had the 1987 regulations applied. *Id.* at 1575. Specifically, the court in *Mars Jewelers v. I.N.S.* stated the following:

It is apparent that the INS was inappropriately applying its 1987 regulations to this factor. Under the 1987 regulations, one of the requirements of a manager is that he "supervises and controls the work of other supervisory, professional, and managerial employees. . . ." 8 C.F.R. § 214.2(l)(1)(ii)(B) (1988). This language is not in the 1983 regulations.

Id. (footnote omitted). Thus, contrary to the assertions of counsel, as the present petition was filed in 2004, it would have been legal error for the director to apply the obsolete 1983 regulations and the holding of *Mars Jewelers v. I.N.S.* to the present matter.

Counsel also refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel's contention that the petitioner's previously approved L-1 employment of the beneficiary sets precedent for the action that is to be taken with regard to a subsequently filed Form I-140 is also without merit. In fact, the approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS 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. 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*, at 597. In fact, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director.

Lastly, counsel's numerous references to the petitioner's gross profits and the large corporate structure, of which the petitioner is a component, are irrelevant for the purpose of determining whether the beneficiary merits classification as a multinational manager or executive. As indicated above, in examining the executive or managerial capacity of the beneficiary, the AAO first reviews the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). Another contributing factor is the beneficiary's placement in the petitioner's organizational hierarchy. In light of the above discussion, which examines these and other relevant factors, the AAO finds that the director's decision with regard to the issue of the beneficiary's proposed employment was warranted.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the petitioner claims to be a subsidiary of the entity that employed the beneficiary abroad. In support of this claim, the petitioner provided the following documentation:

1. The petitioner's Articles of Organization, filed on January 17, 2001 with the State of Florida Division of Corporations. Article IV of the document states that the petitioner is a manager-managed company, and Article V of the same document states that the managing member is [REDACTED]
2. Membership certificate No. 1, showing 2001 as the year of issue and naming [REDACTED] as a member of the petitioning entity to whom 51 of the petitioner's units were assigned. The certificate is also accompanied by an assignment document, dated September 19, 2003, indicating that [REDACTED] assigned 51% of its membership interest to [REDACTED] was appointed as the attorney who would ensure the transfer of interest.
3. Membership certificate No. 2, similarly containing only the year of issue (2001), assigning 49 of the petitioner's units to [REDACTED]. This certificate is accompanied by an assignment document, dated May 16, 2003, in which [REDACTED] transferred his ownership interest in the petitioning entity to [REDACTED]
4. Membership certificate No. 3 dated May 16, 2003, issuing the above 49 shares to [REDACTED], accompanied by an assignment document dated September 19, 2003, transferring [REDACTED] units to [REDACTED]
5. Membership certificate No. 4 dated January 1, 2003, issuing 51% of the petitioner's units to [REDACTED]. This certificate is accompanied by an assignment document, dated September 1, 2005, transferring the 51% of the petitioner's units to [REDACTED]

6. Membership certificate No. 5 dated September 19, 2003, issuing 49% of the petitioner's units to [REDACTED]
7. Membership certificate No. 6 dated September 9, 2005, issuing 51% of the petitioner's units to [REDACTED]

In reviewing the above documents, a number of inconsistencies were observed, causing the AAO to strongly question their authenticity and, therefore, the validity of the transfers of interest they purported to place in effect. First, the petitioner's Articles of Organization clearly names [REDACTED] as the petitioner's managing member, thereby indicating that she is the owner of the petitioning entity. As such, certificate No. 1 appears to be inconsistent with the petitioner's Articles of Organization, as it purported to convey a membership interest from [REDACTED] a company whose membership interest in the petitioning entity had not been established, and as [REDACTED] at that point was identified as the petitioning entity's sole owner and therefore the only one with any authority to convey ownership. For similar reasons the AAO questions the validity of membership certificate No. 2 in which [REDACTED] purports to convey ownership interests that have not been established as belonging to him in the first place. As stated above, [REDACTED] according to the petitioner's own Articles of Organization, had been named as the sole managing member. It therefore follows that none of the successive membership certificates (Nos. 3-6) can be deemed valid as they all stem from the assumption that at some point [REDACTED] had transferred 51% of the petitioner's shares ownership interests to [REDACTED] and 49% to [REDACTED]. However, the AAO cannot assume that [REDACTED] initiated such transfers of ownership without supporting, corroborating evidence. *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)).

Further, the fact that certificate nos. 1 and 2 fail to cite the specific date of issue poses further problems, as this deficiency prevents the AAO from being able to determine whether the transfer documents that purported to authorize the transfer of ownership were consistent with the membership certificates.

Lastly, the assignment document in No. 3 above is inconsistent with the membership certificate in No. 5 above. Namely, the assignment document, which was meant to authorize the transfer of Mr. [REDACTED] ownership interest to [REDACTED], was dated after membership certificate No. 4, therefore indicating that the shares were not authorized for transfer when membership certificate No. 4 was issued. This inconsistency casts yet further doubt on the validity of either of these documents.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the present matter, while the petitioner has attempted to meet the regulatory requirement cited in 8 C.F.R. § 204.5(j)(3)(i)(C) by providing evidence of a qualifying relationship, the documentation provided is fraught with considerable deficiencies and inconsistencies. Precedent case law has well established the petitioner's burden to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582,

591-92 (BIA 1988). Here, the inconsistencies cited above by the AAO have neither been acknowledged nor resolved. Therefore, the AAO cannot conclude that the beneficiary's foreign and prospective U.S. employers are similarly owned and controlled.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.