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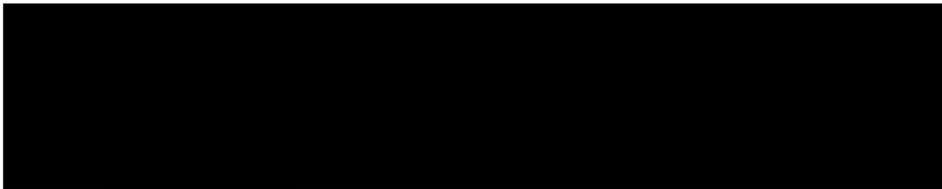
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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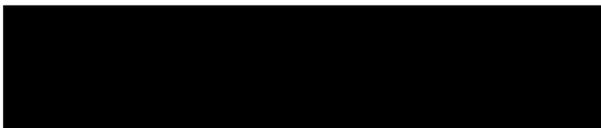


FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: APR 07 2010
LIN 07 253 55250

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 Georgia corporation that seeks to employ the beneficiary as its president/managing director. 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. On appeal, counsel submits an appellate brief disputing the director's conclusions.

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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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 an undated letter from the beneficiary's partner, who stated that the beneficiary would be responsible for "directing and developing the growth of a new establishment." No further information was submitted about the beneficiary's proposed employment, nor was any information provided with regard to the beneficiary's employment abroad.

Accordingly, on November 21, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide more detailed descriptions of the beneficiary's foreign and proposed employment. Namely, the petitioner was asked to provide a list of the beneficiary's specific job duties and to include the percentage of time that was attributed and would be attributed to each of the duties the beneficiary performed during his employment abroad and would have during his proposed employment. The petitioner was also

asked to provide organizational charts illustrating the staffing hierarchies of the beneficiary's foreign and proposed employers.

In response, the petitioner provided daily schedules that describe in detail the tasks that consumed the beneficiary's time during his employment abroad and the tasks that would consume the beneficiary's time during his proposed U.S. employment. Both job descriptions indicated that the beneficiary's focus has been and would be placed on his interaction with customers and on ensuring customer satisfaction for 70% of the time with the remaining 30% of his time devoted to administrative tasks. The petitioner stated that the beneficiary's tasks included of the following: opening and setting up the restaurant daily, including checking stock and making certain menu-related decisions, assigning wait sections to the wait staff and informing them about the restaurant's daily specials, and after opening, the beneficiary is responsible for greeting customers, taking initial drink orders, and helping customers make menu choices. The beneficiary also checks every entrée to ensure customer satisfaction. The beneficiary would perform the same tasks in his position with the U.S. entity.

In addition to the tasks related to food service, the beneficiary performed and would perform administrative tasks, including fielding phone calls and emails, accepting and paying for deliveries, addressing sales calls, developing employee training programs, developing and planning updates to the restaurant's menu and wine list, purchasing equipment, and performing various bookkeeping and accounting tasks.

The petitioner provided the foreign entity's organizational chart, which named the beneficiary as one of two owner/members. Two bar managers were listed under the beneficiary's supervision, followed by a marketing and entertainment employee and a growth and development employee. Aside from the beneficiary and his partner and their respective subordinates, the chart also listed an accounting officer, a housekeeping employee, and a staff welfare employee.

The petitioner also provided its own organizational chart, which depicted the beneficiary at the top of the hierarchy, with an assistant manager/executive chef, an accountant, a front house assistant manager, and a front house assistant manager/host as his subordinates.

On January 24, 2009, the director issued a decision denying the petition. The director briefly reviewed information presented in the organizational chart of each entity and assessed the sufficiency of support personnel on the basis of the 2007 IRS Form W-2s that were issued to the petitioner's employees the year the Form I-140 was filed.

On appeal, counsel disputes the director's findings, pointing to the beneficiary's two previously approved nonimmigrant L-1A visas, which counsel asserts were supported with less evidence than what has been offered in the present matter. However, counsel's argument, which is premised on the belief that a previously approved L-1A petition serves as *prima facie* proof of a petitioner's eligibility under section 203(b)(1)(C) of the Act, is without merit. Contrary to counsel's belief, 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. U.S. Citizenship and Immigration Services (USCIS) 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 prior nonimmigrant approvals in no way guarantee 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 (E.D.N.Y. 1989).

Furthermore, 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. 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 USCIS 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). Additionally, to clarify, the director's decision in the present matter does not serve to "overrule" the service center's approvals of the petitioner's previously filed L-1A nonimmigrant petitions. As explained earlier, each petition is a separate matter whose merits must be determined individually on the basis of the supporting documentation submitted with the respective petition. Thus, while the director's determination in the present matter implies that the earlier nonimmigrant petitions may have been approved in error, such a determination would have to be made if the merits of each approval are revisited in a revocation proceeding.

Counsel also challenges the director's reference to the beneficiary's job description as vague and inflated, pointing to the multi-page job descriptions the petitioner provided earlier in this proceeding. With regard to the director's implication that the job descriptions were vague, the AAO agrees with counsel's challenge. In reviewing the job descriptions offered by the petitioner in response to the RFE, the AAO finds that the petitioner conveyed a meaningful understanding of the tasks the beneficiary performed during his employment abroad and those he would perform during his proposed employment in the United States. However, simply providing the requested information does not ensure the petitioner that the information would warrant approval of the petition.

In the present matter, the AAO finds that the director properly determined that the description of tasks the beneficiary performed abroad and would perform in the proposed position does not establish that the beneficiary has been or would be employed in a qualifying managerial or executive capacity. While both job descriptions adequately convey the beneficiary's significant role in successfully running a restaurant operation, the overwhelming amount of the beneficiary's time has been and would be spent performing operational tasks. As properly noted in the director's decision, 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). Thus, regardless of the beneficiary's high-ranking positions and the heightened degree of discretionary authority that undoubtedly accompanies his organizational placement at the top of each entity's hierarchy, case law has firmly established that 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). In the present matter, the job descriptions indicate

that the beneficiary's duties have been and would be heavily focused on customer interaction during each restaurant's hours of operation and/or during the beneficiary's shift. While it is likely that the beneficiary is relieved from having to perform the duties of a chef, waiter, or bartender, his time has been and would be attributed to the long list of non-qualifying operational tasks with emphasis on the food and service that is provided to the patrons of each restaurant.

Lastly, the AAO will address counsel's objection to the director's reference to the petitioner's employment of the beneficiary's spouse. Specifically, counsel interprets the director's reference as an adverse finding and claims that there is no statute or regulation that prohibits the spouse of a beneficiary from being employed by the petitioning organization. However, counsel's interpretation of the director's comments is inaccurate. While the director admittedly points out that the beneficiary's spouse is among the petitioner's employees, there is absolutely no indication that counsel's comment was anything more than an observation of the petitioner's organizational composition. In fact, counsel is strongly urged to review the context of the director's observation, which includes a discussion of the petitioner's Form W-2s and the fact that only a few of the Form W-2s show full-time employment, among them the Form W-2 that was issued to the beneficiary's spouse. The director made no statements to indicate that the petitioner's employment of the beneficiary's spouse was being interpreted as some form of impropriety or indication of ineligibility. Rather, the director was clear in focusing his adverse findings on the beneficiary's job descriptions with the foreign and U.S. entities. The director expressly stated that the petitioner failed to establish that the beneficiary was and would be relieved from having to primarily perform non-qualifying tasks during his foreign and proposed employment. On the basis of these two conclusions, the director denied the petition. After reviewing the record in its entirety, the AAO finds that the director's observations and findings with regard thereto were accurate. Therefore, the AAO affirms the director's decision.

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.