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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**

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[REDACTED]

FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER

Date: **AUG 12 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas 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. It seeks to employ the beneficiary as its 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that it has the ability to pay the beneficiary the proffered wage.

On appeal, counsel disputes the director's conclusions and submits a statement addressing the beneficiary's proposed employment and his proffered wage.

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 is whether the record establishes that the petitioner would employ the beneficiary 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 (exhibit 3) in which the beneficiary, in his capacity as the petitioner's general manager, discussed his proposed employment with the U.S. entity. The beneficiary stated that he would be responsible for seeking new business opportunities, increasing the petitioner's product offerings, identifying new markets, creating new product designs, negotiating contracts, setting prices on the petitioner's products, and setting financial goals and policies. With regard to human resources, the beneficiary stated that he would have the authority to hire, fire, promote, train, and delegate assignments to support staff, which the beneficiary claimed consisted of "six to eight direct employees and independent contractors." Although the beneficiary did not specify the exact number of direct employees in the support letter, the Form I-140 at Part 5, Item 2, indicates that the petitioner's staff consisted of three employees at the time of filing.

The beneficiary also provided a percentage breakdown that allocates his time among the following duties and responsibilities:

Staffing & Supervision—42.5%

- Provide overall supervision of other managerial personnel
- Hire personnel as needed, terminate workers when necessary, and promote individuals within the company when possible (2.5%)
- Periodically review and assess activities of the company, and make recommendations to [the] German affiliate as deemed appropriate (5%)

Administration & Finance—42.5%

- Establish budgets and budget projections (3%)
- Periodically review existing financial procedures, software efficiency, and update as required (3.5%)
- Review bookkeeping and monthly profit & loss reports (5%)
- Maintain relationships with banks and company accountant, providing financial documentation when appropriate (5%)
- Review supplier wholesale and shipping costs, negotiate competitive terms (5%)
- Determine appropriate retail pricing for products and installation (7%)
- Maintain fiscal controls (7%)
- Oversee inventory control & reporting systems, maintain up-to-date software (2%)
- Research and identify and establish relationships with prospective new accounts (5%)

Marketing Products & Services—10%

- Monitor market shifts and product demand (4%)
- Implement appropriate marketing & advertising strategies (6%)

Legal Requirements—5%

- Ensure compliance with all state and federal safety standards (2.5%)
- Ensure continued compliance with reporting, licensing & other legal requirements (2.5%)

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility for the immigration benefit sought and therefore issued a decision dated May 13, 2009 discussing the grounds for denial. First, the director concluded that the beneficiary would not primarily perform qualifying managerial or executive tasks in his proposed position with the petitioning entity.

On appeal, counsel objects to the above as a basis for denial, asserting that the petitioning entity requires the beneficiary's skill and expertise in order to continue its operations. Counsel claims that the petitioner "employed six to eight workers in diverse positions . . . in addition to independent contractors." Counsel refers to the petitioner's 2008 Forms 1099 as supporting documents.

The AAO finds counsel's statement to be unpersuasive. First, it is noted that, regardless of the petitioner's need for the beneficiary's services, the petitioner has the burden of establishing that it meets the necessary statutory and regulatory criteria. U.S. Citizenship and Immigration Services (USCIS) will not approve a visa

petition where the petitioner fails to meet this burden, which requires the submission of documentary evidence to establish that the primary portion of the beneficiary's time in his proposed position would be spent performing tasks of a qualifying nature. That burden is not discharged merely by establishing that the petitioner needs the beneficiary's services in order to maintain its business operations.

Second, the record does not corroborate counsel's claim with regard to the number of employees and independent contractors the petitioner has employed. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Here, the record not only fails to support counsel's claim regarding the number of employees the petitioner had at the time of filing. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As noted above, the petitioner clearly indicated in the Form I-140 that it had three employees at the time of filing. Additionally, the four 2008 Forms 1099 that were submitted on appeal, one of which was issued to the beneficiary, indicate that the individuals to whom the forms were issued performed services for a very limited amount of time and may not have been performing those services at all when the Form I-140 was filed.

As the petitioner must establish that the beneficiary would primarily perform qualifying managerial or executive tasks, it must establish that it had the requisite support staff at the time of filing such that it would have the capability of relieving the beneficiary from having to spend the primary portion of his time on non-qualifying operational tasks. 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). In the present matter, the petitioner submitted Forms 1099 showing that three individuals, other than the beneficiary, were paid \$365, \$619, and \$2,966, respectively. As the petitioner provided no information about the services these individuals performed or the specific time period during which they provided those services, the AAO cannot determine to what extent such a limited support staff may have been successful in relieving the beneficiary from having to primarily perform non-qualifying tasks.

Additionally, given the petitioner's apparent lack of an adequate support staff, the AAO questions how the beneficiary plans to allocate approximately one third of his time to supervising managerial personnel when the submitted evidence indicates that the petitioner did not have managerial personnel for the beneficiary to supervise. 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)). While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position.

In the present matter, the petitioner has failed to submit sufficient documentation to establish that it was ready and able, at the time of filing the petition, to relieve the beneficiary from having to primarily perform daily operational tasks such that the primary portion of the beneficiary's time would be allocated to tasks of a

managerial or executive nature. While the beneficiary may be justified in his performance of various non-qualifying tasks that are listed as part of his job description, the petitioner's need to employ the beneficiary in such a capacity does not supersede sections 101(a)(44)(A) and (B) of the Act, which require that in order to be classified as a multinational manager or executive, the beneficiary must "primarily" perform managerial or executive duties. The petitioner in the present matter has not reached a level of complexity where the beneficiary would be required to devote the primary portion of his time to qualifying job duties.

Accordingly, on the basis of the above findings, the AAO concludes that the petitioner has failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

The other ground that served as a basis for denial was the petitioner's failure to establish that it has the ability to pay the beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not clarify what specific wage the beneficiary was being offered at the time of filing the petition.

In the present matter, the petitioner's Form I-140 is altogether silent on this issue, as Part 6, Item 9, which asks the petitioner to fill in the proffered wage, is left blank and the support letters that the beneficiary submitted with the Form I-140 also do not contain a specific proffered wage. Rather, the petitioner's undated support letter merely indicates that the beneficiary would be compensated by the foreign entity in an amount ranging from \$60,000-\$120,000. In light of this information and given the petitioner's failure to provide a proffered wage in its Form I-140, the AAO has no way of being able to determine whether or not the petitioner meets the criteria as set forth in 8 C.F.R. § 204.5(g)(2). Moreover, the AAO notes that, regardless of whether or not the U.S. petitioner is actually compensating the beneficiary for his work in the United States, it must nevertheless establish its own ability to supply the compensation. Thus, even if the foreign entity's ability to pay the proffered wage is unequivocally established, the petitioner cannot meet the requirements specified at 8 C.F.R. § 204.5(g)(2) unless it establishes its own ability to compensate the beneficiary.

In summary, the petitioner has failed to specify the beneficiary's proffered wage and has indicated its intent to allow the foreign entity to continue compensating the beneficiary. In light of these factors, the AAO cannot affirmatively conclude that the petitioner has the ability to pay the beneficiary a wage and the petition must be denied on this additional ground.

Additionally, while not addressed in the director's decision, the AAO finds that the petitioner has failed to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." In the present matter, the petitioner's Form I-140 indicates that it is an auto dealership and consignment service. While the petitioner has provided copies of subcontractor agreements, a 2007 tax return, and copies of various utility bills, these documents do not establish that the petitioner has been selling automobiles and providing its consignment services on a "regular, systematic, and continuous" basis. *See id.*

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Based on this additional ground of ineligibility, this petition cannot be approved.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. However, 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. 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 do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 (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). Accordingly, 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.