

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: DEC 06 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:



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 \$630. 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 [REDACTED] that seeks to employ the beneficiary as its 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 the determination that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, the petitioner asserts that the denial was erroneous, claiming that the beneficiary primarily performs managerial and executive job duties. The petitioner's appellate brief and all relevant documents will be addressed in a full discussion below.

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 primary issue in this proceeding is whether 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 a number of documents including a description of the beneficiary's proposed employment and the petitioner's organizational chart. As the beneficiary's job description was incorporated into the director's decision, the AAO need not repeat this information. With regard to the organizational chart, the petitioner shows the president of the company at the top of the hierarchy with the beneficiary in the position of managing director/general manager as his direct subordinate. The beneficiary is shown as overseeing a staff of four individuals—three possessing the title of cashier/store clerk and one in the position title of cashier. The petitioner also provided several of its monthly payroll registers starting with the May 2007 payroll, which named two cashier/store clerks and one cashier. Although the third cashier/store clerk, [REDACTED] was included in the payrolls that predate April 2007, it does not appear that [REDACTED] continued her employment with the petitioner beyond March of 2007. Similarly, while [REDACTED] was named in the April 2007 and May 2007 payrolls, his name did not appear on the payrolls

that predated April 2007, thus indicating that [REDACTED] did not work for the petitioner simultaneously.

On October 16, 2008, the director issued a request for evidence (RFE) instructing the petitioner to provide additional documentation. Some of the documents that were provided in response to the request included the petitioner's payroll documents commencing with January 2008 and the petitioner's quarterly tax returns, including the 2007 third quarterly tax return, which indicates that the petitioner had four employees at the time of filing the petition.

On April 29, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would primarily function in a managerial or executive capacity. The director noted that the petitioner failed to establish that its staffing would be sufficient to support the beneficiary in a managerial or executive position. The director also found that the petitioner failed to provide an adequate description of the beneficiary's job duties or to establish that the beneficiary would oversee managerial, supervisory, or professional employees.

On appeal, the petitioner challenges the director's decision, asserting that the petitioner has submitted sufficient evidence to establish that the beneficiary would be employed in an executive capacity. The petitioner lists the four criteria of the statutory definition for executive capacity, stating that the beneficiary directs the management of the petitioner's convenience store/gas station operation.

With regard to the first criterion—directing the management of the organization—the petitioner states that the beneficiary is responsible for the company's overall profit and for making executive decisions to move forward with future business plans. With regard to the second criterion of the definition—establishing the organization's goals and policies—the petitioner states that the beneficiary makes long- and short-term investment decisions, including the beneficiary's decision to set up a convenience store/gas station in hopes of raising sufficient revenue to enable the petitioner to enter into the construction business in the future. In discussing the third and fourth criteria—exercising wide latitude of discretion and receiving only general direction from higher level executives—the petitioner states that the beneficiary is one of its directors and stresses that the beneficiary oversees the overall management of the organization, including ongoing business relations, budgeting, marketing, and profitability, which requires negotiating for additional business opportunities.

The petitioner also asserts that the beneficiary's prospective employment fits the definition of managerial capacity, claiming that the beneficiary manages all of the company's functions, supervises [REDACTED] who the petitioner claims is a supervisory employee, and handles only managerial-level duties. The petitioner states that beneficiary's business strategy involved diversification, which involved increasing cash flow by investing in a gas station/convenience store operation and by subsequently planning to enter the construction business once cash flow is established.

The petitioner further contends that the director erred in concluding that the beneficiary is a first-line supervisor of non-professional employees, claiming that [REDACTED] who has a baccalaureate degree, acts as the store manager and oversees the non-professional employees who work in the convenience store.

After reviewing the petitioner's statements and supporting documents, the AAO finds that the assertions made on appeal are not persuasive in establishing that the petitioner was capable of employing the beneficiary in a

primarily managerial or executive capacity at the time of filing. First, and most importantly, the AAO notes that the petitioner's claim with regard to [REDACTED] educational level and her placement within the petitioner's organizational hierarchy is inconsistent with the information that was previously submitted in support of the petitioner's Form I-140. As previously noted, the organizational chart that the petitioner submitted initially in support of the petition shows [REDACTED] along with three other employees, at the same bottom tier of the petitioner's organizational hierarchy with the beneficiary as the direct superior to all four employees. The chart made no indication that [REDACTED] held a position that was in any way superior to or supervisory over the three employees whom the chart identified as her equals. In fact, if anything, [REDACTED] position title of cashier indicated that she was charged with a lower level of responsibility in comparison to other employees who were depicted at the same organizational level, as the three other employees carried the position title of cashier/store clerk. Additionally, the petitioner provided a separate list of employees, including their general job descriptions, job titles, and educational levels. It is noted that [REDACTED] educational level was indicated simply as "graduate," which was the same term that was used to describe the educational levels of [REDACTED] co-workers who were identified alongside her on the organizational chart. The petitioner provided a general job description for all of the employees depicted at the bottom tier of the organizational hierarchy, indicating that the same set of responsibilities applied to all four employees.

Second, the AAO notes that, despite the petitioner's claim on appeal, indicating that [REDACTED] would relieve the beneficiary from having to oversee the work of non-professional employees who are depicted at the bottom tier of the petitioner's organizational chart, the first item in the beneficiary's job description, which was provided initially in support of the petition, indicates that supervising the activities of the store clerk/cashier is among the beneficiary's job duties. 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).

Here, while the petitioner's claims on appeal are very different from those made in the initial supporting documents, no documentation was provided to account for the inconsistencies or to support the new claims that are now being made on appeal. If [REDACTED] is in fact a college or university graduate with a baccalaureate degree as the petitioner now claims, it is unclear why this claim was not brought forth earlier and why the petitioner has provided no evidence of the newly claimed educational credentials. It is noted that doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Additionally, in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof; 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); *Ayyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In the instant matter, the job description provided in support of the petition is too general to convey a meaningful understanding of exactly what the beneficiary will be doing on a daily basis. In describing the

prospective employment, the petitioner used such terms as plan, direct, coordinate, and manage. However, these general terms must be considered in light of the petitioner's overall organizational hierarchy to determine whether the hierarchy provides the necessary human resources that would relieve the beneficiary from having to spend the primary portion of his time performing non-qualifying operational tasks. For instance, the petitioner stated that the beneficiary would be responsible for effective and efficient operation of the inventory and management of the company's warehouse budget. However, the petitioner did not specify what actual tasks the beneficiary would perform in meeting these general responsibilities. This question is yet more relevant in light of the petitioner's organizational hierarchy, which does not include any warehouse or inventory employees to actually carry out the underlying operational tasks. The petitioner also indicated that the beneficiary would be responsible for new business development, including paving the way for the petitioner to enter the construction field. However, without further explanation, being in charge of business development indicates that the beneficiary himself would seek out the business opportunities and take all subsequent steps that are necessary to secure future business. The petitioner did not explain how carrying out the daily operational tasks that would be required to allow the petitioner to enter a new business arena can be classified as managerial or executive.

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. 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). The petitioner has not established that a subordinate staff composed of three cashiers/store clerks could reasonably relieve the beneficiary from primarily performing non-qualifying tasks, such that he could primarily focus on performing managerial or executive duties.

Furthermore, while discretionary authority is admittedly an important component of a managerial or executive position, the petitioner must establish that it has the necessary staffing who would carry out the daily operational tasks and that the beneficiary does not spend the primary portion of his time overseeing the work of non-supervisory or non-professional employees. In the present matter, the record indicates that the petitioner has not reached a level of organizational complexity that would require the services of a primarily managerial or executive employee. The record indicates that at the time the petition was filed, the petitioner's primary source of revenue stemmed from the operation of a convenience store/gas station, which, despite the petitioner's organizational chart showing four cashier/store clerks, had only three clerks and the beneficiary to run the operation.¹ At the very least, such an organizational composition indicates that the beneficiary spent a great deal of his time overseeing non-professional employees. Despite the petitioner's desire and expectation that it would expand its business into the construction industry, the record contains no evidence that the required steps had been taken to meet the petitioner's projected goals. The AAO notes that eligibility must be established 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). Here, the record indicates that at the time of filing, the petitioner's sole business interests were focused on the convenience store/gas station, which had a limited staff of non-professional employees.

¹ Refer to the petitioner's 2007 third quarterly wage report showing four employees.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Here, the petitioner has not established how the beneficiary would be relieved of the day-to-day operations of the petitioner's business, such that he could focus the primary portion of his time on executive duties.

Additionally, with regard to the claim that the beneficiary also fits the definition of managerial capacity, the AAO finds the petitioner's arguments to be unpersuasive. The petitioner seems to confuse the key distinction between a personnel manager and a function manager. 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). Here, the petitioner seemingly indicates that the beneficiary manages both supervisory personnel and an essential function. However, the petitioner does not provide sufficient corroborating evidence to support either claim.

In summary, the record in the present matter does not establish that the petitioner had either the need or the ability to employ the beneficiary in a managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Rather, the record indicates that a preponderance of the beneficiary's duties will be overseeing a staff of non-professional employees and directly providing the services of the business. As noted above, the petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

As a final note, with regard to the petitioner's previously approved L-1 employment of the beneficiary, the AAO notes that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. Thus, 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 petition was approved based on the same unsupported assertions that are contained in the current record, the approval 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). Neither USCIS nor any agency will 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.