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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

B4



FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: DEC 16 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 a New York corporation that seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on 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. After reviewing the documentation presented, the AAO finds that an adverse conclusion with regard to the beneficiary's position abroad was not warranted and hereby withdraws the first ground as a basis for denial.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his statements. The AAO will address all relevant portions of counsel's brief and supporting evidence in the 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 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 June 11, 2008 describing the proposed employment as a senior-level position with the authority to supervise the work of others and to hire and fire personnel as need. The petitioner also provided the following description of the beneficiary's proposed employment with the U.S. entity:

To execute his duties, [the beneficiary] will utilize his executive managerial capacity to manage and direct the U.S. operations, develop and expand the market for our products, promote our name in the U.S. and identify new markets for penetration in the U.S. His duties

include the planning, directing and execution of all marketing activities together with the initiation and implementation of advertising strategies. [He] will oversee and manage marketing research and negotiate sales and payment terms with U.S. customers.

Additionally, the petitioner provided an organizational chart illustrating its staffing hierarchy. The chart depicts the beneficiary at the top-most level as the company's president with a sales and marketing manager as his direct subordinate. The third hierarchical tier includes a sales manager in charge of distribution and customer service, an office manager, and a marketing manager in charge of research, development, and promotions. The bottom tier shows four commission-based regional managers—two under the supervision of the sales manager and two under the supervision of the marketing manager—and an office secretary under the supervision of the office manager. Although the chart also shows a general "office help" position, no specific positions were named under this general heading and no clear information was provided to explain which of the remaining positions would oversee and supervise the work of the "office help."

On February 27, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a definitive statement listing the beneficiary's proposed job duties as well as the percentage of time that would be allocated to each job duty. The petitioner was asked to provide the job titles, brief list of job duties, and educational levels of all individuals who would report directly to the beneficiary in his proposed position.

Although the petitioner's prior counsel provided a response dated March 30, 2009 acknowledging the director's RFE, counsel did not provide any of the requested information, but rather asked for an extension of time. The AAO notes that there is no statute or regulation that instructs the director to accommodate counsel's request. Accordingly, on May 14, 2009, the director issued a notice of intent to deny (NOID) repeating the instruction included in the previously issued RFE.

In response, the petitioner provided a letter dated May 6, 2009 as part of its Exhibit 6, in which the beneficiary's role within the petitioning organization was generally described as one of a manager and director of operations responsible for developing and implementing marketing and promotional strategies. The letter stated that the beneficiary is the petitioner's legal representative and is involved in negotiating legally binding contracts, including pricing and scheduling. The petitioner indicated that the beneficiary would allocate 100% of his time to these responsibilities.

Additionally, the petitioner indicated that 50% of the beneficiary's time would be spent planning, directing, and executing the company's marketing and promotional materials, while another 50% of his time would be allocated to supervising and controlling the work of subordinate employees, as well as hiring, firing, and recommending other personnel actions. Lastly, the petitioner stated that the sales and marketing manager, the sales manager, and the office manager all report directly to the beneficiary.

In a decision dated June 4, 2009, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director commented on the petitioner's limited number of support personnel and determined that the petitioner would be unable to relieve the beneficiary from having to primarily carry out non-qualifying tasks.

On appeal, counsel restates portions of the job description that was provided in response to the NOID, pointing to the beneficiary's high-level position within the petitioner's organizational hierarchy, his oversight

of top-level subordinate employees, and the petitioner's retention of commission-based regional managers and other contracted sales personnel. Counsel pointed out that it is common practice in the garment industry to use outsourced personnel to carry out various sales and logistics functions. It is noted, however, that 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)). 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). In the present matter, the petitioner has not provided any evidence to support the assertion that contractors were hired to perform any sales-related or administrative services. Merely including the outsourced positions in the petitioner's organizational chart, without supplying corroborating evidence to show that such outsourcing was actually taking place, is insufficient to support the initial claim.

Additionally, the AAO notes that a detailed description of the beneficiary's proposed job duties is key to determining whether the proposed position is in an executive or managerial capacity. See 8 C.F.R. § 204.5(j)(5). The director's RFE and NOID expressly instructed the petitioner to provide a list of the beneficiary's proposed job duties accompanied by a percentage breakdown indicating the amount of time that would be allocated to each specific item listed. The record shows that while the petitioner responded to the NOID, the response lacked a list of the specific job duties and provided a confusing percentage breakdown, which precluded the director from being able to ascertain how much time the beneficiary would allocate to qualifying tasks versus the non-qualifying ones. For instance, the petitioner indicated that 100% of the beneficiary's time would be consumed with entering into legally binding contracts with customers, 50% of his time would be allocated to planning and executing promotion activities, and another 50% of his time would be devoted to personnel actions, including overseeing subordinate employees as well as hiring, firing, and seeking other personnel actions.

On appeal, the petitioner supplements the record with another job description, which includes the following nine components: 1) directing the development and transformation of the company; 2) leading the company's professional managerial staff in building partnerships with companies and marketing; 3) supervising the "U.S. Head of Sales & Marketing Manager," who would supervise other professional staff; 4) spearheading programs and oversee their implementation both in the United States and in India; 5) developing and overseeing the implementation of long-term growth plans and establish policies and objectives to increase sales revenue; 6) analyzing reports and financial statements; 7) reviewing, analyzing, and evaluating sales and marketing plans prepared by senior professional staff; 8) coordinating financial strategies; and 9) creating policies and strategies to maximize efficiency and increase profits.

Additionally, in an effort to clarify confusion created with the original percentage breakdown, the petitioner supplements the record on appeal with a second percentage breakdown, which indicates that the beneficiary would spend 50% of his time "engaged in his primary executive and managerial function," which the petitioner indicates would include establishing goals, policies, and strategies; formulating sales and marketing plans; meeting with top executives to forge business relationships; and negotiating contracts, planning the budget, and evaluating company performance. The petitioner indicates that another 25% of the beneficiary's time would be allocated to directing the management of the company, including professional managerial staff and senior-level outsourced personnel. Lastly, the petitioner states that the remaining 25% of the beneficiary's time would be allocated to following up with the production department heads located abroad, as well as the commercial support team and logistics vendors. While the additional list of responsibilities and

supplemental percentage breakdown both indicate that the beneficiary's discretionary authority and placement within the petitioner's organizational hierarchy are indicative of a managerial or executive position, the supplemental information is nevertheless vague in its assessment of the beneficiary's daily job duties and therefore fails to convey a meaningful understanding clarifying how the beneficiary would carry out his assigned job responsibilities. A list of the beneficiary's actual duties is necessary to determine 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). Thus, mere broad generalities indicating that the beneficiary directs the company, oversees staff, develops plans for growth, and creates policies and objectives are insufficient, as they do not further U.S. Citizenship and Immigration Services' (USCIS) understanding of the underlying tasks the beneficiary performs on a daily basis to meet broad job responsibilities and business objectives.

Moreover, in looking back on the job description that was provided in response to the NOID, the petitioner indicated that a considerable portion of the beneficiary's time would be allocated to contract negotiation and marketing, neither of which were established as being qualifying managerial or executive functions. More specifically, the petitioner originally indicated that the beneficiary would always be in the process of contract negotiation, as 100% of the beneficiary's time was allocated to this function, and that during approximately 50% of the time the beneficiary would also be involved in carrying out marketing plans to help sell products.

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 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). In the present matter, the record indicates that the primary portion of the beneficiary's time would likely be spent on contract negotiation and marketing, both of which are deemed as tasks that are necessary to produce a product or service. When this information is considered in light of the overall lack of documentary evidence establishing that the petitioner has outsourced employees to sell the petitioner's products, the likelihood that the petitioner would be able to relieve the beneficiary from having to allocate the primary portion of his time to performing non-qualifying tasks becomes even smaller.

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner did not provide a detailed description of the beneficiary's daily tasks and therefore failed to establish that the primary portion of the beneficiary's duties would be primarily managing the organization or directing the management of the organization. The record lacks evidence to establish that the beneficiary would primarily supervise a subordinate staff of professional, managerial, or supervisory personnel or that he would otherwise be relieved from having to allocate significant portions of his time to performing non-qualifying job duties. The petitioner also failed to demonstrate that it has reached a level of organizational complexity that would require an employee who would allocate the primary portion of his time to managerial- or executive-level tasks. As previously stated, neither the beneficiary's job description nor the petitioner's organizational composition establishes that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. The AAO notes, however, that 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 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 a previous nonimmigrant petition were 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 a prior approval 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 a nonimmigrant petition 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).

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.