

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

B4

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **JAN 21 2010**
LIN 07 138 51323

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, 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 District of Columbia non-profit organization that seeks to employ the beneficiary as its executive 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition on that basis. On appeal, counsel disputes the director's decision and submits a brief in support of his arguments.

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 March 30, 2007, which includes the following description of the beneficiary's proposed U.S. employment:

As Executive Director of the Petitioning entity since July 2005, [the beneficiary] is, and will continue to be, responsible for the oversight of total management, development, and expansion of the entity, including budgeting, identifying and meeting with potential donor sources, and formulating operating strategies and

coalition building. She establishes the goals and policies of the U.S. petitioning entity in accordance with the Argentinean parent, as well as exercises wide latitude in discretionary decision-making with only general supervision or direction from higher level executives or board of directors of the organization. Therefore, her employment in the United States is in an executive capacity.

The record also includes a letter dated March 9, 2007 in which the petitioner provided the following list of the beneficiary's proposed job responsibilities:

- Oversight of total management, development, and expansion of the entity as well as overseeing and implementing budgets, identifying and meeting with potential donor sources and formulating operating strategies and coalition building.
- Establishing the goals and policies of [the petitioner] in accordance and at the pleasure of FEU-Argentina, as well as exercise wide latitude in discretionary decision-making with only general supervision or direction from higher level executives or board of directors of the organization.
- Coordinating overall activities for the fulfillment of [the petitioner]'s purpose.
- Fundraising, achieving several contracts supported by different international organizations.
- Networking with other organizations, a[t] both the regional and international level[s].
- Monitoring and provi[di]ng instructions for programming and generation of required outputs as well as reporting to donors.

On April 17, 2008, the director issued a request for additional evidence (RFE), instructing the petitioner to submit, in part, a more detailed description of the beneficiary's job duties in her proposed position with the U.S. entity. The petitioner was asked to specifically enumerate each of the beneficiary's proposed job duties and to assign the percentage of time that would be allotted to each item on the list. The petitioner was also asked to describe its organizational hierarchy, specifying the beneficiary's role therein as well as her placement relative to others within the petitioning organization.

In response, counsel for the petitioner provided a letter dated March 22, 2008, asserting that the beneficiary's prospective U.S. employment is within a qualifying executive capacity. Counsel urged U.S. Citizenship and Immigration Services (USCIS) to take into account the reasonable needs of the petitioning entity. Additionally, the petitioner divided the beneficiary's prospective employment into five main categories, each of which was assigned a percentage of time as follows:

1. Establishing the goals and policies of the [petitioner], as well as exercising wide latitude in discretionary decision-making, in consultation with the Board. 5%

2. Oversight of total management, development, and expansion of the organization, as well as designing project proposals and budgets, identifying donors and formulating operating strategies and coalition building. 25%
3. Implementation and supervision of overall activities for the fulfillment of [the petitioner]'s purpose. 45%
4. Representing [the petitioner] by networking with other organizations, at regional and international levels. 20%
5. Monitoring and proving [sic] instructions for programming and generation of outputs as well as reporting to donors. 5%

The petitioner elaborated on each of the above categories. With regard to the first category, the petitioner stated that the beneficiary would consult closely with the foreign entity's board of directors, helping the board determine how the U.S. entity would operate consistent with its bylaws.

With regard to the second category—managing, developing, and expanding the organization—the beneficiary would develop and periodically update the pool of potential donors and design project proposals requesting funding for the petitioner's initiatives. Designing project proposals would also require developing budgets and partnering with other entities for project execution. The beneficiary would be responsible for submitting the completed project proposals to the donors and subsequently following up with the potential donors for further negotiation to ensure a project's approval.

The activities in the third category—implementation and supervision of activities—would commence after funding is approved for a particular project. The beneficiary would be required to select the support staff and/or third party service providers to carry out the underlying duties required of the approved project. Based on the examples of previously approved projects, the petitioner indicated that the beneficiary's role may vary depending on the other entities involved in a particular project. The beneficiary may be required to do further research in finding additional funding for follow-up phases of a project or she may need to partner with other entities to execute the goals of a particular project. In other words, the beneficiary's job duties as far as implementing a particular project would vary depending on the specific needs of the project.

The fourth category—networking with organizations at regional and international levels—would require the beneficiary to represent the petitioner at various forums and conventions. Based on prior such networking activities, the petitioner indicated that the beneficiary's duties may include providing and disseminating informational literature to other participating organizations or doing further research to provide the necessary expertise for various initiatives.

The fifth and final category—monitoring projects and providing further instruction—would require the beneficiary to report to the board of directors as to the goals set for each project. The beneficiary would also report to each project's donors via narrative and financial reports.

Lastly, the petitioner provided its organizational chart, which consisted of its board of directors at the top of the organizational hierarchy, followed by the beneficiary as the petitioner's executive director, and a graphic designer as the third party service provider to be overseen by the beneficiary.

In a decision dated September 24, 2008, the director denied the petition, finding that the petitioner failed to establish that the beneficiary's prospective employment would primarily consist of job duties within a qualifying managerial or executive capacity.

On appeal, counsel argues that the director failed to take into account the nature and structure of the petitioning entity and instead made the size of the petitioning organization the determining factor in reaching the adverse conclusion. Counsel claims that the director's decision indicates that the reasonable needs of the petitioner were not given proper consideration and further asserts that sufficient documents were submitted to support the claim that the beneficiary would be employed in an executive capacity. Counsel concedes that while the beneficiary would be expected to perform some non-qualifying tasks, her primary responsibilities would be directing and implementing the activities associated with each of the petitioner's initiatives.

After a thorough and comprehensive review of the record, the AAO finds that counsel's arguments are not persuasive. 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). It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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 description of the beneficiary's proposed employment does not indicate that the beneficiary would primarily perform executive or managerial-level tasks. Rather, it appears, based on the job description provided, that until the beneficiary finds a donor(s) to fund one of the petitioner's initiatives, her job would primarily consist of daily operational tasks, including conducting research to use as the basis for a proposal, actually writing the proposal, narrowing down the list of prospective donors, contacting the prospective donors to fund a particular project, and properly staffing a particular project based on the requirements specified in the proposal. It appears that the time constraints for each of these non-qualifying tasks will vary depending on the actual project and the length of time that it would take to obtain a donor(s) to fund the project. Although there is no express discussion as to what happens if the beneficiary is unable to find donors to fund a project, it would appear that such an obstacle would require the beneficiary to conduct further research and perhaps start the process all over again with regard to another project.

Thus, in light of the above, it appears that counsel's assertion is premised on the beneficiary being able to secure funding for a project. Any work the beneficiary would be doing prior to the project being funded would be deemed as a daily operational task where the beneficiary is working to do research, write a proposal, and seek out donors to implement the proposal. In fact, counsel actually discusses a proposal that took the beneficiary eight months to complete only to be rejected by the organization that requested that the proposal be put together.¹ Counsel's example only furthers the

¹ *See* section II, New Developments and Initiatives Since March 2008, appellate brief.

AAO's main concern—that the beneficiary would primarily perform non-qualifying tasks for lengthy and undetermined periods of time until funding for a particular project is ultimately secured.

While it is possible that the beneficiary's set of job duties would change once a proposal is accepted and ready for implementation, the record strongly suggests that the underlying process of attaining funding for the proposal consists primarily of non-qualifying tasks, which would in large part be performed by the beneficiary for unspecified periods of time. In statutorily requiring that the beneficiary of the immigrant visa classification sought herein "primarily" perform duties within a qualifying managerial or executive capacity, there is no indication that Congress intended the definition to apply during only certain phases of the beneficiary's prospective employment. Rather, the key to determining whether the beneficiary's prospective employment would be within a qualifying capacity is narrowing down the types of tasks the beneficiary would perform on a daily basis. Only by determining that the primary portion of the beneficiary's daily tasks are managerial or executive can the AAO ultimately conclude that the beneficiary would be employed in a qualifying capacity. Here, by the petitioner's own admission, the beneficiary's proposed position is cyclical in that it would require the beneficiary to spend extended periods of time performing non-qualifying tasks to secure proper funding prior to the implementation phase of a project at which time the qualifying tasks would commence. Once a particular project is over, however, the cycle would start all over again, requiring the beneficiary to once again commit to performing all the non-qualifying tasks that are inherent to the initial stages of any given initiative.

Additionally, while the instant petitioner's staffing is not the basis for the overall adverse finding, it is noted that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Moreover, in its efforts to establish that the beneficiary does not primarily perform non-qualifying duties, the petitioner must provide documentation establishing who exactly performs its daily operational tasks. 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)). Here, the record shows that while a project is in its initial stages and funding has not yet been obtained, the petitioning organization relies on the beneficiary to accomplish all of the daily operational tasks, as the petitioner cannot staff a project prior to obtaining proper funding. Thus, contrary to counsel's argument, the director can and should look at an organization's staffing to determine the company's ability to relieve the beneficiary from having to devote the primary portion of his or her time to the performance of non-qualifying tasks. In light of the above findings, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. On this basis, the instant petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his or her entry into the United States as a nonimmigrant to work for the same employer. In the instant matter, the record indicates that the beneficiary's employment abroad consisted of tasks similar to those she would perform in her proposed position within the petitioning entity. **Therefore, relying on the reasoning discussed above with regard to the proposed employment, the AAO cannot conclude that the beneficiary's employment abroad was within a qualifying managerial or executive capacity.**

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. 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 context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the present matter, the claim is made that the beneficiary's foreign employer owns 50% of the U.S. entity. However, as stated above, 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. at 165. As the record lacks evidence to establish who owns the U.S. entity, the AAO cannot conclude that the U.S. and foreign entities are similarly owned and controlled.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved. 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 at 1043, *aff'd*, 345 F.3d 683.

Lastly, the director observed in his decision that the petitioner's employment of the beneficiary as the L-1A nonimmigrant visa category had been approved. The director noted that such approval would not guide USCIS in a determination with regard to the immigrant visa classification sought in the present matter, despite the similarities in the regulatory provisions that pertain to the immigrant and nonimmigrant visa categories. The director duly noted that there are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. The director also properly pointed out that USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, particularly because of

the possibility that prior approvals may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597.

On appeal, counsel argues that a USCIS memorandum requires that the director provide the petitioner with an explanation for the apparent inconsistency between the two decisions approving the petitioner's L-1A nonimmigrant petitions and the most recent decision denying the Form I-140 immigrant petition. The AAO notes, however, that USCIS memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). It is further noted 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. It therefore stands to reason that USCIS cannot be burdened with searching the records of proceedings for previously approved petitions in order to explain what the petitioner may perceive as an inconsistency.

Counsel attempts to distinguish the facts of the instant case from the facts of the cases that were cited by the director in support of the proposition that a Form I-140 may be denied notwithstanding a prior approval(s) of a nonimmigrant petition filed on behalf of the beneficiary by the same petitioner. Counsel's main point of distinction seems to be that the petitioners in the cited cases were seeking to classify their respective beneficiaries as multinational managers, while the petitioner in the present matter seeks to classify the beneficiary as a multinational executive. The AAO finds, however, that this distinction is irrelevant. In fact, the three cases were cited as mere examples of USCIS's power to deny I-140 immigrant petitions even 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). Thus, whether the petitioners in the cited cases sought to classify their respective beneficiaries as multinational managers or executives was a distinction entirely immaterial to USCIS's overall authority in denying any petition where eligibility had not been established. Therefore, while the AAO cannot presume to know the contents of the records of proceeding with regard to the petitioner's previously filed petitions, if the previous nonimmigrant petitions were approved based on the same assertions and supporting evidence contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO can conclude with sufficient certainty that the record in the present matter does not support approval of the Form I-140 immigrant petition. Therefore, regardless of any prior findings that were favorable to the petitioner, this immigrant petition does not warrant approval.

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.