

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

[REDACTED]

FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER

Date:

NOV 03 2010

IN RE: [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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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.¹ The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida 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 concluded 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 conclusion, asserting that the decision was arbitrary and capricious. Counsel contends that the petitioner's description of the proposed employment establishes that the beneficiary would be employed in both a managerial and an executive capacity.

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 petitioning United States employer would employ the beneficiary in a primarily managerial or executive capacity.

¹ The record shows that the same petitioner filed three prior Form I-140 petitions. The first Form I-140, with receipt no. SRC0422352967, was denied on July 11, 2005; the second Form I-140, with receipt no. SRC0600452017, was denied on February 8, 2006; and the third Form I-140, with receipt no. LIN0701652670, was denied on April 10, 2008. The record shows that the petitioner did not appeal any of the three previously issued denials.

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.

The record shows that the petitioner submitted a letter dated April 18, 2008 in support of its Form I-140. The petitioner provided the following statements with regard to the beneficiary's proposed position as president of the U.S. entity:

As President of our corporation, approximately 30% of [the beneficiary]'s work week involves establishing and developing our business and financial goals and policies and overseeing the achievement of these business and financial goals and policies, and

establishing our corporation's sales goals and strategies together with hiring and firing employees and setting salaries. Approximately 20% of his work week involves coordinating all activities between sales and administration, and approximately 30% of his work week involves supervising and evaluating the work performance of two supervisory personnel who are the Administrator and Marketing/Sales Managers. The balance of [the beneficiary]'s work week, involves day-to-day activities such as telephonic conferences with distributors and manufacturers where the Petitioner purchases products from and telephonic conferences with its customers.

The petitioner added further that the beneficiary is the head of the corporation and has full discretionary authority with regard to daily decision making.

The director did not find that the petitioner's supporting evidence to be persuasive in establishing that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the director issued a decision dated December 17, 2008 denying the petition. Focusing on the petitioner's quarterly wage reports, the director noted that two out of four quarters for which reports were submitted showed limited personnel, thereby indicating greater involvement from the beneficiary in performing non-qualifying tasks.

On appeal, counsel asserts that because the director failed to ask for additional information regarding the beneficiary's job duties, his adverse determination regarding the beneficiary's employment capacity in his proposed position was arbitrary and capricious. Counsel focused on the beneficiary's supervisory duties in overseeing and evaluating the work of two supervisory subordinates.

Counsel's assertions on appeal are unpersuasive and failed to establish that the beneficiary would allocate the primary portion of his time to performing managerial- or executive-level tasks.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record lacks a comprehensive description of the beneficiary's day-to-day job duties. Although the petitioner provided a job description with time allocations in its support letter, the information provided consisted of vague job responsibilities rather than a delineation of specific tasks that convey a meaningful understanding of how the beneficiary spends his time. For instance, merely stating that the beneficiary spends 30% of his time establishing business and financial goals and policies provides no insight into the underlying daily job duties. In other words, what actions does the beneficiary undertake to determine the goals that must be met and how does the beneficiary decide on the strategic means for meeting those goals? Published case law has determined that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner was equally vague in stating that 20% of the beneficiary's time would be spent coordinating sales and administrative activities. Again, the petitioner listed no actual tasks nor provided an explanation to clarify what specific activities are involved and what types of coordinating duties the beneficiary plans to undertake.

The record also lacks sufficient evidence to establish the petitioner's continued availability to maintain an adequate support staff, which would relieve the beneficiary from having to primarily focus on the performance of daily operational tasks. Although the director's analysis was based on documents that establish the petitioner's staffing during the one-year period directly prior to the date the Form I-140 was filed, the petitioner has had ample opportunity to provide more recent documentation on appeal to show exactly whom it employed at the time the petition was filed. As stated above, aside from the petitioner's description of the beneficiary's proposed job duties, the AAO also looks to the petitioner's staffing and organizational structure to gauge the extent to which the petitioner is capable of employing the beneficiary in a managerial or executive capacity. Such analysis is permitted, as 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)).

Thus, when a petitioner claims, as in the present matter, that some portion of the beneficiary's time would be allocated to overseeing the work of others, it is proper and necessary to verify the petitioner's claim. 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 does not provide sufficient evidence to establish that the petitioner would be adequately staffed with support personnel who assume the burden of daily operational tasks and allow the beneficiary to allocate the primary portion of his time to tasks within a qualifying managerial or executive capacity. 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 summary, the record in the present matter lacks the detailed job description that is required by regulation and fails to establish that the petitioner has the need or the ability to employ the beneficiary in a qualifying managerial or executive capacity. Although the AAO has taken into account the beneficiary's position title and placement within the petitioner's organizational hierarchy, a detailed job description and adequate staffing are both critical factors that must be considered when determining whether the beneficiary would primarily perform tasks within a qualifying capacity. Here, 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 that the beneficiary would perform on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Finally, the petitioner makes numerous references to its previously approved L-1 employment of the beneficiary. As a preliminary matter, the AAO notes 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 the nonimmigrant 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 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).

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.