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U. S. Citizenship and Immigration Services
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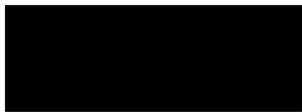


FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: NOV 16 2010

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. 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Missouri corporation that seeks to employ the beneficiary as one of its field distribution managers. 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.

On appeal, counsel disputes the director's conclusions and challenges the accuracy of the analysis that served as the basis for the denial.

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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether she 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 November 13, 2007, which included a brief description of the beneficiary's foreign and proposed employment with the U.S. entity. As the director included this information in his decision, the AAO need not repeat the job description in the current discussion. The director reviewed the job description and determined further information was needed in order to make a determination regarding the beneficiary's employment capacity with the foreign and U.S. employers.

Accordingly, in a notice dated February 12, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to supplement the record with a more detailed description of the job duties the beneficiary performed during her employment abroad and the job duties she would perform during her

employment with the U.S. entity. The director expressly asked the petitioner to assign a percentage of time to each of her job duties. The petitioner was also instructed to provide organizational charts illustrating the beneficiary's placement within the U.S. and foreign entities. The director provided instructions advising the petitioner of the specific information that was deemed essential and explaining what information the petitioner could omit if necessary.

In response, the petitioner submitted a letter dated March 24, 2009, written by [REDACTED] the petitioner's director of human resources. The letter expounded on the brief statements provided earlier to describe the beneficiary's employment abroad and her proposed position with the U.S. entity. [REDACTED] indicated that the beneficiary's foreign and U.S. positions involve similar tasks and responsibilities. He further explained that the beneficiary's job consists of two parts where the first part involves establishing field distribution offices in the desired locations. The second part of the beneficiary's job involves the actual management of distribution operations once the respective offices are opened for business. [REDACTED] also provided a percentage breakdown of the elements that are involved in each of the two parts of the beneficiary's foreign and proposed positions. As the percentage breakdowns have been incorporated into the director's decision, the AAO need not repeat this information in the instant decision.

The petitioner also provided an organizational chart that illustrates a multi-tiered organization with a hierarchy that places the beneficiary in a position that is directly subordinate to a division manager. The chart lists a delivery manager as the beneficiary's direct subordinate, a delivery supervisor as the delivery manager's subordinate, and delivery carriers and field staff members as the subordinates of the delivery supervisor.

After assessing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility and therefore issued a decision dated May 8, 2009 denying the petition. The director concluded that the petitioner failed to establish that the beneficiary's employment with the foreign entity had been and that her proposed position with the U.S. entity would be primarily within a qualifying managerial or executive capacity. The director noted that the petitioner failed to provide documentation establishing the employment of the 1,000 employees named in one of the petitioner's submissions or further evidence of the 26 employees and contractors that were shown as part of the Idearc Media Operations branch of the petitioning entity.

Next, the director addressed the job descriptions the petitioner provided, noting that the petitioner failed to establish how much of the beneficiary's overall time is allocated to establishing field offices versus the time spent arranging for the delivery of telephone directories. The director surmised, based on the petitioner's statement of the number of field offices the beneficiary established, that the beneficiary spent and would spend "a substantial portion" of her work day establishing field offices. The director also found that the description of the remaining element of the beneficiary's position—management of distribution operations—was inadequate, as it is described using vague and non-specific statements.

On appeal, counsel challenges the accuracy of the director's interpretation of the material presented in response to the RFE, asserting that a number of the director's adverse findings were based on the lack of documentation that had not been previously requested. Counsel specifically refers to the director's finding that the petitioner failed to provide documentation of the approximately 1,000 employees the petitioner listed in one of its submissions. Counsel accurately points out the RFE instruction that relieved the petitioner from having to provide such voluminous documentation and contends that no adverse finding should come from the petitioner's omission of unnecessary documentation. Counsel further contends that information about the Idearc Media Operations Division is irrelevant in the present matter, as it has nothing to do with the

beneficiary's position, and that as such, the petitioner is under no obligation to submit documentation of the 26 employees who are part of a division that does not pertain to the beneficiary's foreign and proposed employment.

Next, counsel addresses the director's adverse findings with regard to the beneficiary's job descriptions. Namely, counsel states that the director misapplied the percentage breakdown based on the assumption that setting up field offices and managing them are responsibilities that the beneficiary carries out simultaneously. Counsel clarifies this misconception, explaining that the beneficiary first sets up the field offices and in the process of doing so, allocates her time to the four tasks that are necessary to set up or close down a field office. Counsel states that once the field office is set up with leased premises, furniture, office equipment, utilities, and communication services, the beneficiary then carries out the tasks that are required to actually manage the field office operation.

In reviewing the supporting evidence in light of counsel's statements on appeal, the AAO finds that counsel has made valid points that help to clarify key aspects of the beneficiary's past and proposed positions. While the AAO concurs with counsel's assertion that the director's decision contained certain inaccuracies and certain findings that would not lead the AAO to make an ultimate finding that is unfavorable to the petitioner, the AAO finds that the director did not err in his overall conclusion with regard to the two grounds cited as the bases for denial. More specifically, the AAO finds that the petitioner has failed to meet key eligibility criteria in that it has failed to establish that the primary portion of the beneficiary's time was and would be allocated to the performance of tasks within a qualifying managerial or executive capacity.

First, as noted above, the AAO acknowledges that the beneficiary's job is comprised of two separate parts, where one part includes setting up field offices and the second part includes managing the operations of those field offices in the interim. With regard to setting up field offices, the petitioner has provided an explanation of the underlying tasks the beneficiary has and would continue to carry out. As previously concluded by the director, the AAO finds that these tasks do not require the management of supervisory, professional, or managerial employees; nor are they the tasks involved in managing an essential function. While counsel may argue that the beneficiary's tasks fall within the latter category pertaining to a function manager, the AAO notes that the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Here, the petitioner's explanation of the beneficiary's daily tasks during the course of setting up a field office are operational in nature in that the beneficiary performs them in order to ensure that the petitioner is able to provide its services on a daily basis. Both statute and case law have established that 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).

Given the facts in the present matter, the petitioner has not provided an adequate explanation to clarify how much of the beneficiary's time is actually spent setting up field offices versus the time the beneficiary spends managing those field offices. While the AAO acknowledges counsel's valid point that the tasks required to set up field offices are only performed during a particular phase of the business operation, the petitioner has failed to specify how much of the beneficiary's time has been and would be allocated to that particular phase. The petitioner stated that the beneficiary has set up over 30 offices since January 2004. The AAO cannot determine that this aspect of the beneficiary's job is something that is merely incidental to her foreign and

proposed positions. Therefore, simply based on an assessment of one aspect of the beneficiary's employment, the AAO cannot conclude that the primary portion of the beneficiary's time has been and would be spent carrying out tasks within a qualifying capacity.

Notwithstanding the above conclusion, the AAO will assess the other phase of the beneficiary's job that consists of managing a field office once it has been set up. Again, pursuant to 8 C.F.R. § 204.5(j)(5), the AAO considers the description of tasks and the corresponding percentage of time that is assigned to each given task. In the present matter, the director was correct in pointing out that the petitioner failed to provide a detailed description of the specific tasks that are involved in the second main component of the beneficiary's job. While the AAO is clear as to the degree of discretionary authority the beneficiary has over her subordinate personnel within the context of managing the field offices that are responsible for directory distribution, the beneficiary's specific daily tasks during this phase of her job require further clarification. 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).

In the present matter, the petitioner has failed to provide a list of specific tasks. For example, the petitioner indicated that 10% of the beneficiary's time during the management phase of the operation would involve arranging physical distribution of directories. However, it is unclear how exactly the beneficiary goes about making such arrangements and how, if at all, the beneficiary's subordinates relieve her from having to carry out daily operational tasks of the business. The petitioner indicated that another 20% of the beneficiary's time is allocated to overseeing delivery managers in their administrative duties. However, the specific tasks that are involved in such oversight were not specified. The petitioner also failed to expressly delineate the tasks that are involved in managing payroll and other personnel issues, which consume 20% of the beneficiary's time. In other words, the petitioner did not state whether the beneficiary herself performs the payroll function, which would be deemed a non-qualifying task; nor did the petitioner indicate what types of personnel issues the beneficiary addresses, in addition to managing her direct subordinates, and what portion of this responsibility is devoted to the non-supervisory and non-professional field staff and delivery carriers who may fall under the beneficiary's supervision.

In summary, the petitioner's discussion of the beneficiary's personnel management duties lacks overall clarity as to the types of tasks the beneficiary performed and would perform. Without a more definitive understanding of the beneficiary's specific daily tasks and the amount of time that was and would be allocated to those tasks, the AAO cannot conclude that the beneficiary was employed abroad or that she would be employed by the U.S. petitioner in a qualifying managerial or executive capacity.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be 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. 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 similar assertions as those 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 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.