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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: JAN 19 2011

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

The petitioner is a limited liability company organized in the State of California. The petitioner seeks to employ the beneficiary as its president and chief executive officer. 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 the beneficiary would be employed in the United States in a managerial or executive capacity. On appeal, counsel disputes the adverse decision and submits a statement to overcome the director's findings.

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 record contains sufficient evidence to establish that the beneficiary would be employed by the U.S. petitioner 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, [REDACTED] interim director, submitted a list of the beneficiary's responsibilities with the petitioning entity in his proposed position. The list indicates that the beneficiary makes a wide range of decisions regarding new business opportunities, improving operations, and increasing profitability of the business; confers with the administration and finance manager in managing the company's economic policies and reducing liabilities; attends meetings and negotiates with prospective client companies; formulates marketing plans to help sell the petitioner's products and services; directs and supervises productivity through senior managers and department heads; checks monthly reports provided by the operations departments; oversees the work of engineering managers; and makes plans and recommendations for training of engineering personnel.

On December 4, 2008, the director issued a request for additional evidence (RFE). The director pointed out that only one employee was claimed on the Form I-140 and questioned the validity of a prior statement,

which indicated that the beneficiary intended to hire a support staff upon his arrival in the United States. The petitioner was asked to provide an organizational chart establishing that the U.S. entity has a subordinate staff to relieve the beneficiary from having to primarily perform non-qualifying tasks. The petitioner was also asked to provide payroll documentation as evidence of wages paid to a support staff as well as a description of the job duties performed by each staff member.

In response, the petitioner provided an organizational chart that depicted a heavily staffed entity with multiple tiers of managerial and professional employees. The chart shows two managerial employees and an engineer as the beneficiary's direct subordinates. Each manager is shown as having a team of subordinates. The company units administrative manager—[REDACTED]—is depicted as overseeing four engineers, a shipping contractor, and two outsourced receptionists. The business units general manager—[REDACTED]—is depicted as overseeing a team of engineers, three directors, and outsourced staff. The organizational chart was accompanied two IRS Form W-2s—one issued to the beneficiary in the amount of \$32,500 and the other issued to [REDACTED] in the amount of \$6,666.

After reviewing the submitted documentation, the director determined that the petitioner failed to establish eligibility and therefore issued a decision dated March 4, 2009 denying the petition. Noting that the petitioner submitted only two 2008 Form W-2s, one of which indicated that the beneficiary's subordinate was only on the petitioner's payroll for a limited portion of 2008, the director found that the submitted evidence suggested an overall lack of an adequate support staff to relieve the beneficiary from having to primarily perform non-qualifying tasks. The director also reviewed the list of duties and responsibilities attributed to the beneficiary's subordinate, pointing out that none of the items on the list include providing the services of a telecommunications company. In light of this observation, the director questioned who, if not the beneficiary himself, is providing the services offered by the petitioner.

On appeal, counsel asks the AAO to review the organizational chart that was provided in its response to the RFE, asserting that the chart identified an extensive staff available to perform non-executive job duties. Counsel contends that the chart included non-U.S. employees who relieve the beneficiary from having to primarily perform non-qualifying tasks. Counsel explains that the petitioner did not provide evidence of wages for any of the non-U.S. employees because such information was not specifically requested in the RFE. Counsel argues that the director should have considered both the U.S. and foreign support staff in order to determine the extent of the beneficiary's involvement in the performance of non-qualifying tasks.

Counsel in effect asks the AAO to treat the U.S. and foreign entities as a single entity based on their parent-subsidiary relationship. Contrary to counsel's reasoning, the U.S. entity must establish its own eligibility at the time of filing the petition. While the petitioner is free to employ the foreign entity's work force to assist in providing various types of services, such employment must be documented. In other words, the petitioner and its foreign parent are two separate entities. As such, if the petitioner chooses to utilize the foreign entity's human resources, the record must establish that the petitioner has paid for such services much like it would pay for any services that are provided by outside contractors whom the petitioner does not employ in-house. The mere fact that the foreign entity and the petitioner have a parent-subsidiary relationship does not mean that the foreign entity's work force is considered as being part of the petitioner's organizational hierarchy. If the AAO were to accept counsel's reasoning, any petitioner would be able to bolster a deficient organizational hierarchy merely by claiming that the employees of the foreign entity provide services to the U.S. counterpart. Such claims could never be verified, as there would be no documented transactions to corroborate the commingling of labor between the two entities.

In the present matter, the petitioner has provided no documentary evidence to establish that it paid for the services that are purportedly being rendered by individuals whom the petitioner does not directly employ. 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)). As such, counsel's mere claim that the beneficiary is relieved of having to primarily perform non-qualifying tasks by a foreign support staff is insufficient, as there is no evidence to corroborate this claim. The AAO also rejects counsel's explanation that the petitioner did not provide evidence of wages paid to the foreign workers because such documentation was not expressly requested in the RFE. The director provided sufficient information in the RFE to explain the basis for requesting the petitioner's organizational chart. The director was also clear in instructing the petitioner to provide an organizational chart that shows "all current filled positions in your company." By virtue of the fact that the foreign employees are not employees of "your company," including them as part of the petitioner's organizational hierarchy was misleading, as there is no way to establish that the foreign labor either accounts for positions filled in-house by the petitioning organization or that the foreign labor is being contracted by the petitioner to provide services.

Thus, the record as presently constituted indicates that the petitioner had only one employee—the beneficiary himself—at the time the Form I-140 was filed. The director was therefore correct in questioning the petitioner on this point and instructing the petitioner to provide evidence establishing who relieves the beneficiary from having to perform its daily operational tasks that are not within a qualifying managerial or executive capacity. The AAO notes 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)).

Accordingly, while U.S. Citizenship and Immigration Services (USCIS) generally places great emphasis on the beneficiary's description of job duties in determining whether the proposed employment is within a qualifying managerial or executive capacity, the AAO finds that merely providing a detailed job description, even one that primarily attributes qualifying tasks to the beneficiary, is meaningless if the organization that seeks to hire the beneficiary does not have the human resources to relieve the beneficiary from having to primarily perform non-qualifying operational job duties. That being said, the job description offered by the petitioner in the present matter consists primarily of vague job responsibilities and thus fails to convey a meaningful understanding of exactly what the beneficiary will be doing on a daily basis and how much of his time would be spent on qualifying tasks versus the non-qualifying ones. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). Here, the deficient job description offered by the petitioner does not specify the beneficiary's actual tasks and thus leaves the AAO without any insight as to the beneficiary's specific role within the petitioner's organization. It is noted that the actual duties themselves will 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. As discussed above, a detailed description of the job duties is a key factor in determining the beneficiary's employment capacity in his proposed position with

the U.S. entity. This information is then considered in light of the petitioner's organizational hierarchy, which is another key component in determining the petitioner's eligibility. In the present matter, the record lacks a comprehensive description of the beneficiary's day-to-day tasks and does not adequately establish the availability of support personnel who would perform the petitioner's daily operational tasks such that the beneficiary would be able to primarily focus on the performance of managerial or executive duties. Therefore, based on the evidence furnished, the AAO cannot conclude that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, the AAO notes that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Although this issue was not addressed in the director's decision, the AAO finds that the petitioner failed to provide sufficient evidence to show that it meets the initial filing requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(D).

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

As a final note, counsel makes several references to the petitioner's current 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. As such, 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. 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 petitions 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 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 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).

Regardless, 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.