

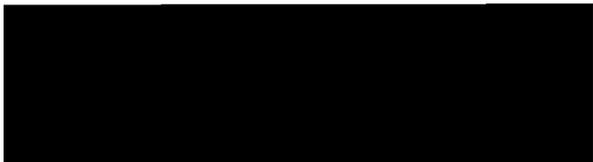
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services



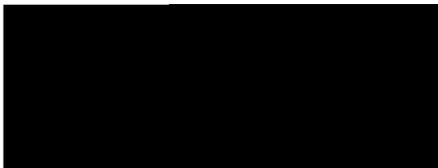
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DATE: **MAY 05 2011** OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

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 Texas corporation that provides administrative services to investment management companies. The petitioner seeks to employ the beneficiary as its administrative 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 denied the petition based on the finding 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 director's conclusions and submits a brief asserting that the petition was denied in error. In a separate appellate brief, counsel argues that the director only considered the beneficiary's employment in the role of a personnel manager but failed to consider whether the beneficiary qualifies as a function manager.

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 whether the petitioner provided sufficient evidence to establish that 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, [REDACTED] in his capacity as the petitioning entity's corporate secretary, submitted a letter dated October 31, 2007 in which he provided the following description of the beneficiary's proposed employment with the U.S. entity:

The Director of [the petitioner] manages the daily operations of the [c]ompany. She is in charge of incorporating and managing offshore companies used by clients as investment holdings and providing other professional administrative services to investment management companies and investors. She provides investment advise [sic] to the [c]ompany's clients, including a large Mexican clientele, by analyzing financial opportunities, forecasting profitability and monitoring the present investment climate. She monitors clients'

investments and make [sic] recommendations based on sound financial analysis using her expertise of the financial markets.

In addition to her investment management duties, the Director manages the [c]ompany's day-to-day operations, which will include preparing financial statements, monitoring expenses and supervising personnel. The Director has a budgetary authority of at least \$250,000. The Director functions at a senior level within the [c]ompany and exercises 100% discretion and authority of the day-to-day operations.

On April 30, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a more detailed description of the beneficiary's proposed employment. The petitioner was asked to list the beneficiary's specific job duties and to indicate the percentage of time she would devote to each of the listed tasks. The director also instructed the petitioner to discuss the beneficiary's subordinates by providing their respective job titles and educational backgrounds and by briefly describing each individual's job duties.

In response, the petitioner provided a statement, dated May 28, 2009, from counsel, who included a list of twelve duties and responsibilities accompanied by percentage breakdowns showing the beneficiary's time allocations in her proposed position with the U.S. entity. As the director included the supplemental position description in the denial, the AAO need not repeat this information at the present time. Also included in the response was a copy of the petitioner's organizational chart, which depicts a four-person entity comprised of the company president, the beneficiary and a company secretary as the president's direct subordinates, and an administrative assistant as the beneficiary's direct subordinate.

On July 7, 2009, the director issued a decision denying the petition based on the finding that the petitioner failed to establish that the beneficiary's proposed position with the U.S. entity would be primarily comprised of qualifying tasks within a managerial or executive capacity. Rather, the director determined that the primary portion of the beneficiary's time would be allocated to performing operational tasks, which, while essential to the petitioning entity, could not be deemed as qualifying under the statutory definition of managerial or executive capacity.

On appeal, counsel disputes the director's finding, referring to the decision as "an error of fact." Counsel asserts that the director erroneously focused on the requirements that apply to a personnel manager while failing to consider the beneficiary's position in the role of a function manager. In support of these assertions, counsel states that the beneficiary has professional and managerial responsibilities, which include daily management of the petitioning entity as well as management of the investments of the petitioner's investor clientele.

Counsel holds the beneficiary out as someone who will be employed in both an executive and managerial capacity. In support of the claim that the beneficiary would be employed in an executive capacity, counsel states that the beneficiary will allocate "100% of her time managing the core functions of the company on a daily basis." Counsel states that the beneficiary will establish the company's financial targets and business objectives and she will create and enact policies to meet those objectives while maintaining authority over company initiatives and exercising her discretionary decision-making authority with minimal supervision from the company's president. In essence, counsel paraphrased the statutory definition of executive capacity.

In support of the claim that the beneficiary would be employed in a managerial capacity, counsel asserts that the beneficiary will manage the investment consulting function. Counsel claims that the beneficiary "supervises the provision of investment consulting to [the petitioner]'s clients, manages the methods by which the client companies' profitability is forecast and monitors the current investment climate."

The AAO finds that counsel's arguments are not persuasive and fail to overcome the director's adverse finding. First, the AAO notes that counsel's conclusory assertions regarding the beneficiary's employment capacity and his restatements of the statutory language does not satisfy the petitioner's burden of proof. The regulatory provisions found at 8 C.F.R. § 204.5(j)(5) clearly state that a detailed description of the beneficiary's proposed job duties is key in determining whether the proposed employment will be in a qualifying managerial or executive capacity. Second, counsel places undue emphasis on the beneficiary's discretionary authority in the proposed position, ignoring published case law that emphasizes the significance of the beneficiary's actual daily job duties in determining 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). That being said, in reviewing the description of the beneficiary's proposed employment as provided by counsel in the response to the RFE, the AAO finds that the director properly concluded that the primary portion of the beneficiary's time would be allocated to performing the petitioner's daily operational tasks.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. As pointed out in the director's decision, 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). Based on the time allocations provided in the present matter, it appears that the beneficiary would primarily perform tasks that are necessary to provide investment services that the petitioner provides to its clientele. While counsel asserts that the director should have considered the beneficiary's job description in light of the beneficiary's alleged role as a function manager, he overlooks the requirement that the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. The main function in this instance appears to be the provision of investment services to the petitioner's clientele. The description of the beneficiary's proposed employment strongly indicates that the beneficiary herself would be providing those investment services in addition to other operational tasks, including managing external providers and carrying out daily administrative tasks.

Despite the beneficiary's crucial role within the petitioning entity, the AAO cannot overlook the fact that the beneficiary would allocate the primary portion of her time to dealing with clientele and directly providing the investment and consultation services offered by the petitioning entity. The record as presently constituted does not establish that at the time of filing the petitioner was ready and able to relieve the beneficiary from having to primarily perform non-qualifying operational tasks. Therefore, on the basis of this finding, the AAO cannot approve the instant petition.

Additionally, the AAO finds that the petitioner failed to meet other eligibility requirements 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 her entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the description of the beneficiary's foreign employment, which counsel provided in his response to the RFE, strongly indicates that the primary portion of the beneficiary's time was allocated to providing investment and consultation services to the foreign entity's clientele. Therefore, the AAO cannot conclude that the beneficiary was employed abroad in 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. Although the petitioner claims that it is an affiliate of the beneficiary's foreign employer by virtue of being commonly owned by the same majority shareholder, the record lacks sufficient documentation to corroborate this 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)). In the present matter, the record does not contain the complete list of stock certificates that were issued with regard to either entity. Although the record indicates that at least seven stock certificates were issued with regard to the U.S. entity, the petitioner submitted only certificate nos. 2, 5, 6, and 7 and provided no stock ledger to establish which certificates were still valid and how much total stock was issued.

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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Although the petitioner provided three stock purchase agreements, it is unclear whether these agreements represent all of the changes in ownership. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. Moreover, the stock purchase agreement that was executed on May 15, 2009 contains inconsistent information about the value of the petitioner's stock. Although the document purports to reassign ownership of 10,000 shares of stock, it indicates that the consideration for these shares was \$25,000, which is inconsistent with the petitioner's Articles of Incorporation, where the petitioner's stock was valued at ten cents per share. Issuance of 10,000 shares of stock, according to the Articles of Incorporation, should be valued at \$1,000, not \$25,000 as indicated in the stock purchase agreement.

The record is also incomplete with regard to the foreign entity's ownership. The petitioner provided stock certificate no. 3 showing that one share of the foreign entity's stock was issued to [REDACTED]

██████████ on June 19, 2001, as well as a document indicating that share certificate nos. 3 and five were canceled and that share certificate no. six was issued to ██████████. The petitioner did not provide documentation to establish what happened to share certificate nos. 1, 2, and 4, nor is there any evidence to establish that ██████████ has an ownership interest in the foreign entity or had an ownership interest in the U.S. entity as of November 13, 2007 when the Form I-140 was filed.

Third, 8 C.F.R. § 204.5(j)(3)(i)(D) states 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 the petitioner provided its tax return as well as quarterly tax documents for 2007, these documents do not establish that the petitioner had been doing business as of November 2006, or one full year prior to filing.

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 grounds of ineligibility discussed above, this petition cannot be approved.

Lastly, with regard to counsel's reference to the petitioner's current and previously approved L-1 employment of the beneficiary, the AAO finds that the prior approvals are not instructive on the issue of the petitioner's eligibility for the immigrant visa petition that was filed in the matter at hand. It is 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. 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).

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.