

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



B4

DATE: OCT 31 2011

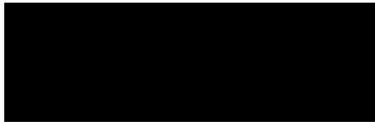
OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

The petitioner is a [REDACTED] corporation that seeks to employ the beneficiary as its vice president and chief operating 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 determined that the petitioner failed to establish eligibility for the immigration benefit sought and denied the petition. Although the director cited 8 C.F.R. § 204.5(g)(2), which requires the petitioner to establish its ability to pay the beneficiary's proffered wage, a specific discussion addressing this issue was not included in the denial. Regardless, after reviewing the record in its entirety, the AAO finds that there is no basis for concluding that the petitioner does not have the ability to pay, as the evidence shows that the beneficiary was compensated at or near the proffered wage at or around the time the Form I-140 was filed. As the petitioner's ability to pay will not serve as a basis for dismissing the instant appeal, this issue need not be addressed further.

The record also shows that the petition was denied on two grounds that the director expressly states in his decision. Namely, the director determined that (1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and that (2) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

Despite the director's findings, the AAO concludes that the record contains sufficient evidence to establish that the petitioner and the beneficiary's foreign employer have a qualifying relationship. As such, the AAO hereby withdraws the director's adverse finding with regard to this issue. The remainder of this decision will focus primarily on the beneficiary's proposed employment with the U.S. petitioner.

On appeal, counsel disputes the director's conclusions and provides a brief and supporting evidence in support of his arguments. All relevant documents and information will be addressed in the discussion below.

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 calls for an analysis of the beneficiary's proposed job duties with the U.S. entity. Specifically, the AAO will examine the record to determine whether sufficient evidence has been submitted to establish that the petitioner would employ the beneficiary 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 president of the petitioning entity, ██████████ submitted a statement dated December 20, 2008 in which he stated that the beneficiary's proposed position would involve operations management, including the purchase of transportation, and management of the company's finances, sales, documentation, compliance with the Federal Maritime Commission, filing tariffs regarding the freight forwarding operations, and managing personnel both in the United States and in the Dominican Republic. Although the petitioner also provided a copy of its May 2008 organizational chart, the record shows that the Form I-140 was filed on January 5, 2009 and thus the organizational hierarchy that was in place seven months prior to the filing of the petition is irrelevant in the present matter. It is noted that the regulations require the petitioner to establish eligibility based on facts that exist at the time the Form I-140 is filed. See 8 C.F.R. §103.2(b)(12).

As the director determined that the petitioner had not established eligibility at the time of filing, a request for evidence (RFE) was issued on June 23, 2009. The beneficiary's proposed employment with the U.S. entity was among the issues that were addressed in the RFE. Namely, the petitioner was instructed to provide an analysis of the qualifying and non-qualifying job duties the beneficiary would perform in order to determine whether the primary portion of the beneficiary's time would be allocated to tasks within a qualifying capacity. The director asked the petitioner to list the beneficiary's actual daily job duties and to specify the percentage of time that would be allocated to each task. The director explained that while the beneficiary's employment may consist of a mix of both qualifying and non-qualifying tasks, the petitioner must establish that the non-qualifying tasks will not consume the primary portion of the beneficiary's time.

In response, ██████████ submitted a statement indicating that in his proposed position with the U.S. entity, the beneficiary would assume managerial responsibility for worldwide carrier relations, including engaging in contract negotiations to establish rates and services to be provided by carrier vendors. ██████████ estimated that one third of the beneficiary's time would be spent ensuring that the carrier vendors carry out the services that are specified in their respective contracts with the petitioner; another one third of his time would be allocated to contract negotiation; and the remaining one third of the beneficiary's

time would be spent training, teaching, and coaching subordinate staff.¹ The petitioner also provided the beneficiary's official position description, including the position's salary range, full compensation package, qualification criteria, and the following list of job responsibilities:

- With subordinates, develop annual customer-based Volume and Revenue Budget and Expense Budget for [the petitioner's] operations. This includes all services, all operations and facilities and all personnel.
- With management, develop Pricing and Regulatory strategies for all services[.] Organize & manage Administrative functions of Human Resources, Government Regulations, Insurance, and Accounting of [the petitioner].
- Negotiate service contracts and rates with ocean carrier partners worldwide[.]
- Develop intermodal transport strategies[.]
- Negotiate Agency contracts worldwide[.]
- Maintain overall responsibility for all expense management.
- Execute leases and manage all facilities.
- Supervise Pricing levels for all Sales efforts.
- Set sales budget and strategies for U.S. Sales[.]
- Assist the President with all functions as required[.]
- Manage community affairs coordination in all major markets served[.]
- Other duties as assigned by management.

The petitioner also provided a copy of its 2009 organizational chart, which depicts the beneficiary at the top of the hierarchy, subordinate only to the company's president, [REDACTED]. The chart indicates that the beneficiary's subordinates in the United States include a general manager, a vice president of sales, and LCL & Airfreight manager, the latter of which is shown as an open position. The sales vice president is shown with an inside sales position as his subordinate and the general manager is shown as overseeing four employees who fill accounting, credit and collections, intermodal, and documentation positions.

¹ Although [REDACTED] indicated that the beneficiary would continue to assume a leadership role with his foreign employer, the primary concern that will be addressed in the current proceeding pertains to the beneficiary's proposed employment with the U.S. entity. As the beneficiary's continued responsibility to the foreign entity is technically not part of his proposed employment with the U.S. entity, any job duties the beneficiary will continue to perform for the foreign entity need not be addressed in this decision.

On October 13, 2009, the director issued a decision denying the petition based, in part, on the conclusion that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Although the director properly stressed that the beneficiary must allocate the primary portion of his time to qualifying managerial or executive tasks in order to merit the sought after immigrant visa classification, he devoted a considerable part of his analysis to the petitioner's staffing, determining that the petitioner lacked an adequate support staff and would thus result in the beneficiary having to spend the majority of his time acting as a first-line supervisor and generally performing the petitioner's daily operational tasks.

While the decision to deny the petition will be affirmed, the AAO finds that the director placed undue emphasis on the petitioner's staffing and failed to address the beneficiary's proposed job description, which is a primary concern when examining the executive or managerial capacity of the beneficiary. *See* 8 C.F.R. § 204.5(j)(5). Specific information about the beneficiary's job duties is crucial in order to properly consider the petitioner's organizational hierarchy and its overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the instant matter, the director omitted a key portion of the analysis by focusing on the petitioner's staffing without first giving due consideration to the beneficiary's proposed job description.

Contrary to the director's finding, the petitioner's organizational chart does not outwardly convey the understanding that the beneficiary will primarily perform non-qualifying tasks. Rather, the chart shows the beneficiary in a top-level leadership position with two managers in the United States as his direct subordinates. The chart further indicates that the non-managerial and non-professional employees would be supervised by the beneficiary's subordinates, not by the beneficiary himself. A thorough reading of the beneficiary's proposed job description, however, leaves several key questions unanswered and allows for the possibility that the beneficiary may allocate a considerable portion of his time to performing non-qualifying job duties. For example, while the petitioner indicated that the beneficiary would be responsible for developing the petitioner's revenue and expense budgets for services, operations, facilities, and personnel, the beneficiary's specific role in these budget activities was not explained and the specific allotment of time was not provided. As the job description indicates that the beneficiary would work with his subordinates to create the revenue and expense budgets, clarifying information is needed in order to distinguish the beneficiary's role and job duties from those of his subordinates in terms of their respective contributions to creating the petitioner's budgets. The petitioner similarly failed to clarify the beneficiary's specific role in developing pricing and regulatory strategy, thus precluding the AAO from being able to determine whether the beneficiary's duties regarding pricing and regulatory strategy are of a qualifying nature.

Other items listed as part of the beneficiary's job description indicate that the beneficiary would perform various non-qualifying tasks. Specifically, the petitioner has not established that negotiating contracts with ocean carrier partners, negotiating agency contracts, and executing leases are job duties within a managerial or executive capacity. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his proposed position. 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).

The job description offered fails to specify any time allocations that pertain to the beneficiary's functions. The petitioner's failure to provide the requested time allocations and relevant information that specifically identifies the beneficiary's job duties with sufficient clarity precludes the AAO from being able to affirmatively determine that the beneficiary's proposed employment would primarily involve the performance of managerial- or executive-level tasks.

On appeal, counsel asserts that the beneficiary's role as the petitioner's chief operating officer is, "by any reasonable person's measure," a position within an executive capacity. Counsel points to the petitioner's previously approved L-1 employment of the beneficiary, asserting that the approved nonimmigrant petition is proof that the petitioner meets the statutory definition of managerial or executive capacity. The AAO finds that counsel's argument is unpersuasive.

Contrary to the underlying inference of counsel's argument, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof and must stand on its own individual merits. U.S. Citizenship and Immigration Services (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 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). Similarly, 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).

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).

As discussed above, the job description that the petitioner offered in response to the RFE does not contain specific information about the beneficiary's actual day-to-day job duties, which are crucial in order to determine the nature of the beneficiary's proposed 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). As the petitioner failed to provide sufficient evidence to establish that the beneficiary's proposed position meets the statutory criteria, the AAO is unable to affirmatively conclude that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity. On the basis of this conclusion, the instant petition cannot be approved.

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.