



U.S. Citizenship
and Immigration
Services

[REDACTED]

B4

DATE: DEC 04 2012

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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 Florida company engaged in "import/export and restaurant services," and it seeks to employ the beneficiary as its General Manager. 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 on June 25, 2011, concluding that the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging 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 issue in this matter is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

In the director's request for evidence, the director requested additional evidence to establish that the beneficiary's foreign employer and the petitioner have a qualifying relationship. In response, the petitioner submitted stock certificates, a stock ledger, articles of incorporation and Form 1120, U.S. Corporation Income Tax Return. According to the stock certificates and stock ledger, the foreign company owns 14 shares of the petitioner which is equivalent to 70% ownership of the U.S. petitioner. Counsel contends that since the foreign company holds 70% of the shares for the petitioner, the foreign company is the majority owner and has control of the petitioner.

However, in reviewing the Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations, for the time period beginning on September 4, 2009 and ending on September 4, 2010, the document stated that the foreign company owns 51% stock of the petitioner. Thus, it is not clear why the stock certificates and stock ledger of the petitioner indicate that the foreign company owns 70% but the petitioner's tax return indicated that the foreign company owns 51% of the petitioner's stocks. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, the director noted in the denial decision the inconsistent information regarding the foreign company's ownership of the petitioner but counsel failed to adequately address this issue on appeal. Counsel failed to submit any additional evidence to establish the qualifying relationship and overcome the director's concern regarding the inconsistency in the record regarding the percentage of ownership of the petitioner by the foreign entity. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to submit 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 examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). That being

said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

An analysis of the record does not lead to an affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

With regard to the proffered position offered to the beneficiary, the petitioner provided a vague and general job description. The petitioner stated that the beneficiary "heads the two major divisions within the company; the first, which is an import and export of TV and radio equipment, and the second, which is a restaurant." The job description provided vague and general duties such as the beneficiary will be responsible for "formulating policies, managing daily operations, and planning the use of materials and human resources"; "oversee activities directly related to providing services and commercializing the merchandise"; "supervises the Marketing & Sales Manager of the company by establishing the parameter and the objectives through the development, design, and management of marketing plans"; "helps on the analysis of all aspects to determine the most cost-effective and efficient means of handling all goods or supplies"; and "redirect and apply new standard policies." It is unclear which specific tasks actually fall within these broad categories and whether the supervisory tasks the beneficiary will perform are of a qualifying nature. The petitioner failed to establish what specific tasks the beneficiary would perform in supervising business affairs or what policy decisions the beneficiary would make. In addition, developing marketing strategy and sales parameters are both operational duties that cannot be classified as managerial or executive tasks. 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. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. 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). The petitioner's vague and general description of the beneficiary's position does not identify the actual duties performed, such that they could be classified as managerial or executive in nature.

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive.

Neither the job description counsel has provided nor the organizational structure of the petitioner establishes that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The petitioner provided a list of employees which included the beneficiary, an Administrative Manager, a Marketing and Sales Manager, an Administrative Assistant, two Sales Agents, an Operation Manager, an Executive Chef, and two Restaurant Services Workers for a total of 10 employees. The petitioner also explained that it outsourced a legal advisor and an accountant advisor. The petitioner did not provide any evidence to establish that all of these employees and contractors are actually employed by the petitioner. The petitioner did not provide Form 941, Employer's Quarterly Wage Reports, or Forms W-2 and 1099, or paystubs. The only evidence provided by the petitioner was Form 1120, U.S. Corporation Income Tax Return, for 2009 that indicated the petitioner spent \$83,515.00 in salaries and wages. It is unclear how the petitioner paid the beneficiary's salary of \$48,000.00 and the salary of an additional 9 employees, including three managers if the total spent on salaries was \$83,515.00. The petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the import and export business operations and running a restaurant.

Without sufficient evidence of the petitioner's employees, it is not clear if the beneficiary will have to perform the tasks necessary to provide services rather than supervise employees that will perform the day-to-day tasks. While the AAO acknowledges that the beneficiary is not required to allocate 100% of 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 her 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 petitioner has failed to establish that the beneficiary would be employed in a qualifying capacity.

On appeal, counsel contends that it was relevant information to consider that the beneficiary was previously granted L-1 nonimmigrant status. The AAO notes that, regardless of the fact that the petitioner had an L-1 petition approved on behalf of the same beneficiary, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof and 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 this petition. 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 petition was 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).

Beyond the decision of the director, the record lacks substantive job descriptions establishing what job duties the beneficiary performed during her employment abroad. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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.). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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). Based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

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.