U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 01 129 55541 Office: CALIFORNIA SERVICE CENTER Date: FEB 25 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a limited liability company organized in California in October of 1998. It claims to be engaged in international trade and travel services. It seeks to employ the beneficiary as its manager. Accordingly, the petitioner seeks 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 had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the Service erred in its decision.

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):
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> * * *
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> (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.

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 that 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 proceeding is whether the beneficiary will be performing managerial or executive duties for the United States

enterprise.

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-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Instead a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The petitioner initially provided the following information regarding the beneficiary's job responsibilities:

> [The beneficiary] is responsible for a number of important functions which include but are not necessarily limited to: directing and coordinating the business to obtain optimum efficiency and economy of operations, maximization of profits, serving as the main connection with the London office, payroll and hiring and training personnel. He is also responsible for the implementation of corporate goals and polices as well as supervising the operations of the U.S. entity as a whole.

The petitioner also provided a Form ETA 750, Application for Alien Employment Certification that described the job to be performed by the beneficiary as follows:

> Direct and manage operations of company. Direct and coordinate the business to obtain optimum efficiency and economy of operations and maximize profits. Serve as main connection with overseas office and report back by preparing financial status reports and status performance reports. Plan strategies, review market analysis and determine customer needs. Establish and implement corporate goals and policies. Select, hire, train and supervise staff and assign specific job dutites [sic]. Establish work schedules and maintain priorities of work to be performed.

The director requested that the petitioner submit a more detailed description of the beneficiary's duties in the United States including a specific day-to-day description of duties performed in the last six months. The director requested that the petitioner provide its organizational chart describing its managerial hierarchy and staffing levels. The director further requested a list of all employees under the beneficiary's supervision, a brief description of job duties for these employees, and their salaries.

In response counsel for the petitioner repeated the description initially provided for the beneficiary's job duties and added the following:

> So in addition to devising the care operational structure, he has been responsible for its implementation as well. He is not primarily involved in day to day [sic] operations but rather insuring that the company is situated to take advantage of market conditions in a very competitive market.

The petitioner also provided its organizational chart depicting the beneficiary as involved in "management, and internet, web" and two individuals involved in sales and one individual handling accounts. The petitioner also provided payroll summaries for periods in the years 1999 and 2000. The latest payroll summary covered the time period of July 16, 2000, through July 30, 2000. This payroll summary reflected only two employees, the beneficiary and an individual identified on the organizational chart as a salesman. The petitioner elected not to provide independent evidence of employees at the time the petition was filed in March of 2001.

The director stated that in addition to reviewing the description of the beneficiary's job duties, the director would also consider the petitioner's type of business and its organizational structure. The director determined from the petitioner's type of business and the petitioner's description of the beneficiary's job duties that it was unreasonable to believe that the beneficiary would not be involved in day-to-day non-supervisory duties. The director also determined that a portion of the petitioner's description of the beneficiary's job duties was indicative of a first-line supervisor and not of an executive or manager. The director concluded that the petitioner had not provided sufficient evidence to demonstrate that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel asserts that the Service's consideration of the petitioner's type of business has no substance in law. Counsel also appears to assert that consideration of the type of positions under the supervision of the beneficiary and whether the positions are professional positions is arbitrary. Counsel further asserts that the Service shall take into account the reasonable needs of the organization in light of its overall purpose and stage of development and that the number of employees supervised is not determinative. Counsel finally asserts that the Service has conceded that the beneficiary is acting in a managerial or executive capacity because of its approval of the L-1A petition without indication that the previous approval was issued in error.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has submitted several versions of the same vague statement to describe the beneficiary's job duties. The position description states that the beneficiary will "[d]irect and manage operations of the company," and

"[[e]stablish and implement corporate goals and policies," and "[s]elect, hire, train and supervise staff." These statements merely paraphrase portions of the statutory definition of executive and managerial capacity without conveying an understanding of the beneficiary's daily activities. *See* section 101(a)(44)(B)(i) and (ii); section 101(a)(44)(A)(i) and (iii) of the Act. Re-stating portions of the statutory definitions does not clearly describe the duties to be performed by the alien. The petitioner's broad position description also vaguely refers, in part, to duties, such as "[d]irect and coordinate the business to obtain optimum efficiency and economy of operations and maximize profits," and "[p]lan strategies, review market analysis and determine customer needs." It is not possible to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. The remaining part of the description that refers to duties such as "[s]erve as main connection with overseas office and report back by preparing financial status reports and status performance reports," and "assign specific job dutites [sic]," and "[e]stablish work schedules and maintain priorities of work to be performed," are indicative of an individual providing basic operational services for the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner did not provide a clear statement of the beneficiary's daily activities for the record despite the request by the director to do so. The remaining documentation in the record is insufficient to demonstrate that the beneficiary is employed in an executive or managerial position. The petitioner has provided its organizational chart but has not provided an adequate description of the beneficiary's subordinate's job duties. The petitioner also has not provided independent evidence of the employment of a staff. The petitioner's latest payroll records cover a time period up to and including July of 2000. The Service has no independent documentation of the petitioner's employees at the time the petition was filed in March of 2001. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Contrary to counsel's assertion that the consideration of the petitioner's type of business has no basis in law, the Service is required to consider the reasonable needs of the business if staffing levels are used as a factor in determining the executive or managerial capacity of the beneficiary's position.[1] Counsel

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[1] Although it appears the director focussed on the type of the petitioner's claimed staff rather than solely on the number of

even makes note of this requirement. To consider the reasonable needs of a business, it is necessary to consider the type of business and furthermore to consider its stage of development. The petitioner was a two and a half year old trade and travel services business at the time the petition was filed. The petitioner did not provide independent documentation of its number of employees and whether the employees were employed on a full or part-time basis. The petitioner's organizational chart shows four employees: two salespeople, a person handling accounts, and the beneficiary. The petitioner did not provide descriptions of the employee's job duties except for the beneficiary. The petitioner's description of the beneficiary's duties is vague except for portions relating to the supervision of an alleged staff. It is not possible to determine from this limited and unsubstantiated information that the petitioner's employees could serve the reasonable needs of the petitioner without the beneficiary contributing to the performance of a majority of the operational tasks of the company. It is not possible to determine from the record that the reasonable needs of a trade and travel services company could plausibly be met by the services of the staff on hand at the time the petition was filed.

Although the record is deficient in substantiating the number of the petitioner's employees subordinate to the beneficiary and the actual job duties of these employees, we will address counsel's concern that consideration of the professional nature of job positions is arbitrary. One of the four elements pertinent to a determination of "managerial capacity" requires that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees.[2] The petitioner's organizational chart does not depict that the petitioner's claimed employees are supervisory or managerial employees. The Service must then consider the nature of the alleged employee's positions supervised by the beneficiary and whether the positions are professional positions. The petitioner has not provided any evidence that the positions subordinate to the beneficiary are professional positions. The petitioner bears the burden of proof in these proceedings. The Service declines to ascribe a professional connotation to positions bearing the title of salesperson and accounts clerk.

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staff, the director did conclude that the petitioner did not require an executive or manager. This conclusion appears based on a determination that the petitioner did not have sufficient staff to relieve the beneficiary from performing non-qualifying duties.

[2] This element also allows for the management of an essential function of the organization. However, the petitioner has not asserted that the beneficiary's primary duties relate to the management of an essential function and, therefore, will not be discussed here.

The Service cannot conclude that the beneficiary manages the organization, supervises and controls the work of other supervisory, professional, or managerial employees, has the authority to hire and fire or recommend these and other personnel actions, and also exercises discretion over the day-to-day operations over which the employee has authority. Likewise, the Service cannot conclude that the beneficiary directs the management of the organization in that a majority of the beneficiary's duties relate to operational or policy management and not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. The record simply does not support such a conclusion.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been or will be employed in either a primarily managerial or executive capacity.

Counsel's reliance on previously approved L-1A petitions for this beneficiary is not persuasive. The director's decision does not indicate whether he reviewed the prior approvals of the other non-immigrant petitions and the record of proceeding does not contain copies of all the documentary evidence in support of the L-1A visa petitions previously approved. However, if the previous non-immigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the Service. The Service 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 the Service 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). Furthermore, the AAO is not bound to follow the rulings of service centers that are contradictory. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. Mar. 15, 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has not established that the beneficiary has been

or will be employed in a managerial or executive position for the United States enterprise.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the beneficiary's overseas employer. The petitioner has provided inconsistent information regarding its ownership and control. The petitioner indicated in its letter in support of the petition that the beneficiary's previous employer was Orland Europe Ltd. The petitioner provided its limited liability agreement signed by the beneficiary as manager. The petitioner also provided a certificate of interest issued to Orland Europe, Ltd., for a 100 percent interest in December of 1998. The petitioner's notice of transaction filed with the California Secretary of State indicated that no consideration had been paid for the 10 percent certificate of interest transaction made in December of 1998. The petitioner also included in the record information relating to another company identified as Reddy Siddiqui & Co. A letter signed by someone on behalf of Orland Europe Limited indicated that its interest in the petitioner would be transferred to Reddy Siddiqui Management Services. The letter is dated March 31, 2000. The record, thus, contains confusing documentation regarding the petitioner's ownership and control. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). There is insufficient evidence in the record to establish a qualifying relationship with the beneficiary's claimed overseas employer.

In addition, the petitioner has not established that the beneficiary was performing managerial or executive duties in his position with the claimed overseas entity. On this issue, the description of the beneficiary's duties for the foreign entity and the foreign entity's organizational chart do not sufficiently demonstrate that the beneficiary's duties for the foreign entity were managerial or executive n nature.

For these additional reasons, the petition may not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.