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: [redacted] Office: VERMONT 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)

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:

SELF- REPRESENTED

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 approved by the Director, Vermont Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New Jersey corporation that claims to be engaged in the import and export business. It seeks to employ the beneficiary as its president. Accordingly, it 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 initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the United States company and revoked the approval of the petition. The petitioner filed an untimely appeal of the revocation decision. The AAO remanded the arguments submitted in the untimely appeal to the director for consideration as a motion. The director reviewed the record and found that the information submitted on motion did not overcome the Service's previous decision.

On appeal, the petitioner asserts that the Service's decision is contrary to the order of the Office of Administrative Appeals direction. The petitioner also asserts that the decision is contrary to the "precedent" decision set by approving the petitioner's vice-president's employment-based petition. The petitioner finally asserts that the Service decision is unfair and based on assertions that are false and without basis.

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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> * * *
>
> (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 petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

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
>
> 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.

The petitioner initially provided a list of the beneficiary's duties including the following:

- performing essential executive functions of president of the company in all aspects of business decision making, policy making and personnel management;
- establishing the company management structure, office rules, operation guidelines, and communication protocol between offices abroad and within the U.S.;
- formulating immediate goals for expansion and long term business policies in accordance with the parent company's direction;
- ensuring our company's compliance with regulations, guidelines, business direction and profit goals established and mandated by the parent company;
- directing the preparation of financial plans and annual budget reports for the parent company's review;
- guiding the company through the web of American, Chinese and other international laws and regulations concerning the import and export of goods;
- researching and familiarizing himself with the American and Chinese markets as well as the relationship between the two markets;
- amending and/or modifying company's directions in response to the changing markets;
- meeting and/or discussing with parent company to form cooperative effort in response to the changing market;
- personally hosting or delegating the responsibility of hosting potential and/or current clients and customers of the company;
- personally hosting and entertaining officers of the parent company in New York;

- creating new company directives in an effort to expand business;
- exercising wide latitude in discretionary decision-making power and receiving only general direction from parent company;
- exercising personnel management authority concerning hiring, discharging, promoting and transferring of subordinates; and
- committing 90% of his time to performing executive duties.

The petitioner also provided its organizational chart depicting the beneficiary as president. The chart also showed a textile machinery department, a garment department, a department manager, a commissioned sales representative, and a secretary.

As noted above, the director initially approved the petition. However, on subsequent review, the director issued a notice of intent to revoke based on the petitioner's failure to establish that the beneficiary's position was an executive or managerial position. In the notice of intent to revoke the director requested the petitioner submit a comprehensive description of the beneficiary's duties and a complete position description for all of the petitioner's employees. The director also requested a breakdown of the number of hours devoted to all the employee's specific job duties. The director further requested a copy of the petitioner's Internal Revenue Service (IRS) Form 941 for the first three quarters of 1998.

In rebuttal to the notice of intent to revoke the petitioner provided the following description of the beneficiary's purported job duties totaling a thirty-five hour workweek:

> 8 hours - holding meetings with departments [sic] managers in the company; discussing the progress of each department's business activities; reviewing reports prepared by department managers; making suggestions to improve the efficiency of each department's operations.
> 10 hours - formulating the company's policies in long-term expansion, business scopes and investment projects, etc.
> 1 hours [sic] - exercising personnel management authority, including hiring, discharging and assigning workload for employees.
> 12 hours - directing and supervising the daily operational [sic] of the two departments of the company, including reviewing, approving and signing off of each department's business plans, proposals, business reports, budget reports, personnel evaluation reports and other internal and external documents.
> 4 hours - flexible hours reserved for emergency calls,

such as attending the company's special meetings, attendance of customers, holding of interviews with employees of the company, etc.

The petitioner also stated that it did not employ any contract workers in 1997 or 1998. The petitioner also provided a revised organizational chart that reflected the beneficiary's position as president, and also included a vice-president, a textile machinery department manager, a garment department manager, and two supporting staff. The petitioner further provided a second breakdown of the beneficiary's job duties on the organizational chart. This breakdown of job duties re-stated the initial job description and noted the hours spent on each of the particular duties totaling a forty-hour workweek.

The petitioner also provided its IRS 941 Forms for the first three quarters of 1998 each showing a total of three employees for each quarter.

The director determined that the petitioner's description of the duties of its staff was insufficient to establish that the beneficiary's position had been and would be primarily managerial or executive in nature. The director concluded that the petitioner had not demonstrated that the beneficiary would be employed in a managerial or executive capacity or that the petitioner could currently support such a position.

On motion,[1] the petitioner stated that the Service revocation was "un-prudent, un-consistent, & un-reasonable." The petitioner disputed the Service's conclusion that it could not support a manager or executive. The petitioner noted that the Service had "approved & granted our co. 10 L-1 & several I-140 petitions during the last ten years."

The director noted the statement submitted by the petitioner and also noted that no other documentary evidence was submitted. The director determined that after a complete review of the record, including the statement submitted on motion, that the grounds for revocation had not been overcome. The director also noted that another organization had filed an L-1 petition on behalf of the beneficiary and questioned whether the beneficiary intended to accept the petitioner's offer of employment.

On appeal, the petitioner asserts that the Service decision is biased and arbitrary and is contrary to the decision of the Office of Administrative Appeals. The petitioner also asserts that the Service established a precedent by approving the petitioner's I-140 petition for its vice-president and that since the organization is still the same size, the Service must now approve

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[1] The initial appeal was filed untimely and the Associate Commissioner remanded the petition to the director as a motion to reopen and reconsider.

this petition for its president. The petitioner further asserts that its business has been viable for ten years and the Service's decision is biased. The petitioner states that the company that filed an L-1 petition for the beneficiary is its sister company and that the sister company is attempting to obtain L-1 status for the beneficiary so that the beneficiary may file for other executives to come to the United States. The petitioner finally requests approval of the petition.

It is noted that the petitioner never effectively clarified whether the beneficiary is claiming 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. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's assertion that the director disregarded the Office of Administrative Appeal's directive on remand is in error. The Administrative Appeal's office simply remanded the untimely appeal and the record to the director for the director's review and decision. The petitioner's appeal of the director's decision dated August 28, 2001 and the record are now properly before the Associate Commissioner.

The petitioner's assertion that the approval of other I-140 employment-based visas for other individuals in the employ of the petitioner requires the approval of this petition is also in error. The director's decision does not indicate whether he reviewed the prior approval of the vice-president's immigrant petition referred to by the petitioner. However, if the immigrant petition for the vice-president was approved based on the same unsupported and contradictory 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 compound past errors 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). 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's assertion that the director's decision is biased is unfounded. The record contains no information that supports

the petitioner's assertion in this regard. Although the petitioner may be frustrated that the close review of the record has resulted in the revocation of the approval of the petition, the director's decision is well reasoned and based on the facts and lack of facts in the record.

Although the petitioner did not specifically assert on appeal that the beneficiary was employed in a managerial or executive position, we will examine the issue. 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). In the initial petition, the petitioner provided a general description of the proposed duties of the beneficiary referring vaguely to duties such as establishing the management structure, formulating goals of the company, and modifying the company's direction. It is not possible to determine from the general description provided whether the beneficiary is performing managerial or executive duties with respect to these various activities or whether the beneficiary is actually performing the activities. The petitioner also indicated that the beneficiary would be ensuring and guiding the company's compliance with various laws and regulations. Although, this duty may have complex attributes, the petitioner has failed to show how performing this basic function for the petitioner is an executive or managerial duty.

In response to the notice of intent to revoke, the petitioner provided two inconsistent statements outlining the beneficiary's purported duties for the petitioner. Each statement depicted the number of hours the beneficiary spent on these purported duties. It is not clear how the beneficiary managed to perform all the duties outlined in the number of hours noted in the statements. 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). Furthermore, both statements are made up of generalities that do not actually convey an understanding of what the beneficiary is doing on a daily basis.

Upon review of the record, it is noted that the petitioner did not provide supporting evidence that it employed individuals other than the beneficiary and two others at the time the petition was filed. The petitioner's IRS Form 941s for the first three quarters of 1998 show the petitioner only employed three individuals, including the beneficiary. The IRS Form 941s also include the name of the vice-president, who has now left the company for her own personal reasons according to the petitioner. The third name on the IRS Form 941s does not match any of the names provided on the petitioner's organizational chart submitted in response to the notice of intent to revoke. A petitioner must establish eligibility at the time filing; a petition cannot be

approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45,49 (Comm. 1971). At the time the petition was filed the petitioner had provided evidence only of a president, a vice-president and a third employee in an unknown position. The petitioner confirmed that it did not need to use independent contractors. Although the petitioner may have employed additional personnel at a later date, the record does not support a finding that the petitioner employed sufficient staff who could relieve the beneficiary from performing the day-to-day operational duties of the petitioner at the time the petition was filed. The petitioner has not demonstrated that the beneficiary has been or will be employed in a managerial or executive capacity.

It appears that the director did base his decision partially on the size of the petitioner and the number of staff and failed to completely take into account the reasonable needs of the company in light of the overall purpose and stage of development of the company. At the time of filing, the petitioner was an eight-year-old trading company that claimed to have a gross annual income of $2,481,921. The firm employed the beneficiary as president, a vice-president, and a third individual in an unknown capacity. The petitioner did not submit evidence that it employed sufficient subordinate staff that would perform the actual day-to-day, non-managerial operations of the company. Based on the record, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Regardless, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily executive or managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are general and fail to consistently describe his actual day-to-day duties. The record does not adequately demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. 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 employed in either a primarily managerial or executive capacity.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.