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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

JUL 0 2 2003

File: EAC 02 176 50583 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
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:
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 Bureau of Citizenship and Immigration Services (Bureau) 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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner states it is a corporation organized in the State of New York in 1973. It is engaged in the import and export of glass, chinaware, lead crystal, and tableware. It seeks to employ the beneficiary as its president. 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, based on the evidence in the record, the beneficiary had not been and would not be primarily employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision was arbitrary, capricious, and an abuse of discretion.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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

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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

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.

The petitioner initially stated that the beneficiary as its president would "maintain overall responsibility for the direction and execution of all aspects of [the petitioner's] operations in the U.S." The petitioner indicated that the beneficiary would "identify and facilitate new business opportunities in the U.S., . . . review feasibility and market studies of competitive factors, evaluate the national and global business environments . . . [,] analyze market trends and predictions . . . [, and] prepare [the petitioner's] budget."

The director, in a letter requesting additional evidence, indicated that the evidence submitted did not establish that the beneficiary would be engaged primarily in managerial or executive duties. The director noted that the beneficiary appeared to be a "one-person United States sales office." The director requested that the petitioner, bearing these comments in mind, submit additional evidence to establish that the beneficiary would be engaged primarily in managerial or executive duties. The director specifically requested a "concrete" description of a typical workweek for the beneficiary.

In response, the petitioner stated that the beneficiary's position as president was an essential function of the company's business. The petitioner stated further that the beneficiary's direction and management of the essential function required the beneficiary to "initiate, plan, and coordinate the key activities necessary to achieve and further the petitioner's commercial success" ultimately through the control and supervision of services provided by outside professionals. The petitioner indicated that the beneficiary would oversee the preparation of reports and provision of services from an accounting professional, five economic professionals, and six public relations professionals.

The petitioner also provided the following description of the beneficiary's typical workweek:

> Identifying and facilitating new business opportunities in the U.S. This may involve attending and participating in trade shows, developing sales leads, contacting prospective buyers and participating in meetings with the Polish Commercial Office in the U.S.;
>
> Developing sales and marketing campaigns. This involves analyzing market trends and predictions provided by outside professionals, performing market research, determining the target market and territory, and

arranging for the preparation and dissemination of promotional materials;

Negotiating sales contracts with prospective U.S. buyers;

Conferring with [the parent company's] senior management on sales results, financial status, group policy, and administrative procedures;

Reviewing feasibility and market studies of competitive factors generated by outside professionals in order to determine potential sales and to forecast future marketing trends;

Compiling sales data for the preparation of [the petitioner's] budget;

Formulating and establishing corporate policy, ensuring conformity with the [parent company's] overall policies and objectives;

Formulating financial programs to provide funding for [the petitioner's] operations. This involves developing pricing strategies, securing corporate loans, and managing the business' investment; and

Consulting with [the petitioner's] accountants regarding working capital, financial stability, and risk.

Although not noted in the description of the beneficiary's typical workweek, the petitioner also stated that the beneficiary would hire and train sales representatives and set sales goals and quotas.

The director determined that, although the beneficiary had some managerial or executive duties, it appeared the beneficiary's primary duties would be the non-managerial and non-executive duty of making sales to buyers. The director concluded that the petitioner had not established that the beneficiary would be primarily employed in either a managerial or an executive capacity.

On appeal, counsel asserts that the director did not accord sufficient weight to evidence of the beneficiary's duties and failed to consider that the beneficiary was serving in a managerial capacity with respect to an essential function. Counsel also asserts the director failed to address the previous approval of the petitioner's intracompany transferee L-1A petition on behalf of the beneficiary. Counsel further asserts that the director abused his discretion by failing to distinguish the facts of this case from those pertaining to the *Matter of Irish Dairy Board, Inc.* 28-845-421 (AAU Nov. 16, 1989). Counsel finally asserts that the director abused his discretion by failing to provide an adequately detailed

statement supporting his denial or the basis for discounting the evidence provided by the petitioner.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. *See* 8 C.F.R. 204.5(j)(5). Upon review of the petitioner's description of the beneficiary's it is not possible to determine whether the beneficiary will primarily be engaged in performing executive or managerial duties relating to the tasks described or will be actually performing the duties described. 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).

For example, in reviewing the petitioner's description of the beneficiary's typical workweek, the petitioner states that the beneficiary may be involved in attending and participating in trade shows, developing sales leads, and contacting buyers. These tasks are indicative of an individual involved in selling the petitioner's product. The petitioner states that the beneficiary will develop sales and marketing campaigns, an activity indicative of an individual directly performing the marketing duties of the petitioner. The petitioner states that the beneficiary will negotiate sales contracts, a task that appears to be performing the fundamental operational transactions of the petitioner. The petitioner states that the beneficiary will compile sales data in order to prepare the budget, a basic administrative task.

The petitioner describes other activities performed by the beneficiary, such as conferring with the parent company's senior management, reviewing feasibility and market studies, and consulting with accountants. The record does not indicate that the beneficiary's time is primarily occupied by these tasks. The petitioner's statement that the beneficiary will formulate corporate policy and financial programs is not sufficiently detailed to convey an understanding of the beneficiary's daily duties regarding these tasks.

Although counsel contends that these duties taken together comprise management of all aspects of the petitioner's operations, an essential function of the organization's business, the petitioner has not provided documentary evidence that the beneficiary utilizes other personnel to actually accomplish the various fundamental tasks of operating the business. The failure of documentation is important because the descriptions of the beneficiary's tasks do not contain duties that are traditionally only managerial or executive duties. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner

must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Even though the petitioner stated in the response to the request for evidence that the petitioner utilized professional employees to perform various economic, public relations, and accounting tasks, the record does not contain verifiable evidence of the ongoing employment of individuals either as independent contractors or salaried employees. The assertions of the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does contain a financial statement prepared by an accounting firm, but the preparation of a financial statement is not sufficient to establish the continuing use of independent contractors who relieve the beneficiary from primarily performing the economic, budgetary, and public relations duties described by the petitioner.

The director's conclusion that the beneficiary primarily performed non-managerial and non-executive functions implicitly includes a finding that the beneficiary primarily performed the essential functions of the petitioner rather than managing those functions. The director's recitation of the petitioner's description of the beneficiary's duties and conclusion that this evidence did not establish the beneficiary's managerial or executive capacity delineates the primary deficiency of the record. The petitioner's evidence of the beneficiary's claimed managerial and executive capacity consisted only of the petitioner's description of the beneficiary's duties. Although the description of the beneficiary's duties is given substantial weight, the description must be reviewed in light of the remainder of the record. In this case, the description is not supported by documentary evidence. The record does not establish that the beneficiary's assignment for the petitioner is in a primarily executive or managerial capacity.

Counsel's reliance on unpublished decisions is without merit. Unpublished decisions are not binding on the Bureau's administration of the Act. *See* 8 C.F.R. § 103.3(c). Counsel's reliance on a previous approval of the petitioner's intracompany transferee L-1A petition and contention that a failure to address the prior approval is an abuse of discretion is also not persuasive.

The director's decision does not indicate whether he reviewed the prior approvals of other nonimmigrant petitions. The record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. If the previous nonimmigrant 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 Bureau. The Bureau is not required to approve applications or petitions where eligibility has not been

demonstrated, merely because of prior approvals which 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 Bureau 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). Moreover, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the courts of appeals, service center decisions do not control the AAO. 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. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.