PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

B4

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

JUN 19 2003

File: EAC 02 049 50673 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 claims to be a limited liability company organized in the State of Maryland in October 2000. It initially claimed to be engaged in the trading business. It seeks to employ the beneficiary as its 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 had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the beneficiary clearly qualifies as a manager and executive under the statutory definitions of managerial and executive capacity.

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 described the beneficiary's job duties as follows:

> His job is to search the market of [sic] various Pakistani products. In addition he is responsible to for [sic] planning investments in [the] service sector and strategies of the trading department of the company. He administers management of different departments of the company and ensures that they are managed properly. His goal is to establish the company in its intended businesses.

The director requested additional evidence, stating that the evidence in the record did not establish that the beneficiary's position would be an assignment in a primarily managerial or executive capacity for the United States entity. The director specifically requested the names, job titles, and descriptions of the educational credentials of the petitioner's employees, the petitioner's two most recently filed quarterly federal income tax returns, copies of the petitioner's 2001 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, and a copy of the petitioner's office lease.

In response, the petitioner provided a list of the petitioner's "managers," including a chief executive officer, the beneficiary's position of chief operating officer, a "supervisor-gas station/resident agent," a "supervisor-trading house," and an individual who held an untitled job position. The petitioner also provided copies of diplomas for individuals holding two of these positions. The petitioner also provided two sets of IRS Forms 941, Employer's Quarterly Federal Tax Return for the year 2001. The first set of IRS Forms 941 identified the filer as the petitioner with the further description of "Riverdale Amoco." The second set of IRS Forms 941 identified the filer as "Lanham Amoco Service, Inc." The petitioner also provided two sets of IRS Forms W-2, one set identifying the employer as the petitioner doing business as the "Riverdale Amoco" and the second set identifying the employer as "Lanham Amoco Service, Inc." The petitioner also indicated, through its counsel, that the "petitioner's place of business is in one of the gas stations owned by the petitioner." The petitioner provided a copy of a lease entered into between Amoco Oil Company and an individual. The individual who signed the lease is identified as the petitioner's "supervisor-gas station/resident

agent." The lease indicated it was a "dealer lease and supply agreement" for the purchase and sale of gasoline and related products and services.

The director noted the inconsistency in the record regarding the nature of the petitioner's business. The director determined that the record did not support a finding that the petitioner was engaged in trading activity. The director indicated that he could not determine the nature of the beneficiary's job duties from the record. The director concluded that the petitioner had not established that the beneficiary had been and would be engaged in primarily managerial or executive duties in the United States.

On appeal, counsel asserts that the petitioner intends to engage in trading of Pakistani merchandise but is engaging in the operation of gas stations to generate cash flow for the trading business. Counsel asserts that the beneficiary "has been instrumental in his role as Chief Operating Officer and can be credited with the successful operation of these four gas stations as the managers of the four gas stations report to him and his guidance in running the gas stations has been of immense value to them." Counsel asserts that the beneficiary oversees "professionals such as the Director of Personnel and Public Relations, Director of Inventory and the Directory of Accounting." Counsel asserts that the beneficiary oversees the corporation and its employees and is also a functional manager. Counsel cites an unpublished decision in support of this statement. Counsel asserts that the beneficiary's job duties are clear and can be categorized as "managerial" or "executive." Counsel asserts that the denial of this petition in light of the prior approval of the beneficiary as a nonimmigrant intracompany transferee in L-1A status is arbitrary and an abuse of discretion.

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). The petitioner's initial description of the beneficiary's duties was general. The Bureau cannot determine from the petitioner's initial description whether the beneficiary is performing managerial or executive duties with respect to the activities described or whether the beneficiary is actually performing the activities. 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). Moreover, the petitioner did not submit evidence that the beneficiary actually conducted the broadly cast description of his 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). The record does not contain evidence that the beneficiary is actually "searching the market of [sic] Pakistani products" or is "establish[ing] the company in its intended businesses." The record is devoid of information regarding the beneficiary's actual daily duties.

Counsel's various assertions on appeal regarding the beneficiary's supervision and guidance of the petitioner's other employees is not supported in the record. The assertions of counsel 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). First, the record does not provide a basis to conclude that the petitioner is involved in any gas station other than the gas station identified as the petitioner doing business as "Riverdale Amoco." Second, the record does not describe the beneficiary's actual daily duties regarding this service station. Counsel's assertion that the beneficiary guides manager(s) in running a gas station does not establish that the beneficiary is primarily engaged in managerial or executive duties. Moreover, counsel's assertion that the beneficiary oversees professionals is not supported in the record. The determining factor is whether the position encompasses professional duties, not whether the person holding the position holds a particular degree. As previously stated, 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), *supra*.

In addition, counsel's assertion that the beneficiary oversees the corporation and its employees and is a functional manager is not supported in the record. The petitioner has not submitted a comprehensive description of the beneficiary's duties or a clear description of the function allegedly managed. Further, counsel provides no evidence to establish that the facts of the instant petition are in any way analogous to the unpublished case cited in support of his assertion that the beneficiary is a functional manager. Finally, unpublished decisions are not binding on the Bureau in the administration of the Act. *See* 8 C.F.R. § 103.3(c).

In sum, the record is deficient in establishing that the beneficiary's purported duties are or will be primarily managerial or executive. The Bureau 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.

Counsel's reliance on past approvals of the beneficiary as a nonimmigrant intracompany transferee in L-1A status is also not persuasive. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions and the record of proceeding does not contain copies of the visa

petitions that are claimed to have been previously approved. However, 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).

Beyond the decision of the director, the record does not establish a qualifying relationship between the United States petitioner and the beneficiary's overseas employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* 8 C.F.R. § 204.5(j)(2). For this additional reason, the petition will 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.