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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

[redacted]

MAY 07 2003

File: WAC 01 258 55508 Office: CALIFORNIA 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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

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 Director of the California Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president and general manager. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on the ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the director recently approved a nonimmigrant intracompany transferee visa (L-1A) petition extension for the beneficiary that contained the same facts as those in this immigrant petition.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a

statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of [redacted] of the People's Republic of China (China); (2) is a travel and tourism wholesale corporation; and (3) employs five administrative managers, including the beneficiary, who is currently occupying the proffered position as an L-1A nonimmigrant worker. The petitioner is offering to employ the beneficiary permanently at a salary of $26,000 per year.

The issue to be discussed in this proceeding is whether the proffered position of president and general manager is in an executive or managerial 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.

At the time of filing the petition with the California Service Center on July 5, 2001, the petitioner stated that the president and general manager would be responsible for:

> Working closely with the Vice President and manager of the corporation, directing the daily operations of the company's wholesale and distribution of the Parent company's tourism products (tour packages and services), continuing the promotion of Chinese tourism and handling problems presented by managers and manager/owners of the 400 travel agencies. He is also responsible for representing the Parent [company] in managerial level business negotiations with. . .U.S. business partners. . . . Working closely with managers under his direction in training, supervising, disciplining, and terminating company managers and employees under their supervision. . . . The President/General manager represents the parent corporation in making company decisions regarding the employment of managers, administrative staff and good quality tour guides; negotiating with tour agencies, hotel sales representatives, managers of tourist attraction providers, restaurant managers/owners and other firms and individuals for the best deals available for the petitioner and for the interest of the tourists; listening to reports of managers and checking on the work duties and assignments of the personnel he supervises, decides what work is to be done then reviews them [sic].

The director did not find the petitioner's description of the proffered position sufficient to determine whether the beneficiary would be employed in a managerial or executive capacity. Therefore, on February 7, 2002, the director requested additional evidence from the petitioner, to include:

<u>U.S. Business Organizational Chart</u>: Submit a copy of the U.S. company's line and block organizational chart describing its

managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission. (Emphasis in original.)

Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific. Explain how the U.S. business functioned up to his point without the beneficiary and why the beneficiary must report to the U.S. company.

- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees at the beneficiary's work site for the lasts four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees.

In response, the petitioner submitted an organizational chart, which showed the beneficiary as the president and general manager. Under the beneficiary's direction was the vice president who, in turn, supervised one assistant, the corporate secretary, one accountant, and one operations manager. According to the chart, the operations manager directed seven contracted tour guides, and both the vice president and the operations manager had direct supervisory authority over 200 commission-based travel agents. The petitioner did not describe the job duties of the individuals who were listed on the organizational chart in positions subordinate to the beneficiary.

The beneficiary also submitted a statement regarding his job responsibilities. According to the beneficiary, he devotes 100 percent of his time to directing and managing the petitioner's daily operations. In particular, the beneficiary listed his responsibilities as:

Planning and approving business plans, [and] making decisions in hiring and firing managers and staff;
Approving financial decisions, [and] inspecting performances [sic] of managers and staffs;

Directing the promotion of the China [sic] and U.S. tourism products, [and] giving job assignments to managers and staff;
Hosting meetings to raise morals [sic] of our tour-guide staffs, [and] participating in trade showing [sic] to meet with manager[s]/executives of wholesale tour corporations and retail travel agencies to get to know their needs and find out the feedbacks [sic] from their many clients who came back from their tour to China or at the completion of their travel to the United States;
Approving tourist trade deals negotiated by managers under my leadership, [and] attending board meetings in both China and the United States.

The director denied the petition on the basis that the proffered position was not in an executive or managerial capacity, in part, because:

[T]his type of business does not require or have a reasonable need for an executive because all they do is set up tours and such. Additionally, it is contrary to common business practice and defies standard business logic for such a company to have an executive, as such a business does not possess the organizational complexity to warrant have such an employee.

The director further concluded that the beneficiary would necessarily become involved in support tasks because the petitioner, which employees approximately four to six persons, does not have a sufficient number of employees to perform the daily operational duties. The director also stated that the beneficiary would be a first-line supervisor to nonprofessional employees.

On appeal, counsel states that the director recently approved a nonimmigrant intracompany transferee (L-1A) visa petition extension that the petitioner submitted on the beneficiary's behalf, and notes that the facts in the nonimmigrant petition were identical to the facts in this immigrant petition. According to counsel, several years ago, the director of the California Service Center devised a "formula," which stated that in order for a company to need an executive or manager, there needed to be 12 subordinate employees. Counsel asserts that this "formula" is at odds with several decisions from the Administrative Appeals Office, which note that an individual working in a managerial or executive capacity can perform primarily executive or managerial duties and participate in performing some work for the company. Counsel refers to several unpublished decisions by the Administrative Appeals Office to support his assertions.

Additionally, counsel states that the beneficiary's primary responsibility is to: "understand and implement [the] parent company['s] goals and policies, to set company operating

strategies, to maintain good relations with leading supplies [sic], travel agencies, and customers of travel services, to supervise the work of subordinate workers, and to ensure adherence to the company budget." Counsel further states that the beneficiary devotes 85 percent of his time to these tasks, among others and does not participate in the day-to-day work of the company, except for emergencies.

Counsel's assertion regarding the alleged "formula" used at the California Service Center is without foundation. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel does not present any documentary evidence of an alleged policy at the California Service Center regarding the minimum number of employees that a petitioner must have in order for the Bureau to consider a beneficiary a manager or executive. However, counsel correctly asserts on appeal that the size of the petitioner alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

The director's denial of the petition, in part, on the basis that the petitioner's need for an executive was contrary to "common business practice" and defied "standard business logic" was inappropriate. The director should not hold a petitioner to his undefined and unsupported views of "common business practice" and "sound business principles." The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. The fact that the petitioner is in the tourism and travel industry does not, by itself, preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act as a manager or an executive. Instead, the duties of the proffered position must be the critical factor. *See* Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

The beneficiary's two job descriptions do not contain the level of detail necessary for the Bureau to determine whether he primarily executes the high level responsibilities that are specified within the definition of managerial or executive capacity. The beneficiary stated that he spends 100 percent of his time directing and managing the petitioner's daily operations. However, neither the beneficiary nor the petitioner specifies, with any degree of particularity, the duties that the beneficiary executes to both direct and manage

the U.S. company. The beneficiary's stated duties, which include, but are not limited to, planning and approving business plans, directing the promotion of products, participating in trade shows, and approving financial decisions, are not instructive. None of these duties, either by itself or as a group, establishes that the beneficiary primarily either directs the management of the organization, or manages the organization or a function. Without more specific information regarding how and at what frequency the stated duties are performed, the petitioner's job description does not establish that the position offered to the beneficiary involves primarily managerial or executive duties.

Additionally, the evidence regarding the petitioner's staffing levels fails to establish that the beneficiary would be employed as more than a first-line supervisor. 8 C.F.R. § 204.5(j)(4)(i). The director requested the petitioner to submit an organizational chart that listed the names, titles, and job responsibilities of the individuals whom the beneficiary would supervise. The petitioner submitted the requested organizational chart, which listed the names and job titles of the employees; however, the petitioner did not provide the individuals' job descriptions or specify how they perform the services that the petitioner provides. Absent a listing of the specific duties of persons supervised by the beneficiary, the petitioner has not shown that the beneficiary would act as more than a first-line supervisor to nonprofessional employees. *See Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991).

Counsel refers to several unpublished decisions of the Administrative Appeals Office to support his claim that the beneficiary would be employed in an executive or managerial capacity regardless of whether the beneficiary supervised any individuals. Although 8 C.F.R. § 103.3(c) provides that precedent decisions of the Immigration and Naturalization Service, now the Bureau, are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding. Therefore, counsel's reference to these decisions carries little weight.

Finally, counsel implies that the Bureau has already determined that the proffered position is in an executive or managerial capacity since the California Service Center recently approved an L-1A nonimmigrant visa petition extension on the beneficiary's behalf. This record of proceeding does not, however, contain any of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the Administrative Appeals Office cannot determine whether the nonimmigrant intracompany transferee petition was approved in error.

Nevertheless, it is important to emphasize that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the Bureau is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the Administrative Appeals Office may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the Administrative Appeals Office, however, the approval of the prior petition would have been erroneous. The Bureau is not required to approve 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). Neither the Bureau nor any other 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 petitioner must establish that the beneficiary qualifies for this immigrant visa regardless of any nonimmigrant petitions that the Bureau may have approved on the beneficiary's behalf. The Administrative Appeals Office is never bound by a decision of a service center or district director. *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).

Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition on this basis shall not be disturbed.

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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.