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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 01 253 61976 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 manager of business development. 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 grounds that: (1) the petitioner was not doing business; and (2) the proffered position was not in an executive or managerial capacity.

On appeal, counsel submits a brief and copies of evidence already included in the record. Counsel states, in part, that the director failed to consider evidence and abused her discretion by reaching a conclusion that is inconsistent with the approvals of three nonimmigrant intracompany transferee (L-1A) petitions that were filed on the beneficiary's behalf.

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 Meishan County Nitrogen Fertilizer Factory of the People's Republic of China (China); (2) owns and manages authentic Sichuan-style Chinese restaurants; and (3) employs 27 persons, including the beneficiary, who is currently occupying the proffered position as an L-1A nonimmigrant worker. The petitioner is offering to employ the beneficiary on a permanent basis at a salary of $508 per week.

The first issue to be discussed is whether the petitioner has been doing business. In the denial letter, the director concluded that the petitioner had not shown that it had been doing business in the United States; however, the director did not explain why she made this conclusion or discuss any evidence that the petitioner had previously submitted relating to this issue. It appears from a review of the denial letter that the director unintentionally inserted language in the concluding paragraph that discussed the issue of "doing business." This portion of the denial letter appears to have been a typographical error. Therefore, the director's conclusion regarding this issue shall be withdrawn.

The second issue to be discussed is whether the proffered position of manager of business development is in a managerial capacity. The Bureau notes that the petitioner is seeking to classify the beneficiary as a multinational manager, not as a multinational executive.

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.

At the time of filing the petition with the California Service Center on June 11, 2001, the petitioner described the responsibilities of the beneficiary as follows:

> As the Manager of the Business Development Department, [the beneficiary] exercises authority in the area of human resources management. He implements recruitment, hiring, firing, and job assignment decisions according to each employee's capabilities, experience, discipline and goals. [The beneficiary] undertakes reviews of employees' performance and makes sure that all personnel are following company guidelines.
>
> [The beneficiary] is responsible for managing all [of the petitioner's] business development activities in the area of restaurant operations and rice wine production. . . . In the area of rice wine production, [the beneficiary] is responsible for selecting and purchasing key ingredients, [and] training staff for production of Chinese rice wine, which has become a very popular drink in the Little Sichuan Restaurants.
>
> [The beneficiary] represents the goals and concerns of the Business Development Department directly to [the petitioner's] Chief Executive Officer. He assists in the formulation of marketing and production plans to promote the successful implementation of strategic policies in all [of the petitioner's] operations. [The beneficiary] meets with other department heads to review policies and formulate strategies to ensure consistency in company-wide production and development. Moreover, [the beneficiary] maintains clear pathways of communication between the Business Development Department of [the petitioner] and the parent company.
>
> In conclusion, [the beneficiary] has authority over restaurant operations and long-term development planning. . . .

The director did not find the petitioner's initial evidence sufficient to determine whether the beneficiary would be employed

in a managerial capacity. Therefore, on January 8, 2002, the director requested additional evidence from the petitioner, to include:

- U.S. Business Organizational Chart: 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; list the education and employment qualifications for the position in the United States company. Include evidence that the beneficiary meets the petitioner's qualifications. Also, indicate [an approximate] percentage of time spent in each of the listed duties.

- 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 last 8 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 that the beneficiary, as the manager of business development, directed three employees with titles such as "marketing," "finance," and "supply." The chart also indicated that the beneficiary held the position directly subordinate to the general manager.

Counsel stated that the individuals under the beneficiary's supervision held the titles of marketing director, finance specialist, and assistant. Regarding descriptions of these individuals' job duties, counsel asserted, "Their job duties are self-explanatory from the job title." Therefore, he did not provide any other information regarding the employees' job responsibilities. Counsel did state that the positions of marketing director and finance specialist required college degrees

plus three years of experience, and that the position of assistant required a high school diploma with two years of experience.

Counsel also listed the percentages of time that the beneficiary would spend performing his job responsibilities. Counsel stated that the beneficiary would devote 20 percent of his time to human resources management, 60 percent of his time to business development and staff training, and 20 percent of his time to assisting in the formulation of marketing and production plans. The duties assigned to each of these broad job responsibilities remained the same as in the petitioner's initial description of the beneficiary's proposed duties.

The director denied the petition, in part, because the proffered position was not in an executive or managerial capacity. In particular, the beneficiary's job description did not comport with information in the organizational chart and the petitioner's payroll records. According to the director, the petitioner claimed that the beneficiary would supervise rice wine production; however, neither the organizational chart nor the petitioner's list of employees showed any employees who had duties related to producing rice wine. Additionally, the director noted that one employee allegedly under the beneficiary's supervision was also supervised by another individual with a managerial title. The director concluded that the beneficiary would act only as a first-line supervisor, not as a manager. The director also concluded that the beneficiary would not manage a function because he would be involved in performing operational tasks.

On appeal, counsel states that the director "imposed a higher standard than the statutory requirement" by not considering that the beneficiary could qualify for this immigrant visa classification as a manager of an essential function. According to counsel, the business development department is a critical department within the petitioner's operations because it is concerned with the petitioner's expansion and growth. Counsel contends that the beneficiary primarily performs managerial responsibilities. Additionally, counsel claims that the director misinterpreted the petitioner's evidence by concluding that beneficiary would serve only as a first-line supervisor. According to counsel, the alleged inconsistencies among the petitioner's items of evidence were not, in fact, inconsistencies. Counsel states that, although the petitioner indicated that the beneficiary would be in charge of rice wine production, this responsibility never came to fruition and, therefore, the organizational chart did not reflect any employees with responsibility for producing rice wine. Additionally, counsel states that one employee under the beneficiary's supervision does work under the direction of another employee with a managerial title, but that this arrangement allows the beneficiary to monitor the petitioner's day-to-day business activities more closely. Counsel notes that the Bureau approved one L-1A nonimmigrant petition and two subsequent requests to

extend the beneficiary's nonimmigrant status. In turn, counsel asserts that the director abused her discretion in denying this immigrant visa petition, which is based upon the same facts that were in the nonimmigrant petitions.

The duties of the proffered position must be the critical factor in determining whether the beneficiary would be employed in a managerial capacity. *See* Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). The petitioner states that approximately 60 percent of the beneficiary's time would be devoted to managing business development activities, which is an area that counsel claims is essential to the petitioner's expansion and growth. However, neither counsel nor the petitioner explains how business development is an essential function to the petitioner's operations. The beneficiary's specific job responsibilities of overseeing the performance of the restaurants and monitoring opportunities for expansion are not sufficiently detailed. The petitioner has not submitted any information regarding how and at what frequency the stated duties are performed. Without more specific information, the beneficiary's job description is simply a reiteration of the statutory definition of managerial capacity. *Fedin Bros. Co., Ltd. v. Sava*, 724 F.Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). Thus, there is insufficient evidence that the beneficiary would manage an essential function within the petitioner's organization, or a department or subdivision of the organization.

Additionally, the petitioner has not established that the beneficiary would supervise and control the work of other supervisory, professional, or managerial employees. Specifically, the petitioner indicated on its organizational chart that the beneficiary would supervise three employees in "marketing," "finance," and "supply." Counsel stated that the titles of these employees were marketing director, finance specialist, and assistant. Nowhere in the evidence does the petitioner assign the job titles of marketing director, finance specialist and assistant to the employees under the beneficiary's supervision. Counsel's assertion regarding the employees' titles cannot be considered evidence that the three employees possess the titles that counsel claims. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A petitioner bears of burden of establishing that the beneficiary would be employed as more than a first-line supervisor to nonprofessional employees. Section 101(a)(44)(A)(iv), 8 U.S.C. § 1101(a)(44)(A)(iv). 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 indicated on the organizational chart that the beneficiary supervised three individuals, but it failed to provide these individuals' job descriptions or specify

how they performed services that the petitioner provides. Although counsel asserts that the job duties of these employees are self-explanatory, 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. *See Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991). Simply 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). Accordingly, the director's decision to deny the petition on this basis shall not be disturbed.

Counsel states that the denial of this immigrant is inconsistent with the director's prior decisions to confer L-1A nonimmigrant status on the beneficiary. Counsel states that it is difficult to believe that the director made an error on more than one occasion when approving one L-1A petition and two extensions of the beneficiary's stay in the United States in L-1A status.

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). This record of proceeding does not contain any of the supporting evidence submitted to the California Service Center in association with the L-1A nonimmigrant petition filing and the subsequent requests for extensions. Although the Administrative Appeals Office may attempt to hypothesize as to whether the prior approvals were granted in error, it would be inappropriate to make such a determination without reviewing the original L-1A nonimmigrant petition filing in its entirety. If, however, the L-1A nonimmigrant 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 Appeal Office, 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. As discussed in the preceding paragraphs, the petitioner has not met its burden of establishing that the proffered position is in a managerial capacity.

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.