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U.S. Citizenship
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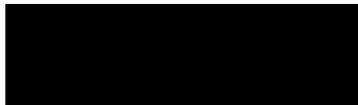
Office: TEXAS SERVICE CENTER

Date: AUG 22 2005

SRC 03 256 50722

IN RE:

Petitioner:



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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Florida in October 2001. It is engaged in construction. 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 that the petitioner had not established: (1) it had been doing business for one year prior to filing the Form I-140 petition; or (2) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, the petitioner asserts that Citizenship and Immigration Services (CIS) erred when considering the petition.

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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it had been doing business for one year prior to filing the petition on September 22, 2003.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

- (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In this matter, the petitioner was incorporated on October 1, 2001. The petitioner has provided evidence that it purchased a property in Florida in December 2001; entered into an agreement to lease a warehouse and office space in August 2002;¹ created a business plan in November 2002; obtained an architectural services proposal on November 4, 2002; and obtained a business license to operate a management service on November 4, 2002. The record also contains the petitioner's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement issued to six individuals in 2002 for the total amount of \$72,058. The petitioner's 2002 IRS Form 1120, U.S. Corporation Income Tax Return, on the other hand, does not show any salaries or compensation paid on page 1 of the return but does show that the petitioner's four officers were compensated in the total amount of \$59,352 for the 2002 year.

On appeal, the petitioner indicates that between February 2002 through November 2002, the petitioner was involved in "[s]election of different contractors: Architect constructors, attorney, CPA, etc. Study of different possibilities: Meetings with different City officials." The petitioner asserts that the director did not consider the nature of its business and that it had employed personnel, independent contractors, and had obtained licenses to begin a construction project when determining that the petitioner had not begun doing business one year prior to filing the petition.

The petitioner's evidence is not persuasive in establishing that it had been doing business for one year prior to filing the petition on September 22, 2003. The critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the "mere presence of an agent or office" without conducting any business activities. The proper focus on this issue

¹ The petitioner's agreement to lease warehouse and office space indicated that the lease term began August 1, 2002 and ended July 30, 2002. The signature page does not include a date. It is not possible to determine the lease term from the face of the lease.

thus, is the nature and conduct of the petitioner's business activities, if any. In the matter at hand, the petitioner has presented evidence that it purchased property in December 2001 and a year or so later, in November 2002 began operations to develop the property. The petitioner has not provided documentary evidence that it began facilitating the development of the property on a continuous, regular, and systematic basis prior to November 2002. Investment in property is not sufficient to establish that an entity is doing business as defined in the regulations.

The petitioner's claim that between February 2002 and November 2002, the petitioner was involved in "[s]election of different contractors: Architect constructors, attorney, CPA, etc. Study of different possibilities: Meetings with different City officials," is not substantiated in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The absence of documentary evidence for the months September and October along with evidence that in November the petitioner began the process of engaging an architect and obtaining business licenses shows that the petitioner began conducting business in November 2002, not in February through October 2002. Further, the AAO finds that the petitioner's claim to have studied different possibilities between February 2002 and November 2002, evidences that the petitioner's business was speculative and was not regular, continuous, or systematic during that time period. The record does not establish that the petitioner was doing business in September or October of 2002, thus the petitioner has not established that it was doing business for one year prior to filing the petition.

The AAO acknowledges that the record contains some evidence that the petitioner paid the officers of the company in 2002. However, the record does not establish when the monies were paid. Furthermore, the record contains inconsistencies regarding whom the petitioner paid in 2002. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not adequately established that it engaged in facilitating the regular, systematic, and continuous provision of goods or services prior to November 2002. The record establishes that the petitioner began conducting business in November 2002 and undermines the petitioner's claim that it began conducting business in a regular and non-speculative manner prior to that date. For this reason, the petition will not be approved.

The next issue in this proceeding is whether the beneficiary will be employed in a 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

- 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.

In a September 9, 2003 letter appended to the petition, the petitioner stated that the beneficiary would have the following responsibilities for the U.S. petitioner:

- 1) Devise and implement business development policies for the company in all of the areas.
- 2) Focus the business development towards the areas of: Construction, contracts, sub-contracts, buys, sells and rents; but can direct her job to another interesting areas according to our identify such us [sic]: Remodeling, real estate, etc.
- 3) Conduct market analysis and research for new potential markets.
- 4) Research of market conditions.
- 5) Conduct research on potential new areas to expand.
- 6) And all others that the Position may require.

On October 20, 2003 in a letter requesting further evidence, the director questioned how the beneficiary's position encompassed primarily managerial or executive duties. The director requested a "more concrete" explanation of the beneficiary's day-to-day execution of the position. The director also requested documentary evidence of the duties, education, and experience of the employees of the company, as well as an organizational chart describing the petitioner's employees' job duties, and identifying the employees as part-time or full-time employees.

On January 5, 2005, the petitioner identified the beneficiary's principal duties as:

Plan, develop, and establish policies and objectives of our business organization in accordance with board directives and the main company:

- Confer with officials to plan business objectives, to develop organizational policies, to coordinate functions and operations between departments, and to establish responsibilities and procedures for attaining objectives.
- Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions.
- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.
- Plans and develops public relations policies designed to improve company's coverage and relations with possible customers, employees, contractors and public offices.
- Evaluates performance of executives for compliance with established policies and objectives and contributions in attaining objectives.
- Preside [sic] the board of directors.
- Plan, direct and coordinate operational activities with the help of subordinate executives and independent contractors and third parties.

(Bullets added.)

The petitioner also included its organizational chart showing the beneficiary as president and a general manager and a vice-president subordinate to the beneficiary's position. The chart also depicted a construction manager, an accountant, and an administrative director subordinate to the general manager. The chart listed an architect and an individual contractor subordinate to the construction manager's position. The chart also listed several vacant positions.

The record also contains the petitioner's Florida Forms FL UCT-6, Employer's Quarterly Report for the quarter ending June 30, 2003 and the quarter ending December 31, 2003.² Both Florida Forms FL UCT-6

² The record does not contain the petitioner's Florida Form FL UCT-6, for the third quarter of 2003, the quarter in which the petition was filed. The record does contain Florida Forms FL UCT-6 for various other quarters but the more pertinent Forms FL UCT-6 are referenced above.

listed individuals identified on the petitioner's organizational chart in the positions of president (the beneficiary's position), general manager, vice-president, accountant, and general manager. Both forms also identified an individual whose name did not appear on the petitioner's organizational chart.

The petitioner provided brief job descriptions for the individuals subordinate to the beneficiary's position. The petitioner indicated that: the vice-president is primarily in charge of international sales and in all aspects of the day-to-day operation of the business including project management, safety, insurances, office-field staff management, and accounting; the general manager's duties included administration and management of the business, research and development of new markets, coordinating operations of the company, meeting with potential clients, hiring necessary employees, signing contracts and any other legal duties essential to the management of the corporation; the construction manager's duties included supervision of construction projects, coordinating office and field activities, communication with project superintendents, negotiating subcontractor awards, establishing and maintaining the project construction schedule, preparing requisitions for payment, processing owner's change orders, budget analysis, and conducting weekly meetings with owners and subcontractors; the accountant is in charge of office operations and administrative support staff, administering all general ledger and job cost accounting, accounts receivable and payable, payroll, employee benefits, and vehicle-equipment fleet maintenance. The petitioner also provided a description for an administrative director who performed typing, filing, copying, ordering, organizing, and receptionist duties.

On January 10, 2005, the director denied the petition, determining that the petitioner's description of the beneficiary's duties including marketing and sales duties were not managerial or executive duties, but rather duties involved in producing a product or providing a service. The director concluded that the beneficiary was primarily involved in non-managerial/executive duties and was not a manager.

On appeal, the petitioner asserts that the director did not consider the petitioner's "more detailed" description of the beneficiary's duties in response to the request for evidence. The petitioner claims that its description of the beneficiary's duties in response to the director's request for evidence is consistent with the "description that the Labor Department established for Presidents/General Managers/Private Chief Executive." The petitioner also avers that CIS erred when not considering the beneficiary's recent activities in 2004.

The petitioner's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In this matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner's initial description of the beneficiary's duties paraphrased section 101(a)(44)(B)(ii) of the Act, as well as, indicating that the beneficiary would provide market research and analysis for the organization. However, as the director referenced, 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).

The petitioner's second iteration of the beneficiary's duties is vague and nonspecific and fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[p]lan[ing], develop[ing], and establish[ing] policies and objectives," and "[c]onfer[ing] with officials to plan business objectives, to develop organizational policies, to coordinate functions and operations between departments, and to establish responsibilities and procedures for attaining objectives," and "[d]irect[ing] and coordinate[ing] formulation of financial programs." The petitioner did not, however, define the petitioner's policies and goals and did not clarify or provide distinctions between the organization's functions and departments. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, it is not possible to determine whether the beneficiary's planning and developing public relations, reviewing activity reports and financial statements are primarily managerial or executive duties or tasks associated with providing the petitioner's administrative and operational services. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner also references the beneficiary's duties associated with planning and coordinating operational activities with the help of subordinate "executives," independent contractors, and third parties and evaluating the performance of "executives." However, the petitioner has not sufficiently defined the beneficiary's duties in relation to her subordinates and has not sufficiently distinguished the beneficiary's subordinates' duties from her own duties. At most, the general statements regarding the beneficiary's work with "executive" subordinates and oversight of other employees appears more directly related to operational and supervisory tasks rather than performing primarily managerial or executive duties related to those tasks. Again 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Upon review of the totality of the record, including the petitioner's organizational structure, the general description of the beneficiary's duties, and the roles of her claimed subordinates, the AAO cannot conclude that the beneficiary's primary tasks are managerial or executive. The record is insufficient in substantiating the beneficiary's actual role in the petitioner's organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

On appeal, the petitioner references the beneficiary's activities in 2004. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary

becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner must be sufficiently established to support a managerial or executive position when it files the petition.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the United States petitioner comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.