



U.S. Citizenship  
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[REDACTED]

FILE: [REDACTED]  
EAC 04 021 50990

Office: VERMONT SERVICE CENTER

Date: AUG 25 2005

IN RE: Petitioner: [REDACTED]  
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 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 preference 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 is a New York corporation doing business as an internet retail sales operation. 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 beneficiary would not be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 which 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.

The issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or 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.

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 support of the petition, the petitioner submitted a letter dated October 20, 2003, which provided the following description of the duties to be performed by the beneficiary under an approved petition:

[The beneficiary] exercises and will continue to exercise discretionary decision-making with respect to the activities of the company and its expansion. He establishes and will continue to establish the company's salary structure, pay policies, recruiting and hiring, and performance appraisal programs. He is and will continue to be responsible for setting and controlling the company's budget, including having authority to expend the company's resources, contract with outside providers, and enter into contracts on behalf of the company. [The beneficiary] is and will continue to be responsible for concluding negotiations with the company's suppliers and service providers; reviewing daily reports from other employees concerning the day-to-day operations of the company; and reviewing the work performed by the other employees of the company. At least 70% of his time is spent in the oversight of the

company's financial and business activities, and in the setting of goals and means for expanding the company's business.

[The beneficiary] is and will continue to be responsible for the development of new corporate clients and distributors to provide wholesale goods to [the petitioner]. He has and will continue to have ultimate authority on personnel decisions, including hiring and firing, vacation requests, promotion, and training requirements. [The petitioner] currently has six employees (all hired and supervised by [the beneficiary]) . . . . Recently, at the decision of [the beneficiary], the company moved its operations to a new, larger warehouse to enable it to stock greater amounts of inventory, which will also allow the company to expand . . . .

[The beneficiary] makes all strategic decisions about which sales channels the company should utilize, which service providers to have business relationships with, and which product suppliers to contract with. He is responsible for making executive decisions on whether and how to expand the business, including hiring and promoting employees, and negotiating and signed [sic] leases and other contracts on behalf of the company. [The beneficiary] prepares company budgets and determines methods for reaching budgetary goals. He decides whether and how to expand channels for sales, and what product lines to sell. [The beneficiary] reviews sales reports to determine which items should be continued or discontinued. [The beneficiary] receives and will continue to receive only general direction from the overseas parent company . . . .

The petitioner also submitted several of its state quarterly wage statements and tax returns, including the statement for the third quarter of 2003, which was the most recent statement at the time the petition was filed. The wage and withholding portion of the quarterly statement indicated that the petitioner had a total of six employees, including the beneficiary. However, a comparison of the salaries in the petitioner's second and third quarterly wage and withholding reports indicates that at least two of the petitioner's employees consistently received salaries that were not commensurate with those of full-time employees.

On February 11, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a detailed description of the beneficiary's proposed duties including a breakdown of the number of hours the beneficiary would spend carrying out each of the listed duties. The petitioner was also instructed to provide its organizational chart illustrating its managerial hierarchy and personnel structure. The director attempted to guide the petitioner in providing all relevant information by formulating a number of questions, which included a request to provide the job titles and job duties of the employees the beneficiary would be expected to manage. Additionally, the petitioner was instructed to provide the W-2 wage and tax statements it issued in 2003, as well as its complete Form 941's for the third and fourth quarters of 2003.

The petitioner's response included a letter dated April 30, 2004 written [redacted] the petitioner's vice president of operations/general manager. [redacted] provided the following description of the beneficiary's duties:

Out of a 40-hour workweek, [the beneficiary] will spend at least 10 to 15 hours receiving reports from his subordinate employees regarding the status of the company's business, including order volumes, order fulfillment, and general inventory levels, and ensuring that appropriate steps are being taken by those employees to manage the flow of orders,

shipments, and inventory. At least 5 to 10 hours per week are spent in [sic] reviewing reports prepared by subordinate employees that describe the sales level of all products, and instructing these employees on price changes or discontinuation of specific products or product lines.

Another 5 to 10 hours per week will be spent in analyzing reports from his employees on the relative performances of sales through different Internet sites or search engines, and then directing creative and financial resources as appropriate to best profit from the best performing sales portals. Another 2 to 4 hours will be spent receiving updates from employees regarding customer service satisfaction, and directing those employees on which areas need improvement. A further 6 to 8 hours is spent in evaluating the business of [the petitioner] to determine avenues for growth and new sales opportunities, such as branching out into new product lines, and in determining new marketing strategies, such as new Internet sales portals or direct[ing] marketing campaigns. The remainder of his time will be spent in [sic] overseeing and reviewing work performed by outside contractors, such as accountants, and making personnel decisions. As [the petitioner] is a rapidly growing company, there are undoubtedly times when [the beneficiary] will need to . . . assist with non-managerial and [non-]executive tasks . . . , but this occurs only in exceptional periods of unusually high volume . . . .

[The beneficiary] has the final say on all major business plans, strategies, and goals, as well as their implementation. He determines which sales avenues . . . to pursue; formulates strategies on how to grow the business; allocates the company's financial resources in order to capitalize on market conditions; has full discretionary decision-making authority as to all aspects of the business, including product pricing advertising and Internet presence, expansion or reduction of current product lines, and identifying and approving new product areas, and hiring outside contractors and signing legal agreements; and has authority over the company's personnel decisions, such as hiring, firing, giving raises and promotions, and issuing bonuses.

[redacted] also stated that the beneficiary receives and analyzes weekly summary reports regarding sales performance and customer satisfaction. Based on his analysis, the beneficiary then directs the company's employees. [redacted] stressed that employees other than the beneficiary would perform the petitioner's daily operational task. However, the petitioner's Form 941 for the fourth quarter of 2003 was not accompanied by the quarterly wage report naming each of the petitioner's employees during the time period when the petition was filed. As such, the AAO is unable to determine who was actually working for the petitioner at the time the petition was filed.

On July 2, 2004, the director denied the petition stating that the petitioner's organizational chart indicates that the petitioner has 16 employees, whose employment cannot be verified as a result of the petitioner's failure to submit its quarterly wage and withholding statement for the quarter during which the petition was filed.

On appeal, counsel disputes the director's comment regarding the submission of incomplete Form 941 stating that the fourth quarter Form 941 did not require information regarding the number of employees and submits instructions issued by the Internal Revenue Service, which support counsel's claim. Further, it is important to note that while the director's request specifically addressed the petitioner's Form 941, it made no mention of

the petitioner's wage and withholding statement, which is a separate document. Thus, the director's statement that the petitioner failed to submit a requested document is inaccurate and will be withdrawn.

Nevertheless, the director properly pointed out that the petitioner listed a total of 16 positions in its organizational chart even though the petition indicates that the petitioner had six employees at the time the petition was filed. [REDACTED] accurately points out on appeal that the director only asked the petitioner to provide an organizational chart listing position titles, but did not ask the petitioner to provide the names of each of its employees. However, the director specifically requested an organizational chart illustrating the petitioner's managerial and personnel structures. An organizational chart that lists position titles that are not filled does not accurately reflect the petitioner's actual hierarchy at the time the petition was filed.

Counsel also disputes the director's statement that the petitioner failed to submit a detailed description of the beneficiary's duties. [REDACTED] pins counsel in his objection to the director's statement and goes into additional detail regarding the beneficiary's duties. Based on the details provided by the petitioner regarding the beneficiary's duties, the objections of the petitioner's counsel and [REDACTED] are properly raised. Contrary to the director's statements, the descriptions of the beneficiary's duties were neither general nor vague. However, despite the claims made by the petitioner through its detailed description of the beneficiary's job duties, 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)). In the instant matter, the petitioner has consistently stated that it has a sufficient support staff to relieve the beneficiary from having to perform the non-qualifying operational tasks. In support of this statement, Mr. [REDACTED] provides the names of the employees claimed to be in charge of performing the customer service related tasks and the warehouse duties. However, the evidence of record does not corroborate his claims. Specifically, while [REDACTED] states that [REDACTED] perform the tasks that are related to customer service, the petitioner has submitted no documentation to show that it employed either of these women at the time the petition was filed. Counsel is correct in pointing out that the director did not request the petitioner's fourth quarter wage and withholding statements, which list the employees by name and provide their social security numbers. However, [REDACTED]'s claim regarding the employment of these two women is entirely unsupported by any of the documentation on record. Even if the AAO simply refers to the petitioner's third quarterly wage and withholding statement for 2003, which lists the names of the petitioner's employees for the third quarter of 2003, [REDACTED]'s claim still remains unsupported, as neither [REDACTED] are named in that document. *See id.* Rather, the document names a number of individuals whose position titles and duties are unknown, with the exception of [REDACTED] himself and [REDACTED] whose duties were described on appeal.

Counsel is incorrect in pointing out that the director did not request the petitioner to provide a description of duties for any of the petitioner's employees, aside from the beneficiary. Page three of the RFE provides a list of six questions in an effort to assist the petitioner in providing CIS with all the information needed to fully adjudicate this case. Of the six questions, No. 2 specifically instructs the petitioner to provide the job titles and job duties of the employees managed by the beneficiary. Furthermore, where the petitioner claims that the beneficiary is almost entirely relieved from having to perform the petitioner's nonqualifying tasks, the AAO is confused at the petitioner's reluctance in providing information that would specify how exactly the petitioner's organizational structure can support the beneficiary's position. The petitioner cannot merely indicate that the beneficiary is relieved from having to perform nonqualifying duties without stating who actually performs the tasks that are essential to the company's daily operation. Although the petitioner may

currently employ [REDACTED] there is no evidence to suggest that the petitioner employed either of these women during the fourth quarter of 2003 when the petition was filed, as there were no W-2 wage and tax statements issued for either woman. 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). The petitioner provided no information to establish who was performing its customer service related tasks during the relevant time frame.

Furthermore, a comparison of the wages in the petitioner's W-2 statements for 2003 and the petitioner's quarterly wage and withholding reports for 2003 indicates that at least two out of the petitioner's six employees were not employed on a full-time basis. As the petitioner has not submitted any information establishing which employee was responsible for which of the daily operational tasks, the AAO is unable to affirmatively determine that the petitioner had a sufficient support staff to relieve the beneficiary from having to perform nonqualifying duties at the time the petition was filed. As such, the AAO cannot conclude that the beneficiary would be employed in a managerial or executive capacity.

Additionally, though not addressed in the director's decision, the record lacks sufficient evidence to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. See 8 C.F.R. § 204.5(j)(3)(B). The only evidence of a qualifying relationship has been submitted in the form of a stock certificate and a stock transfer ledger, both indicating that 100 shares of stock have been issued. However, while the stock transfer ledger indicates that \$100 was paid for the issued stock, Schedule L of the petitioner's corporate tax return for 2003 indicates that the petitioner has \$1,000 of outstanding common stock. 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). In the instant matter, the record contains inconsistent information regarding the amount of money received for the issued stock. Therefore, the AAO cannot determine how much stock was actually issued and whether the foreign entity is the sole shareholder of the petitioner's stock as claimed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional issues discussed in the paragraph above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.