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FILE:



Office: TEXAS SERVICE CENTER

Date:

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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:



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 visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Georgia that is engaged in the "small business management" of a QuickMart convenience store. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the beneficiary had not been employed abroad and would not be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel for the petitioner states that the director misinterpreted the petitioner's 2004 corporate tax return, and erroneously concluded that the petitioner had not employed any workers other than the beneficiary. Counsel submits an explanation stating that in addition to the beneficiary, the petitioner employed a manager and three part-time employees at the time of filing the petition. Counsel submits a letter in support of the claim that the beneficiary would be employed in a primarily managerial or 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 or 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, 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 AAO will first address the issue of whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director concluded in her May 16, 2005 decision that the beneficiary had not been employed overseas in a primarily qualifying capacity. In support of her denial, the director noted that the petitioner provided a "limited" description of the beneficiary's job duties, particularly after the director had requested an additional "detailed" job description. On appeal, counsel fails to address the director's finding that the beneficiary was not employed abroad as a manager or executive. As counsel has not submitted evidence on appeal that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity, the AAO will affirm the director's decision with regard to this issue. 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 AAO will next consider the issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 filed the instant immigrant petition on November 12, 2004 requesting employment of the beneficiary as its president at an annual salary of approximately \$40,000. The petitioner noted that it employed four workers at the time of filing the petition. An attached Employer's Quarterly Wage Report for the quarter ending September 30, 2004 identified five employees, including the beneficiary, however, the statement reflects that only four employees were paid during this period. As the petitioner did not provide additional evidence regarding the beneficiary's employment capacity, the director issued a notice of intent to deny on April 18, 2005. In her notice, the director asked that the petitioner provide the following documentary evidence: (1) a detailed description of the daily job duties to be performed by the beneficiary and the percentage of time to be spent on each task; (2) an organizational chart listing the petitioner's employees, their job titles, and the job duties performed by each; and (3) the year 2004 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, or the petitioner's quarterly tax returns.

Counsel responded in a letter dated May 5, 2005, and provided the following job description for the beneficiary as the "Manager" of the petitioning entity:

[The beneficiary] is responsible for establishing policies and procedures for the U.S. subsidiary, as well as for all personnel decisions. He is responsible for negotiating contracts with suppliers and clients, as well as marketing and accounts. He reports back to the Board of [the foreign entity] in Pakistan, but [the beneficiary] makes all decisions for [the petitioning entity], taking into account the best interests of the Parent and U.S. companies.

The estimated breakdown of [the beneficiary's] activities is: Contract-related work – 25%; Vendor Relations/Marketing – 30%; General Management – 45%. [The beneficiary] is currently assisted in his duties by four employees. One employee serves as an Assistant Manager and oversees the day-to-day workings of the company, including, but not limited to, keeping a proper accounting of the daily transactions, inventory, and customer relations. The additional three employees staff the retail business, serving as clerks. They handle the front-end customer service, as well as all stocking duties. . . . Fortunately, [the beneficiary] is not called upon to perform any non[-]managerial functions in the day-to-day running of the company, which leaves [the beneficiary] free to pursue other business matters and opportunities.

The petitioner submitted an organizational chart identifying the beneficiary as the "general manager," plus an assistant manager, and three sales clerks. As evidence of its staffing levels at the time of filing the petition, the petitioner provided the Form W-2 issued to each employee in 2004.

In a decision dated May 16, 2005, the director concluded that the petitioner would not employ the beneficiary in a primarily managerial or executive capacity. The director stated that although additional evidence was requested in support of the beneficiary's employment as a manager or executive, "[t]he petitioner's response [did] not sufficiently establish that the beneficiary will work primarily within either capacity in his United States assignment." The director noted that while the petitioner claimed to employ four workers, its 2004

federal income tax return only reflected compensation paid to the beneficiary. The director recognized the W-2 forms submitted to each worker in 2004, but noted that, even if employed, the workers would only be part-time. The director concluded that the petitioner did not employ any direct subordinates of the beneficiary, and further determined that the petitioner's "lower-level productive tasks" would be the primary component of the beneficiary's assignment in the United States company. Consequently, the director denied the petition.

The petitioner filed an appeal on June 13, 2005, contending that the director erroneously concluded that the petitioner did not employ any subordinate workers. Counsel for the petitioner states that the director misread the petitioner's corporate tax returns and overlooked the balance listed on the tax return as compensation paid to a full-time assistant manager and three part-time employees. Counsel states:

With a retail store, there would not need to be more than one clerk on staff at any given time, under the supervision of a full-time manager. Three part-time employees can certainly staff the business for a full year. As a result, the employees of the company ensure that [the beneficiary] is not needed to provide front-end customer service, or to supervise unskilled workers. Furthermore, the nature of the work does not require the managerial supervision of a degreed worker – [the assistant manager's] experience in the field is sufficient for the company's needs.

Counsel also provides a May 4, 2005 contract for the petitioner to purchase an additional business in the United States.

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

A petitioner is obligated to clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. Here, the petitioner has not clarified the position in which the beneficiary will be employed by the United States entity. The petitioner inconsistently refers to the beneficiary's position as "president" and "general manager." It is essential for the petitioner to clarify the beneficiary's true position in the organization in order to determine the capacity in which the beneficiary is to be employed. Without further clarification, the AAO cannot conclude that the additional information offered by the petitioner supports the claim that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the beneficiary's job responsibilities does not adequately identify the managerial or executive job duties to be performed by the beneficiary. The limited statement that the beneficiary's time would be divided among three broad responsibilities - contract-related work, vendor relations-marketing, and general management – fails to outline the specific tasks that the beneficiary would perform in relation to each responsibility. The regulations require that the petitioner clearly identify the managerial or executive job duties associated with the beneficiary's responsibilities. *See id.* For instance, the petitioner has not addressed with whom and for what the beneficiary is entering into contracts, or what specific managerial functions the beneficiary is performing in his "general management" of the company. This information is relevant and essential to

demonstrating that the beneficiary is primarily performing managerial or executive job duties. See §§ 101(a)(44)(A) and (B). The AAO cannot be expected to speculate what qualifying job duties the beneficiary is performing in relation to the named job responsibilities. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, the proposition that the beneficiary is responsible for "contract-related work" and "vendor relations/marketing" raises the question of whether the beneficiary is personally performing non-managerial and non-executive functions of the United States business. Counsel's statement in his May 5, 2005 letter that the beneficiary "[negotiates] contracts with suppliers and clients" demonstrates that the beneficiary, rather than the petitioner's salesclerks, is personally involved in the sale of the petitioner's products. With regard to the responsibility of "vendor relations/marketing," the petitioner has not accounted for the performance of its marketing functions by any of its four lower-level employees. Consequently, it is reasonable to conclude that the beneficiary would assume the responsibility of personally performing the tasks related to the petitioner's marketing. Moreover, it does not appear that the petitioner employs any workers who would carry out the petitioner's "vendor relations." The lower-level employees are said to be responsible for recording daily transactions, maintaining inventory, and "provid[ing] front-end customer service." While the petitioner has not specifically defined the tasks associated with "vendor relations," the subordinate staff's job duties appear to be administrative in nature and do not seem to encompass communications between the petitioner and its vendors. The record does not demonstrate that the beneficiary's subordinates would relieve the beneficiary from the additional responsibility of vendor relations. Based on the petitioner's representations, the beneficiary would spend approximately fifty-five percent of his time performing day-to-day tasks of the business that cannot be considered managerial or executive. 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).

Counsel stresses on appeal the director's misinterpretation of the amount of compensation identified on the petitioner's 2004 corporate tax return. As correctly explained by counsel, the director failed to consider the additional sums paid to employees other than the beneficiary. Despite counsel's explanation, however, the record does not demonstrate that the petitioner employed a staff sufficient to support the beneficiary in a primarily managerial or executive capacity.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a two-year-old company that was operating a convenience store. The petitioner represented that it employed the beneficiary as president, plus an assistant manager and a three part-time clerks. The petitioner's quarterly tax return ending September 30, 2004, however, demonstrates that one of the petitioner's clerks, [REDACTED], did not receive compensation during this period. Because she was paid in the months prior to September, it is likely that Susan Lewallen terminated her employment with the petitioner prior to the filing of the immigrant petition in November 2004. As a result, the record

demonstrates that at the time of filing, the petitioner employed two part-time clerks in addition to the beneficiary and the assistant manager. Counsel contends on appeal that the petitioner can adequately operate as a convenience store without additional staff members. However, as addressed previously, counsel has not provided a comprehensive description of the job duties performed by each employee, particularly the beneficiary, which would substantiate the claim that the reasonable needs of the organization could be met by three lower-level employees, two of which are employed part-time, while maintaining the beneficiary's employment in a primarily qualifying capacity. It seems implausible that the petitioner, operating as a convenience store, would adequately support the beneficiary in a primarily managerial or executive capacity when the beneficiary's subordinate staff includes an assistant manager and two part-time employees. While the petitioner did not identify its hours of operation, it is reasonable to conclude that with only two part-time clerks either the beneficiary or the assistant manager would be responsible for performing daily functions of the business, including such tasks as operating the cash register, maintaining and stocking inventory, making purchases, and maintaining accounts. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO acknowledges the purchase contract submitted by counsel on appeal presumably as evidence of the managerial or executive decisions made by the beneficiary. The AAO notes that 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). Because the contract was entered into in May 2005, approximately six months after the filing of the immigrant petition, it will not be considered herein.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner established the existence of a qualifying relationship as required in section 203(b)(1)(C) of the Act. In his May 5, 2005 letter, counsel identified a parent-subsidiary relationship between the foreign and United States entities, stating that the foreign company owned 51 percent of the petitioner's 100 shares of authorized stock. As evidence, the petitioner provided two stock certificates naming the foreign entity and the beneficiary as owners of 51 and 49 shares of stock, respectively. The AAO notes inconsistencies, however, in the claimed stock ownership. IRS Form 2553, Election by a Small Business Corporation, and Schedule E of the petitioner's year 2003 and 2004 IRS Form 1120 identify the beneficiary as the owner of 100 shares of the petitioner's stock. In other words, the beneficiary has been named on corporate documentation as the sole shareholder of the petitioning organization. The petitioner failed to complete Schedule K of the same tax returns, which would further identify ownership interests in the corporation. An additional inconsistency exists on stock certificate number one belonging to the beneficiary. Information contained on the stock certificate indicates that on March 11, 2003, the beneficiary's ownership interest was transferred to the petitioning entity. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without clarification from the petitioner regarding the true ownership interests in the petitioning entity, the AAO cannot conclude that a qualifying relationship exists between the foreign and United States organizations. As a result, the petition will be denied for this additional reason.

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).

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.