



U.S. Citizenship
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FILE: [Redacted]
EAC 02 196 51908

Office: VERMONT SERVICE CENTER

Date: DEC 22 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:



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, California Service Center. The matter subsequently came before the Administrative Appeals Office (AAO) on appeal. The AAO determined that the appeal was untimely filed and rejected the appeal. The matter is now before the AAO on motion to reopen and reconsider. The AAO will grant the petitioner's motion.¹ A comprehensive review of the petitioner's record of proceeding indicates that approval of the petition is not warranted. Accordingly, the appeal will be dismissed.

The petitioner is a Virginia corporation that seeks to employ the beneficiary as an innkeeper. 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 the United States in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusion 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.

¹ In the decision rejecting the appeal, the AAO determined that the appeal was received on August 29, 2003, which would have been 37 days after the denial was issued. However, a review of the date stamp on the Form I-290B shows that the appeal was received on August 25, 2003, which is within the 33-day time limit.

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 May 10, 2002 claiming that the beneficiary currently performs and would continue to perform the duties of a function manager. The letter provided the following description of the duties to be performed by the beneficiary under an approved petition:

Sets budgets and hires personnel. Supervises and coordinates activities of workers in bed and breakfast engaged in providing meals and lodging accommodations for transients and permanent guests. Advertises vacancies and shows and rents rooms. Supervises household employees engaged in such tasks as cleaning rooms, issuing linens, and cooking and serving meals. Plans menus and purchases supplies. Collects rent, pays bills, and posts information in records. Resolves complaints regarding food, accommodations, or service. May participate in hospitality and cooking activities as part of providing unique ambiance and atmosphere. May make minor repairs to building and furnishings. Will negotiate any contracts with outside contractors for major repairs or renovations. Will organize promotional efforts for [i]nns and represents the [i]nns in local cultural and commercial events. Will meet with local university staff to advise them of availability of [the] inn to alumni visitors. Reports only generally to [the] CEO and will exercise daily discretion in management and operation of the [i]nns [footnote omitted.]

The petitioner further explained that the beneficiary takes part in the cooking and hospitality activities for the purpose of providing the patrons of the inn with an authentic bed and breakfast experience.

On January 13, 2003, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a comprehensive description of the beneficiary's proposed job duties explaining how such duties fall under the category of managerial or executive capacity. The petitioner was also asked to describe its organizational structure in order to clarify the beneficiary's position within the hierarchy.

The petitioner responded with a letter dated April 9, 2003, which contained the following description of the beneficiary's proposed duties:

1. Manage the implementation and maintenance of a computer-based reservations system for guest reservations and billing, to include the following components: (a) printed brochures; (b) internet website; (c) listing on regional, national and international web directories, both fee paid and free; (d) 24-hour telephone answering of reservations line; (e) capability of online reservations.
2. Manage the design and takes responsibility for the arrangement of the furnishing of each component of the [i]nn
3. Contract with outside contract help for the maintenance and housekeeping functions of the [i]nn[.]
4. Assures [sic] that the [i]nn keeps accurate financial records of the income and expenditures, using computer[-]based programs for such[.]
5. Maintain business checking and other financial accounts
6. Arrange for credit card service . . . ; monitor credit card receipts and deposits into [the] [i]nn bank accounts.

7. Acts [sic] as host to [i]nn guests whenever possible, greeting them, showing them their accommodations, familiarizing them with the offerings of the [i]nn and with local possibilities . . . preparing breakfast
8. Manages [sic] over \$100,000 in renovation, furnishing and marketing of additional acquisitions of [the petitioner] in its hospitality ventures
9. Insure that the [i]nn and all other buildings meet local construction, health and safety codes; maintain positive relations with appropriate building and health inspectors who manage these functions.
10. Assist in the short and long range planning of [the petitioner's] hospitality ventures
11. Manages [sic] purchase of supplies, furnishings and equipment for the [i]nn and extended stay operations[.]
12. Maintain the buildings and their furnishings in excellent state of repair and readiness[.]
13. Coordinates [sic] accounts receivable and payable related to [the] [i]nn functions[.]
14. On a monthly basis, complete reports . . . showing taxable sales and remit amount due to appropriate offices.
15. Maintain membership in the Bed and Breakfast Association of Virginia and, as appropriate, other regional or national innkeeper organizations; represent [the petitioner] at meetings and conventions held by these organizations.

The petitioner again stressed that the beneficiary does not manage personnel but rather is a function manager whose functions include managing properties acquired by the petitioning organization. The petitioner claimed that 90% of the beneficiary's duties are of a qualifying nature and provided the following percentage breakdown of the beneficiary's responsibilities:

Sets budgets, hires[,] [and] reviews performance of independent contractors. 10%

Manages accommodations [sic] related activities. 10%

Manages the computer reservation system. 10%

Manages and coordinates on an ongoing basis interior and exterior inn design including renovations[.] 25%

Plans and manages all purchasing activities[.] 10%

Prepares and serves breakfast for guests . . . explaining the history of the [i]nn, the attractions of the town in which it is located, etc. 10%

Plans and manages customer service functions[.] 10%

Negotiates contracts with outside contractors[.] 5%

Plans and manages promotional and public relations activities[.] 10%

On July 23, 2003 the director denied the petition addressing each of the above listed duties. The director concluded that such duties do not fall under the definition of managerial capacity as claimed.

On appeal, the petitioner asserts that according to a questionnaire developed by the U.S. Department of Agriculture, the duties of innkeeper are managerial in nature. Again, however, there is no indication that the questionnaire was developed with any consideration for the statutory definition of managerial capacity as defined by section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). While the position within an organizational hierarchy is clearly important, a petitioner must establish that the beneficiary would primarily perform qualifying managerial or executive duties. 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). In the instant matter, the petitioner refers to a questionnaire, which strongly suggests that an innkeeper would be expected to carry out all necessary duties without any consideration for the distinction between daily operational tasks, which would be considered nonqualifying, and those duties that fall within the statutory definition of managerial capacity.

The petitioner similarly refers to the U.S. Department of Labor's definition of a boarding house manager claiming that an innkeeper is defined as a manager by yet another U.S. agency. However, there is no indication that the term manager has a uniform definition in every title of the U.S. code or that any deference is given to the definition found in section 101(a)(44)(A) of the Act. The fact that a boarding house manager is expected to supervise nonmanagerial, nonsupervisory, and nonprofessional personnel and perform daily operational tasks including planning menus, purchasing supplies, and resolving customer complaints strongly suggests that a boarding house manager, regardless of the managerial position title, would not fit the statutory definition of managerial capacity. As such, the petitioner's argument is without merit.

Next, the petitioner refers to the beneficiary's duties of interacting with guests of the inn claiming that such interaction requires discretion and extensive knowledge of the area where the inn is located. However, even a beneficiary that has a heightened degree of discretionary authority and extensive knowledge of the petitioner's product or service may not be employed in a managerial capacity if the duties of that beneficiary are not primarily of a qualifying nature.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner claims that the director focused on the abbreviated list of responsibilities that were accompanied by percentage breakdowns without giving due consideration to the comprehensive description, which provides a thorough explanation to each of the abbreviated responsibilities. The petitioner then goes on to discuss the comprehensive description justifying the beneficiary's need to perform certain nonqualifying tasks. However, regardless of the particular nuances of the hospitality industry and the particular needs of the petitioner's inn, precedent case law has firmly established that 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. at 604. Therefore, regardless of whether the beneficiary's daily nonqualifying tasks are essential to the inn's operation, and no matter how complex or highly specialized those nonqualifying tasks may be, if the beneficiary's time is not primarily spent managing (rather than performing) an essential function or managing a managerial, supervisory, or professional staff that individual cannot be deemed a managerial employee. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

In response to the director's RFE, the petitioner stated that the beneficiary would act as a function manager, thereby managing a function rather than personnel. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As consistently restated throughout this proceeding, 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).

Based on the petitioner's description of the beneficiary's duties, the beneficiary will perform all necessary bookkeeping duties, interact with the inn's guests providing them with necessary tourist information, check the building for health and safety requirements, make necessary purchases for supplies, furniture, and equipment, and maintain the computer-based guest reservation system. Regardless of their significance to the petitioner's daily operation, these duties are not of a qualifying nature.

The petitioner also indicated in its response to the RFE that the petitioner contracts outside help to assist with maintenance and housekeeping duties. However, the record lacks evidence, such as pay records or 1099 tax forms to establish that the contracted employees had been hired. Moreover, even if such documentation were submitted to support the petitioner's claim, there is no indication that the beneficiary oversees a staff that is comprised of supervisory, professional, or managerial employees. As such, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial or executive capacity.

Additionally, though not directly addressed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires that the petitioner establish that the beneficiary was employed abroad in a qualifying capacity for at least one out of the three years prior to his nonimmigrant entry to the United States.

In the instant matter, the petitioner claims that the beneficiary's primary responsibility during his employment abroad was managing boarding schools. Much like the beneficiary's duties associated with running the petitioner's inn in the United States, his duties associated with managing boarding schools are not primarily of a qualifying managerial or executive nature. Regardless of the high caliber of attendants at the schools managed by the beneficiary, the beneficiary's tasks included making travel and hospitality arrangements for the school's visitors, as well as providing them with entertainment, meals, and arranging for their sightseeing. While these tasks may have been essential for the schools' ongoing operation, they cannot be deemed qualifying, nor could the

petitioner claim that the beneficiary managed these functions, which he clearly performed himself. As such, the petitioner failed to meet the requirement discussed in 8 C.F.R. § 204.5(j)(3)(i)(B).

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 deficiency discussed 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.