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FILE:

[Redacted]
EAC 03 252 51264

Office: VERMONT SERVICE CENTER

Date: JUN 01 2005

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)

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, 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 operating as an oriental rug dealer. It seeks to employ the beneficiary as its vice president of product development. 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 the following description of the duties to be performed by the beneficiary under an approved petition:

[The beneficiary] will develop a business and marketing plan that will increase the product line that we can offer in the United States. With this extensive knowledge and ability to accurately and economically source products, we believe that we can develop additional product lines so as to access additional price levels in the carpet business. [The beneficiary] will establish and manage the entire department for product development, including the hiring of designers, buyers and marketing personnel. [H]e will establish and maintain contacts with manufacturers in Asia, and direct our buyer's activities in those areas. In sum, he is expected to create and manage the department that will be the basis of the future growth and development of [the petitioner].

On January 14, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a detailed description of the beneficiary's proposed duties in the United States, including an hourly breakdown of time the beneficiary would spend performing each duty.

The petitioner responded with a letter dated April 6, 2004 stating that it is impossible to provide an hourly breakdown of the beneficiary's proposed duties. Instead, the petitioner provided the following description:

It is [the beneficiary's] job to develop, with the assistance of a [m]arket [r]esearch [a]nalyst, who is already employed by this organization, a marketing plan that will increase the product line and market in the U.S. [The beneficiary] with his 35 years of experience has a unique ability to plan the design and to source oriental carpets, which are unique to the industry. He does this work by directing the activities of subordinate personnel. His workweek will consist of supervising the work of our [m]arket research [a]nalyst [redacted] . . . ; supervising the work of [redacted] [o]ffice [m]anager (Both [redacted] and [redacted] hold Bachelor's degrees). He will also supervise the work of [redacted] [w]arehouse [m]anager, who himself supervises the work of two other individuals. [The beneficiary] will continue to maintain contacts with executives and manufacturers in Asia. He will continue in his managerial capacity to negotiate contracts for those products which are designed with the assistance of personnel, both in the U.S. and Germany. I would summarize his workweek by saying that he is an executive and a manager who will supervise the work of three managers in our organization. He will work with the [p]resident . . . in the creation of the business plan, marketing plan and financial plan to create and have manufactured exclusively for us, unique oriental carpets for the U.S. market. Again, whether [the beneficiary] works 40, 50, or 60 hours per week, approximately 100% of his time is engaged in managerial activities. His activities will meet the definition for performing in a managerial or executive capacity He directs the management of a major component of our organization; he participates in establishing the goals of the organizations and exercises wide latitude in decision making.

The petitioner also submitted an organizational chart and various tax forms. The organizational chart is consistent with the description of the beneficiary's duties, illustrating a hierarchy in which the beneficiary would directly supervise three individuals and be subordinate to the position of president. The petitioner's tax documentation consists of W-2 wage and tax statements, issued by the petitioner in 2002 and 2003, as well as Forms 941 for the first, third, and fourth quarters of 2003. It is noted that two of the individuals who received W-2 wage and tax statements from the petitioner were not named on the petitioner's organizational chart. As such, their duties and positions within the petitioner's organizational hierarchy are unknown.

On June 14, 2004, the director denied the petition noting that the petitioner failed to specify which of the beneficiary's duties are of a managerial capacity and which are of an executive capacity. The director concluded that the petitioner's description of the beneficiary's duties lacked sufficient detail to adequately convey an understanding of what the beneficiary would be doing on a daily basis.

On appeal, counsel explains the discrepancy between the number of employees initially indicated in the petition and the employees listed in the petitioner's Forms 941, stating that the petitioner's staffing varies from one week to another.

Counsel disputes the director's finding that the beneficiary would not manage professional employees and refers to the petitioner's response to the RFE, which indicates that the beneficiary would supervise one manager and two professional employees. A review of the petitioner's organizational chart shows that one of the beneficiary's subordinates would be a warehouse manager who has two subordinates. The chart also indicates that the beneficiary would supervise a market research analyst whose duties and educational level suggest that this is a professional level employee. *See* section 101(a)(32) of the Act and 8 C.F.R. § 204.5(k)(2). However, contrary to the inference of the office manager's position title and educational level, the duties assigned to this individual do not suggest that she is either a managerial or professional employee. Furthermore, while the office manager may be assisting the beneficiary, the brief description of her duties suggest that she would assist the petitioner's entire operation with the daily mundane office tasks, rather than specifically assisting the beneficiary in his particular role as vice president. Thus, based on the evidence of record, the beneficiary's direct subordinates would consist of one managerial employee and one professional employee. However, Citizenship and Immigration Services (CIS) cannot assume that the beneficiary would primarily perform qualifying duties based on the fact that the beneficiary's two subordinates are managerial and/or professional.

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). 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 would 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). In the instant case the petitioner repeatedly states that the beneficiary's time would be spent supervising managerial and professional employees. However, the petitioner failed to disclose the specific duties that would be involved in supervising two employees. Although the petitioner stated that the beneficiary would negotiate contracts, it provided no information as to the types of contracts, the frequency of the negotiations, and the significance of contract negotiation in the context of the petitioner's organization. As such, the AAO cannot determine with any degree of certainty that the beneficiary is not actually engaged in performing the petitioner's essential tasks.

The petitioner also failed to establish that contract negotiation is a qualifying task. This factor is crucial, as 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). As the petitioner failed to specify how much of the beneficiary's time would be spent performing this potentially non-qualifying task, the AAO cannot affirmatively determine that the beneficiary would primarily perform qualifying duties regardless of the petitioner's repeated affirmations. Furthermore, 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. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In the instant matter, the petitioner consistently uses the terms "managerial" and "executive" interchangeably without acknowledging the significant differences between the two terms and without specifying whether the beneficiary would be employed in a managerial capacity, an executive capacity, or both.

Counsel vehemently objects to the director's comment, which assumes that the beneficiary would be fulfilling the petitioner's sales-related needs. In support of his objection, counsel makes a noteworthy point stating that the beneficiary is not currently working for the petitioner, which suggests that the sales function has been and would continue to be carried out by someone other than the beneficiary. However, despite counsel's logical reasoning, the petitioner has failed to disclose and submit evidence to indicate who within the petitioner's organizational hierarchy has been performing the essential sales function, which has not been attributed to any of the employees listed in the petitioner's current organizational chart. It is noted that 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 cannot assume that the beneficiary would refrain from performing the sales function merely based on counsel's logical explanation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without a specific explanation of the contract negotiating duty, which has been attributed to the beneficiary's position, and evidence as to who is performing the petitioner's sales function, the possibility remains that the beneficiary himself would be directly involved in this non-qualifying duty. Based on the evidence furnished, it cannot be found that the beneficiary would be employed in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that it has a qualifying relationship with a foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the instant matter, the petitioner has submitted evidence that ownership of the beneficiary's foreign employer is broken down as follows:

- [REDACTED] 30%
- [REDACTED] 10%
- [REDACTED] 10%
- [REDACTED] beneficiary) 10%
- [REDACTED] 17.5%
- [REDACTED] 17.5%
- [REDACTED]

The petitioner also provided its certificate of incorporation indicating that it has authorized the issuance of 200 shares of its stock. The petitioner provided the following copies of stock certificates explaining the distribution of its issued shares:

- [REDACTED] 32 shares (16%)
- [REDACTED] 10 shares (5%)
- [REDACTED] 16 shares (8%)
- [REDACTED] 0 shares (5%)
- [REDACTED] 25 shares (12.5%)
- [REDACTED] 32 shares (16%)

The petitioner submitted a copy of a voting proxy dated August 22, 2003 indicating that the voting rights belonging to [REDACTED] as a result of her ownership interest in Pasand, Inc. would be passed to [REDACTED]. However, [REDACTED] is not included in the above list of shareholders, as that exact name does not appear on any of the submitted stock certificates. The petitioner further contributes to the confusion by providing an additional statement dated August 15, 2003 from an account for the Corell Corporation, which indicates that stock certificate No. 1 has been cancelled and in its place stock certificate No. 2 has been issued to [REDACTED] for five shares. A subsequent letter from an accountant for the Pasand Realty Corporation, dated August 21, 2003, states that stock certificate No. 2 has been voided and stock certificate No. 1 has been issued to [REDACTED] for five shares and stock certificate No. 3 has been issued to [REDACTED] for five shares. As the petitioner did not submit copies of these companies' records or the newly issued stock certificates, however, the AAO cannot confirm the claimed ownership and control of the Corell Corporation or the Pasand Realty Corporation.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the instant matter, the petitioner and the beneficiary's foreign employer are owned by different parties. While the petitioner is owned by a combination of companies and individuals, the foreign entity is owned only by individuals. Based on the evidence submitted, the AAO cannot determine that the U.S. and foreign entities are similarly owned and controlled.

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 ground discussed in the above paragraphs, this petition cannot be approved.

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.