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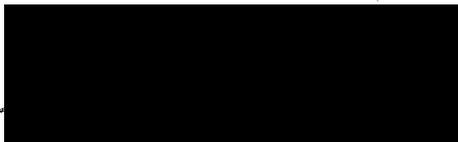
U.S. Department of Homeland Security  
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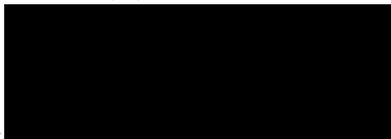
Office: VERMONT SERVICE CENTER

Date: JUN 01 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, 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 Jersey corporation engaged in the import, export, and distribution of scanners and computer parts. 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 conclusion and submits documentation 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 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 issue in this proceeding is whether the beneficiary would be employed in a 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) 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 beneficiary's employment verification, which contained the following description of the job duties to be performed by the beneficiary under an approved petition:

As managing director [the beneficiary] is responsible for developing and instituting corporate [o]perational policies including, long and short-term goals, financial forecasting, [and] evaluation criteria. [The beneficiary is a]lso in charge of developing international market penetration strategy, allotment of corporate resources for overseas operations and establishing the integrated distribution policy for domestic and international markets.

[The beneficiary's] responsibilities also include[] evaluating and reviewing the performance of all departments, including, [sic] production, marketing, administrative,

(finance) and [r]esearch and development and instituting any necessary changes to meet the established goals and guidelines.

The employment verification also indicated that the beneficiary's salary would be \$60,000 per year plus stock options. Additionally, the petitioner submitted two organizational charts dated October 24, 2002 illustrating the organizational structures of the foreign and U.S. entities. The foreign entity's organizational chart contained the name of the company's president and the beneficiary as the managing director, a position that is directly subordinate to the president. Although the chart indicated that the company also had administrative, sales, production, and other staff members, none of the staff were specifically identified by name and position title. The petitioner's organizational chart named the beneficiary as the company president and listed the following four departments: administration and accounting, sales and marketing, import and export, and the customer service department. The petitioner did not specifically identify any of its employees by name or position title. The petitioner submitted the beneficiary's tax return and wage statement for 2001 showing earnings of \$48,000, as well as its own 2001 tax return showing \$32,400 paid in officer compensation and no money paid in salaries and wages.

On July 9, 2003, the director issued a request for additional evidence noting various discrepancies between the petitioner's claim regarding its ownership and the information provided in its 2001 tax return regarding the same issue. The petitioner was instructed to submit all W-2 wage and tax statements it issued in 2001 and 2002, as well as its two most recently filed quarterly tax returns. The petitioner was also asked to provide the names, job titles, and brief job descriptions of its employees. The director stated further that the evidence of record suggests that the beneficiary would be "primarily handling uncomplicated paperwork" rather than primarily performing qualifying tasks. The petitioner was asked to comment on the director's observation.

In response, the petitioner submitted a 2001 W-2 statement for [REDACTED] showing gross earnings of \$32,400 and a 1042-S statement showing the beneficiary's 2001 gross earnings of \$39,000. The petitioner also submitted a letter dated September 26, 2003 providing the position titles, educational levels, and names of the petitioner's four employees, including the beneficiary. The petitioner provided a job description only for the beneficiary, not for any of its other claimed employees. The petitioner also provided the following description of the beneficiary's job duties:

The beneficiary is responsible for contract negotiations, primarily with the United State[s] Government Immigration Service and the Defense [D]epartment as well as other governmental agencies and other major suppliers or users in the field to whom he is supplying specialized scanners. He sets policy for the company including whom we will not supply with specialized scanners. He makes all executive determinations and keeps the parent company in Korea apprised of all developments in the field top [sic] enable them to improve the engineering of the product.

The petitioner also submitted a letter dated September 23, 2003 from its accountant. The accountant explained the discrepancies in the petitioner's 2001 tax return, which accounted for a one-year time period from July 1, 2001 to June 30, 2002. He stated that Schedule E of the tax return erroneously indicated that the beneficiary owned 20% of the petitioner's stock and that the beneficiary's 40% ownership share would be reflected in future tax returns. The accountant also stated that [REDACTED] was shown in Schedule E erroneously and that the beneficiary's \$37,000 compensation, which should have appeared in Schedule E, was included somewhere else in the tax return. The accountant did not specify where in the tax return she

accounted for the \$37,000. The accountant further explained that the petitioner's corporate tax return addresses a different period of time than personal tax returns and wage statements and suggested that this difference in reporting periods may account for certain discrepancies in compensation.

On December 17, 2003, the director denied the petition concluding that the evidence of record does not establish that the beneficiary would be employed in a qualifying capacity. The director cited the various discrepancies regarding the ownership of the petitioning entity and pointed out that the beneficiary's Form 1042-S wage statement for 2001 appears to have been altered. The director also noted the petitioner's failure to submit W-2 wage and tax statements for all but one of its employees. The director stated that the accountant, in his attempt to explain the various mistakes made in the petitioner's 2001 tax return, made an additional error by stating that the beneficiary was shown as a 20% shareholder of the petitioning entity. The director questioned the accuracy of the remaining information in the petitioner's 2001 tax return in light of the numerous mistakes made by the accountant in the initial filing of the tax return and subsequently in explaining those mistakes.

On appeal, counsel states that the director's decision is incorrect and submits a statement from the beneficiary's foreign employer in support of the prior claim that the beneficiary owns 40% of the petitioner's stock. The petitioner also submitted a letter from the petitioner's accountant claiming that the 2001 Form 1042-S showing the beneficiary's earnings of \$39,000 was incorrect and states that the beneficiary's true gross earnings for 2001 were \$48,000. The Form 1042-S reflecting the amended gross earnings was submitted. However, the accountant did not explain why this significant error occurred or why the initial Form 1042-S appeared to have been altered. The petitioner also submitted what appears to be the Internal Revenue Service's (IRS) copy of the beneficiary's filed tax return showing the beneficiary's gross earnings as \$48,000. However, the IRS did not indicate which year is reflected in the tax filing. Finally, the petitioner submitted an amended tax return showing changes made to its total income claimed for the 2001 tax year. The petitioner provided no additional information regarding the beneficiary's duties or the duties of its support staff, which is purportedly comprised of three to four other individuals.

Upon review, the evidence of record does not establish that the beneficiary would be employed in a managerial or executive capacity. 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 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). The petitioner has failed to specify what actual duties the beneficiary would perform and what duties the purported support staff would perform in an effort to relieve the beneficiary of having to perform non-qualifying duties. The petitioner's only submitted tax return is replete with errors and discrepancies regarding the petitioner's ownership and salaries the petitioner paid to its employees. 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). Furthermore, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In the instant case, the petitioner submitted a written explanation from its accountant in an effort to reconcile the conflicting information

submitted in its tax return. However, the explanation failed to specify where in the tax return the petitioner accounted for all of the salaries of its claimed employees and made additional errors, which had not previously appeared in the original tax return. Although the petitioner claimed to have a total of four employees in its initial I-140 petition and claimed to have five employees in the supporting organizational chart, the petitioner only submitted wage statements for two employees—the beneficiary and one other employee. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the record as presently constituted contains documented proof for only two employees and fails to provide adequate descriptions of their duties. As such, the AAO cannot affirmatively determine that the beneficiary would primarily perform managerial or executive duties. For this reason, this petition cannot be approved.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states the following in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant case, the petitioner has submitted conflicting evidence regarding the beneficiary's actual salary for the year prior to filing the I-140 petition. However, even if the AAO were to assume that the beneficiary got paid \$48,000 as claimed in his tax return and in the corresponding Form 1042-S, the petitioner indicated that the beneficiary would be paid \$60,000 per year. The petitioner has submitted no documentary evidence in the form of its recent quarterly tax returns or the beneficiary's actual W-2 statement for 2002 to suggest that it has the ability to pay the beneficiary's proffered wage, which is significantly higher than the wage it paid the beneficiary in 2001.

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 paragraphs above, 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.