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U.S. Citizenship
and Immigration
Services

B4

[Redacted]

FILE: [Redacted]
LIN 03 148 51390

Office: NEBRASKA SERVICE CENTER

Date: JUN 18 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Wisconsin corporation operating as a retailer of food, general merchandise, and sundry items. 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 denied the petition based on the determination that the petitioner has not (1) established that the beneficiary would be employed in a managerial or executive capacity and (2) established a continued ability to pay the beneficiary's proffered wage.

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 first issue in this proceeding is whether the beneficiary would be employed 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 stated that the beneficiary's duties include directing the management of daily operations, financial policy and growth strategy, managing outsourced professional services, and hiring employees. The petitioner also submitted an organizational chart showing the beneficiary at the top of the petitioner's hierarchy. The beneficiary's subordinates include two managers. However, the chart indicates that only one of the managerial positions was filled at the time the petition was filed. The chart shows two clerical workers at the bottom of the organizational hierarchy. However, only one name appears in the position of clerical staff. The chart also indicates that the petitioner intends to hire a subordinate staff to be supervised by the manager who will eventually be hired. Additional documentation also included the petitioner's quarterly tax returns for the first three quarters of 2002 as well as the first two pages of the petitioner's tax return for 2002.

On August 12, 2003, the director issued a request for additional evidence instructing the petitioner to submit a statement from an authorized official of the petitioner describing the beneficiary's intended employment in the United States. The petitioner was instructed to include the beneficiary's specific job duties and the job duties of the beneficiary's subordinates.

In response, the petitioner submitted the following description of the beneficiary's duties:

From the date of acquisition to the present, the transferee has devoted himself to overall direction of the company operations as follows: Interviewing and hiring of staff including managers, their training and development. Supervision of the retail operations managers in the exercise of his overall management and supervisory duties in the day[-]to[-]day operations of the business. This takes about 30% of [the beneficiary's] time. Additionally, to the present, [the beneficiary] reviews current vendor agreements and supervises the management of vendor relations for the company including negotiations with new and potential suppliers for the retail operations and the merchandising of new products including financial terms. This takes about 30% of [the beneficiary's] time.

Seeking to leverage current retail operations [the beneficiary] spends about 30% of his time reviewing additional growth, expansion and acquisition opportunities available to petitioner, including other convenience store retail operations, visiting the business premises, performing due diligence and otherwise fully reviewing and analyzing the financial, operational, locational, and other issues related to acquisitions.

[The beneficiary] spends about 10% of his time managing the services of the company's outsourced legal, accounting and IT professionals coordinating and managing their services with regards to current business operations and with regards to consultation regarding future business acquisitions[.]

In summary[, the beneficiary] directs the overall operations and sets the policy growth and financial objectives of [the] Petitioner. [The beneficiary] has overall supervision of the store managers in the conduct of their duties. [He] hires, trains and supervises staff as necessary, particularly the managers in the exercise of his duties including the manager's handling of vendor, customer and employee relations to insure operations continue to grow in goodwill, sales and profitability.

The petitioner also submitted an updated organizational chart showing that the managerial position that had been previously open was now filled, and that the clerical personnel consisted of three individuals. The petitioner also submitted documentary evidence in the form of quarterly wage statements for the last quarter of 2002 and for the first three quarters of 2003. Each quarterly return was accompanied by the list of employees that were employed by the petitioner during that quarter. It is noted that in the second quarter, during which the instant petition was filed, the petitioner listed the beneficiary and two other individuals, both of whom are identified as the managers on the petitioner's organizational chart. The quarterly salaries of the managers \$1,650 and \$2,520, respectively. Based on the salaries of the two store managers, it appears that at least one and possibly both subordinates were only employed on a part-time basis at the time the petition was filed.

On December 16, 2003, the director denied the petition basing the denial, in part, on the petitioner's inability to establish that the beneficiary would be employed in a qualifying capacity. The director noted that only one of the submitted quarter tax returns indicates that the petitioner had any employees and further stated that the petitioner's third quarterly tax return for 2003 does not show any employees at all. While the director is correct in pointing out that item No. 1 on each of the quarterly tax returns for the second and third quarters of 2003 and the last quarter of 2002 indicates that the petitioner had zero employees, a review of the attachments of each quarterly return clearly names the employees who worked for the petitioner during each quarter. Therefore, the director's observation in this regard was incorrect and will be withdrawn. The director's comments do, however, properly imply that the petitioner's quarterly wage statement filed during the same quarter as the petition suggests that the store's clerical personnel, as indicated in the organizational chart, were hired after the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, the only staff working for the petitioner at the time the petition was filed included the beneficiary and what appears to be two part-time store managers. In light of this account, the director properly questioned the abilities of the beneficiary's subordinates to support a managerial or executive position and to relieve the beneficiary from having to primarily perform the petitioner's daily operational tasks.

On appeal, counsel challenges the director's observation in regard to the number of employees the petitioner accounted for in its quarterly tax returns. As the director's comments in this regard have been withdrawn in the above paragraph, this issue need not be further addressed.

Counsel also states that none of the statutes or regulations pertaining to the L visa require that the beneficiary's subordinate managerial positions be of a professional nature. It should be noted that the petitioner in the instant matter has filed an I-140 petition to classify the beneficiary as a permanent resident, not an I-129 petition to classify the beneficiary as an L-1 intracompany transferee. Regardless, counsel is correct in stating that the beneficiary's subordinates do not have to be both professional and managerial. However, the record indicates that, at the time the petition was filed, neither manager had any subordinates and, thus, were not managing or supervising anyone. Therefore, they could not have been considered managerial or supervisory employees.

Pursuant to section 101(a)(32) of the Act that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The petitioner has not submitted sufficient evidence to establish that either of the petitioner's subordinates possessed a baccalaureate degree (or its equivalent) or that the positions actually required such a level of education in order to carry out their duties.

Counsel further focuses on the petitioner's financial growth, which he claims is supported by the growing personnel and the average amount of sales per employee. However, as previously stated, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. Therefore, even if the petitioner were able to show a growth in its business since the date of its inception, CIS must consider the petitioner's stage of development at the time the petition was filed.

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 case the description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary would be doing on a daily basis. 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 indicated that the beneficiary spends 30% of his time on "overall management and supervisory duties." However, the petitioner provides no practical definition for what these vague terms actually mean in the scope of the beneficiary's job. The petitioner also stated that 30% of the beneficiary's time is spent dealing with vendors and suppliers. However, these tasks are part of the petitioner's daily operations and cannot be considered managerial or executive. It is noted 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. 593, 604 (Comm. 1988). Thus, based on the petitioner's account of the beneficiary's duties, at least 60% of the beneficiary's time is either spent performing non-qualifying duties or duties that remain undefined as to their specific nature. Additionally, the petitioner has provided no evidence to establish who was assisting with selling the store's merchandise at the time the petition was filed since the only assistance, aside from the beneficiary, was in the form of two part-time employees.

On review, the record does not establish that a majority of the beneficiary's duties at the time the petition was filed were primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties were the petitioner's daily operational tasks. The petitioner has not demonstrated that the beneficiary has been primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he has been otherwise relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence of record, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties. For this initial reason, this petition cannot be approved.

The other issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage.

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

Ability of prospective employer to pay wage. 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, the petitioner has provided a number of its quarterly tax returns, which include the period during which the petition was filed. These quarterly tax returns indicate that the beneficiary's quarterly earnings totaled \$6,000, which equates to \$24,000 annually. However, in the petition, the petitioner stated that the beneficiary's proffered wage would be \$500 per week. Based on their being 52 weeks in one year, the beneficiary's proffered wage is \$26,000 annually. Thus, based on the documentary evidence submitted, the beneficiary's salary falls \$2,000 short of the proffered wage. Therefore, the AAO concludes that the petitioner has failed to establish its ability to compensate the beneficiary his proffered wage. For this additional reason, this petition cannot be approved.

Beyond the decision of the director, the evidence of record fails to establish that the foreign entity is currently doing business or that the U.S. petitioner had been doing business for one year prior to filing the petition. See 8 C.F.R. § 204.5(j)(2) and (3)(D), respectively.

Pursuant to the regulation at 8 C.F.R. § 204.5(j)(2), "doing business" means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

In the instant matter, both the U.S. and foreign entities are engaged in retail. Accordingly, the petitioner submitted a number of invoices to show that each entity has been doing business. While the evidence clearly establishes that the foreign entity had been engaged in the provision of services in the past, none of the invoices submitted account for any time periods after February of 2002. Therefore, the record lacks evidence to establish that the foreign entity was doing business in April of 2003 when the petition was filed.

In regard to the U.S. entity, the petitioner submitted sales invoices going back to February of 2003. However, since the petition was filed in April of 2003, the petitioner needed to establish that it had been engaged in the regular, systematic, and continuous provision of its retail services since April of 2002. Since the earliest invoice in this case only dates back to two months prior to the filing of the petition, the AAO cannot establish that the petitioner had been doing business for one year prior to filing the petition.

Also beyond the director's decision, the petitioner has submitted inconsistent documentation in regard to its capital funding. The petitioner's Articles of Incorporation, Second Article, states that the petitioner had 9,000 shares of capital stock at two cents per share par value. However, in the petitioner's Subscription Agreement, dated August 8, 2000, the petitioner indicated that the foreign entity paid \$500 for ten shares of the petitioner's common stock. This information is also reflected in the petitioner's stock certificate. According to the Subscription Agreement, the par value of the petitioner's stock would have to be \$50 per share, not the two cents per share, as indicated in the Articles of Incorporation and stock certificate. 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).

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 adverse findings 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.