

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



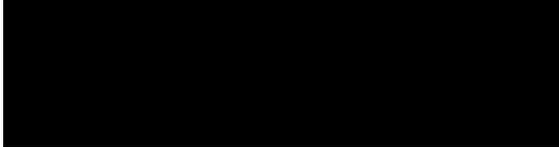
BH

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 14 2005
WAC 03 181 52854

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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in the business of processing, freezing, packaging, distribution and sales of "quick frozen" seafood. It seeks to employ the beneficiary as its operations manager. 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 her 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 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.

The petitioner submitted a description of the beneficiary's proposed duties in support of the petition. As the director has included that description in the denial, the AAO need not repeat it in this decision.

The petitioner also submitted an organizational chart showing the beneficiary as the second from the top of the company's hierarchy. The chart also names an auditor and the employees of three sales brokerage companies as the beneficiary's subordinates.

Upon determining that the petitioner did not submit sufficient evidence to warrant approval of the petition, the director issued a request for additional information (RFE) dated July 2, 2004. The petitioner was instructed to submit its Forms DE-6 for the second, third, and fourth quarters of 2003 and for the first quarter of 2004.

The petitioner complied with the director's request submitting all of the requested quarterly tax returns. As noted by the director, the petitioner's quarterly tax return for the second quarter of 2003, the quarter during

which the petition was filed, names two employees—the beneficiary and the individual named in the organizational chart as the petitioner's auditor.¹ In a written statement dated September 21, 2004, the petitioner stated that the beneficiary has the discretionary authority to hire and fire employees and assign tasks. The petitioner also submitted evidence of broker agreements it signed with various brokers to promote and sell the petitioner's food products. The petitioner claimed that the beneficiary oversees the work of the employees who actually work for the food brokers.

On October 7, 2004, the director denied the petition concluding that the petitioner's organizational structure suggests that the petitioner lacks the "adequate operational support" to relieve the beneficiary from having to carry out the petitioner's daily operational tasks.

On appeal, counsel states that the denial was erroneous and submits a number of exhibits in support of the appeal. Among the documents submitted was a letter from the petitioner dated November 3, 2004 in which the petitioner states that the beneficiary is employed in a managerial and executive capacity. The petitioner claims that the beneficiary "manages the distribution of more than **\$5 million** of goods through a network of professional individuals." (Emphasis in original.) The petitioner further states that it has outsourced most of its daily operational tasks to the brokers who sell its food products and submits the quarterly tax returns of one of the brokers.

The petitioner's claim, however, is not persuasive. While the petitioner claims that it has outsourced the sales duties to food broker companies, the documentation on record merely shows that agreements between the petitioner and various food brokers actually exist. There is no evidence, however, that such companies have acted on the agreement or received payment for any services rendered. The AAO acknowledges the petitioner's submission of a letter dated September 21, 2004 from one of the petitioner's alleged food brokers. However, the letter is merely a third party's claim and, like any claim made by the petitioner, must be corroborated by supporting documentary evidence in order to meet the burden of proof in these proceedings. See *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 claim, in and of itself, cannot be deemed evidence. The petitioner also submitted the DE-6 forms of a company that was hired to sell the petitioner's food products. However, these documents merely show who was working for the company and how much they were paid. They do not corroborate the petitioner's claim that the company actually provided its sales services to the petitioner. More importantly, the DE-6 forms do not assist the petitioner in establishing that the beneficiary was relieved from having to perform the petitioner's daily operational tasks.

Furthermore, even if the AAO were to acquiesce to the petitioner's claim that various food brokerage companies were actually performing the petitioner's daily sales tasks, the petitioner has provided no evidence to suggest who completes the remaining daily operational tasks and what specific tasks are carried out by the beneficiary himself. Specifics are clearly an important indication of whether a beneficiary's duties are

¹ It appears that the petitioner's auditor was approved as a multinational executive or manager under the Act and has since adjusted status to that of a U.S. permanent resident. Thus, the petitioner's only other employee either appears to be serving as an executive or manager and not as an auditor, subordinate to the beneficiary, as claimed by the petitioner, or the immigrant petition filed on his behalf was approved in error. In either case, these inconsistencies raise doubts as to the truth of the petitioner's claims in this matter. 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).

primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, evidence that one of the petitioner's brokers paid commission to a third party carries no evidentiary weight in this proceeding, as it does not establish that the payment in any way stemmed from work performed on behalf of the petitioner.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Merely claiming that the beneficiary refrains from performing certain tasks does not reveal the specific tasks that the beneficiary purportedly performs 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. at 1108, *aff'd*, 905 F.2d 41.

The petitioner attempts to provide a more detailed description of duties by submitting a breakdown of time the beneficiary spends on various responsibilities. Based on the petitioner's percentage breakdown, the beneficiary spends 25% of his time on market analysis; 15% on supply negotiations with vendors and overseas partners; and 10% "overseeing the development of publicity for the seafood industry" and promoting the petitioner's products at trade shows, none of which can be deemed qualifying. Thus, the beneficiary would spend at least 50% of his time performing nonqualifying duties. 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). The remaining 50% of the beneficiary's time would be spent directing the petitioner's sales brokers, evaluating new projects, "overseeing the company's network" to ensure compliance with the Food and Drug Administration's requirements, and 5% overseeing the company's finances. While these responsibilities suggest that the beneficiary has been imparted with broad discretionary authority, the petitioner failed to identify the actual duties that are associated with this broad list of responsibilities. Thus, the AAO is unclear as to the duties that are involved in evaluating new projects, overseeing the company's network, and overseeing its finances.

Furthermore, as the petitioner claims that the beneficiary assumes executive *and* managerial roles, it must then establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. In the instant matter, the petitioner fails to acknowledge the two terms as separate and distinct from one another and provides no explanation as to the beneficiary's specific job characteristics that would qualify him under the definitions of managerial and/or executive capacity.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization or supervising a subordinate staff of professional, managerial, or supervisory personnel. Nor does the record suggest that the petitioner has attained a level of organizational complexity wherein the beneficiary would be relieved from having to perform the petitioner's daily operational tasks and would instead focus on the

hiring/firing of personnel, discretionary decision-making, and setting company goals and policies. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily 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 the petitioner had been doing business for one year prior to filing the instant petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states that 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, the petitioner submitted various invoices that reflect transactions that took place in 2004 after the petition was filed. However, 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). The record as presently constituted does not establish that the petitioner was engaged in the regular, systematic, and continuous provision of goods for the requisite period of time prior to filing the petition.

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 information discussed 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.