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U.S. Citizenship
and Immigration
Services

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BY

JUN 20 2005

FILE:



Office: VERMONT SERVICE CENTER

Date:

EAC 03 24252716

IN RE:

Petitioner:

Beneficiary



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 Director, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of New Jersey in May 1990. Its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, identify it as a holding company. The petitioner avers it operates a restaurant/health club/entertainment center. It seeks to employ the beneficiary as its manager of business and administration. 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 petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the director's decision is contrary to the extensive evidence that was submitted in support of the petition. Counsel also lists the position titles of the beneficiary's claimed subordinates on appeal.

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 a July 27, 2003 letter appended to the petition, the petitioner stated that the beneficiary would: "[oversee], through the administration and supervision of a [sic] subordinate department assistant managers and other administrative and managerial level staff, all aspects of the business and financially related day-to-day business operations as well as related budgetary matters." The petitioner added that the beneficiary would also make decisions on personnel matters and financial and budgetary matters concerning company advertising, marketing, sales, and other promotional activities and would set and establish short term and long term corporate and department goals, policies, and objectives.

The petitioner also noted that the beneficiary would be involved in: corporate planning by analyzing the company's financial and budgetary position; general administration by overseeing financial operations of each department; business development by planning and working with other department managers to expand the company; marketing and sales by setting guidelines, recommending marketing and advertising policies, and analyzing the cost/benefit of advertising, marketing, and other promotional activities; overseeing purchases of goods, materials, inventory, and supplies by the company's various departments; and, overseeing personnel, including hiring and appointing managerial, administrative, and other staff of the company's various departments.

The petitioner provided an organizational chart for the Palisadium Restaurant showing a vice-president, general manager, and assistant general manager on successive tiers below the president. The petitioner depicted three departments (the operations/administration department, the restaurant department, and the banquet/catering department) directly below the assistant general manager. The beneficiary was depicted in the position of department manager of the operations/administration department. The organizational chart noted that assistant department managers and department administrative and operations staff fell below the beneficiary's position, but did not provide the number, position, or identity of the beneficiary's subordinates.

On March 17, 2004, the director requested additional evidence to show that the beneficiary had been and would be engaged in a primarily managerial or executive position. The director specifically requested the petitioner's organizational chart identifying all management and executive positions in the United States as well as their subordinates. The director also requested the minimum education requirements, if any, of the positions under the beneficiary's control and how the education requirements related to the beneficiary's subordinates' duties. The director further requested the petitioner's IRS Forms 941, Employer's Quarterly Tax Return "for the quarter of 2003" and the first quarter of 2004, including the page that listed the petitioner's employees by name.

In a June 4, 2004 response, the petitioner indicated that the petitioner did not have specific guidelines or requirements for employees' educational background but relied on employees' experience. The petitioner provided the same organizational chart previously submitted. The petitioner also provided an attachment listing the names of its employees for the fourth quarter of 2003 and the first quarter of 2004.

The director determined that the petitioner had not provided evidence that the beneficiary's subordinates were managerial or professional employees or that the beneficiary provided primarily managerial duties through the oversight of others. The director concluded that the petitioner had not established that the beneficiary would be engaged primarily in managerial or executive duties and denied the petition.

On appeal, counsel for the petitioner asserts that the petitioner has provided extensive, detailed and comprehensive evidence to show the size and scope of the nature of its business operations, its management structure, and the beneficiary's position within the structure. Counsel notes that the organizational chart shows that there are only four persons above the beneficiary's position as manager of the operations/business administration department. Counsel asserts that the beneficiary's department oversees all business, financial, budgetary, payroll administration, purchasing, inventory control, internal audits, marketing, and physical maintenance of the employer's premises. Counsel adds that the operations/business administration department has a staff of 15 employees. Counsel identifies the operations/business staff positions as two assistant managers, an accountant, two bookkeepers, a purchasing manager, an assistant purchasing manager, an inventory control coordinator, a marketing manager/events coordinator, an assistant marketing manager/events coordinator, a human resources coordinator, a maintenance coordinator, and four assistants to the maintenance coordinator. Counsel also contends that the organizational structure of this department consists of two tiers of employees below the beneficiary's position. Counsel claims that with the petitioner's organizational structure, it is unrealistic to conclude that the beneficiary will not be acting in a primarily executive or managerial position.

On the Form I-290B, counsel notes that additional evidence or a brief will be sent to the AAO in 30 days. To date, careful review of the record shows no subsequent submission. The AAO's decision will be made on the evidence before it.

Counsel's assertions are not persuasive. 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). The petitioner provided a broadly cast description of the beneficiary's duties stating generally that the beneficiary had oversight, through the supervision of assistant managers and other administrative personnel, to accomplish his tasks. However, 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).

In addition, the director specifically requested that the petitioner provide its organizational chart identifying all management and executive positions in the United States as well as their subordinates and the petitioner failed to do so. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Counsel, for the petitioner finally on appeal provides the titles of various employees allegedly subordinate to the beneficiary's position. However, the AAO will not consider this evidence and the appeal will be adjudicated based on the record of proceeding before the director. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

Moreover, counsel's assertion regarding the number and titles of individuals subordinate to the beneficiary's position is not sufficient to establish that the beneficiary is primarily a manager or an executive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Contrary to counsel's assertion that the petitioner provided extensive, detailed and comprehensive evidence in support of this petition, the record does not demonstrate the beneficiary's eligibility for this visa classification. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. The petitioner has not provided sufficient evidence to the record to establish that the beneficiary's position is primarily managerial or executive. Again, 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. at 165.

Beyond the decision of the director, the petitioner has provided inconsistent evidence regarding its ownership and control. The petitioner claims that it has two shareholders, each holding a 50 percent interest in the petitioner. The petitioner provides two stock certificates dated in May 1990 issued to two individuals to establish its ownership and control. However, the petitioner's 2002 IRS Form 1120 shows on Schedule E, Line 1, that a third individual owns a 25 percent interest in the petitioner. The petitioner has not explained or otherwise resolved this inconsistency. 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). The petitioner has not established a qualifying relationship with the foreign entity in this matter. For this additional reason, the petition will not be approved.

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).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.