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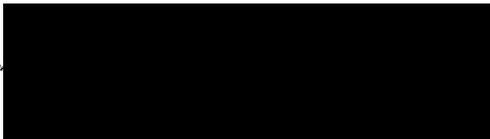
U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



SRC 03 101 53424

Office: TEXAS SERVICE CENTER

Date:

JUN 29 2005

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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation engaged in commercial real estate investment and the operation and management of [REDACTED] franchises. It seeks to employ the beneficiary as its managing director. 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 following grounds: 1) the beneficiary was not employed abroad in a managerial or executive capacity; 2) the beneficiary's proposed employment is not within a managerial or executive capacity; 3) the *foreign entity* was not doing business for one year prior to the date the instant petition was filed; and 4) the petitioner has not established its ability to pay the beneficiary's proffered wage of \$36,000 annually.

On appeal, counsel disputes the director's findings 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 two issues are related to the beneficiary's employment capacity. The first issue questions whether the beneficiary was employed abroad in a managerial or executive capacity, while the second issue questions whether the beneficiary's proposed position would be within 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.

The record indicates that no evidence was submitted in support of the petition. Accordingly, the director issued a request for additional evidence (RFE) on June 23, 2004. The petitioner was instructed to submit detailed descriptions of the beneficiary's job duties abroad and her proposed job duties with the petitioning entity. Specifically, the petitioner was asked to list the beneficiary's individual duties and provide percentage breakdowns of time allotted to each duty.

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

Briefly, [the beneficiary] held a key managerial position with us as she oversaw the operations of our holding company . . . and reported directly to [the president]. She planned, directed, and coordinated the operations of our [REDACTED] and its affiliate enterprises, which took up about 35% of her time.

[The beneficiary]'s top managerial duties and responsibilities mainly included formulating policies (5% of her time), managing the daily business operations (20% of her time), and planning the use of materials and human resources in our different businesses (10% of her time), including her agricultural and cattle operations. [T]hose included: overseeing, managing, and administering our personnel (10% of her time); purchasing, sales, and inventory management (5% of her time); investment tracking (5% of her time); supervision over marketing initiatives (5% of her time); and other related administrative services (5% of her time).

The petitioner further stated that the beneficiary's duties abroad changed when she became a member of the board of directors. The petitioner stated that in this capacity, the petitioner supervised the work of the company's in-house counsel, financial officer, office manager, and professional property manager. With regard to the foreign entity's agricultural subsidiaries, the beneficiary supervised the work of two cattle ranch managers at two different ranches.

In regard to the beneficiary's proposed duties, the petitioner submitted the following description:

Establish the national and international long[-]term goals and policies of [the petitioner], including its structure, components and functions as per the parent's company guidelines. Shall direct the general management of the corporation and shall exercise wide latitude in discretionary decision-making.

Shall receive its directives and general supervision from the [b]oard of [d]irectors. As part of the beneficiary[s] duties, she shall supervise and control the work of the company staff. Shall have full authority to hire or fire personnel, or recommend, [sic] promotion or leave authorization for the company employees. Shall have and exercise discretion over the day-to-day operations of the American enterprise and shall directly report the status and functions of the organization directly to the [b]oard of [d]irectors to which the beneficiary shall be solely responsible of [sic] her acts and management discretionary powers.

The beneficiary will be responsible of [sic] creating the investment, development, and management goals and operational plans, oversee [sic] the employees['] work, sets [sic] standards for the work and general guidelines, and shall coordinate the activities of fully establishing the business operations under the integration process, supervise [sic] the implementation of the purchase, investments, sales, and marketing departments and the work quality of the American employees in accord to [sic] the parent company guidelines.

On October 4, 2004, the director denied the petition noting, "[T]he beneficiary was not found to have performed work as an executive or manager for at least one of the three years prior to the date of filing, February, 24, 2003." Contrary to this interpretation of 8 C.F.R. § 204.5(j)(3)(A) and (B), the proper reading of relevant sections of the regulations indicates that the pertinent time period of the beneficiary's employment

abroad is the three years prior to her entry into the United States as a nonimmigrant, not the three years prior to the filing of an immigrant petition. There are many instances where a beneficiary enters the United States more than three years prior to filing the petition. Based on the director's interpretation of the regulations, such beneficiaries' respective job duties abroad would become irrelevant, as they were performed more than three years prior to the filing date of the petition. This interpretation of the regulations is incorrect, however, and is hereby withdrawn.

The director also improperly pointed out the lack of evidence to substantiate the work performed by the beneficiary in the United States. Regardless of whether the director's statement is accurate, this observation is entirely irrelevant for the purpose of the instant petition, as an I-140 petition is filed by a *prospective* employer seeking to hire the beneficiary in the future once the petition has been approved and the status of the beneficiary changed to that of permanent resident. In the instant matter, the director improperly implied that the beneficiary must have been working for the petitioner at the time the petition was filed. Accordingly, the director's improper statement is hereby withdrawn.

Notwithstanding the director's errors, the director properly concluded that the petitioner failed to establish that the beneficiary's employment abroad and her proposed employment in the United States have been and would be within a qualifying capacity.

On appeal, counsel points out the director's incorrect statement regarding the relevant period of employment abroad and states that the beneficiary satisfied her statutory burden. While counsel's assertion regarding the director's error is accurate, as evidenced by the above withdrawal of the comment, such error does not automatically suggest that the director's entire decision must be overturned.

Counsel properly states that 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. In the instant matter, the petitioner's percentage breakdown of the beneficiary's duties abroad failed to identify the actual duties performed by the beneficiary on a day-to-day 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). Rather than providing the actual duties, the petitioner's letter from the beneficiary's foreign employer used general terms such as "planned, directed, and coordinated the operations" to describe 35% of the beneficiary's job duties. Similarly, the foreign employer's letter indicated that 20% of the beneficiary's job was "managing daily operations." Thus, at least 55% of the beneficiary's time was spent performing duties that are entirely undefined. While the AAO is not prepared to affirmatively establish that the beneficiary was primarily performing nonqualifying duties, the vague statements describing the position abroad preclude the AAO from affirmatively concluding that the beneficiary was employed in a qualifying managerial or executive capacity. Despite counsel's many claims in favor of the petitioner, 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 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).

Similarly, in regard to the beneficiary's proposed position in the United States, counsel disputes the director's findings claiming that the beneficiary will manage the organization and function at the top of the petitioner's organizational hierarchy. However, counsel's statements are not supported by the evidence on record, which

lacks a detailed and thorough description of the beneficiary's proposed duties. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503. While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties. Where, as in the instant case, the petitioner fails to provide CIS with a specific list of duties, a determination cannot be affirmatively made that the beneficiary would primarily perform qualifying tasks. Specifics are clearly an important indication of whether a beneficiary's duties are 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. In the instant matter, the director issued an RFE for the purpose of obtaining specific information regarding the beneficiary's proposed daily duties. The petitioner was even instructed to provide percentage breakdowns of the beneficiary's specific duties. Thus, the significance of a detailed job description was clearly conveyed to the petitioner well prior to the issuance of the denial. However, the petitioner failed to provide the percentage breakdown for the proposed job duties, instead providing CIS with an overly broad description that does little more than paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). The petitioner failed to identify the duties involved in "creating the investment, development, and management goals and operational plans" and overseeing the work of her subordinate employees. Although the petitioner's organizational chart indicates that the beneficiary's immediate subordinates would include a treasurer and a marketing director, the petitioner did not provide any descriptions of either position in order to enable CIS to determine whether the beneficiary would manage professional level employees.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary was employed abroad or will be employed in the United States 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. Rather, the record is entirely unclear as to the beneficiary's actual duties, either abroad or in the United States. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that she would otherwise be relieved from performing nonqualifying duties. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this initial reason, the petition may not be approved.

The next issue in the director's decision is whether the *foreign entity* was doing business for one year prior to the date the instant petition was filed. While 8 C.F.R. § 204.5(j)(3)(D) requires the petitioner to establish that it had been doing business for one year prior to filing an I-140 petition, there is no statute or regulation that imposes a similar burden on the petitioner with regard to the beneficiary's foreign employer. The petitioner need only establish that the foreign entity is doing business at the time the petition is filed. *See* definition of *multinational* at 8 C.F.R. § 204.5(j)(2). Contrary to the director's implication, the regulation does not specify a time period during which the foreign entity must have been doing business. Accordingly, the director's comments and conclusion in this regard are hereby withdrawn.

The final issue in this proceeding is whether the petitioner 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 petition was filed in February 2003 promising to pay the beneficiary a salary of \$36,000 per year.

In response to the director's RFE, the petitioner submitted the W-2 wage and tax statements it issued to its employees in 2002 and 2003. Although the petitioner submitted a 2003 W-2 statement for [REDACTED] the statement indicates that the beneficiary was paid only \$19,904.41, which is more than \$16,000 less than the proffered wage indicated in the petition. Although the petitioner also submitted a W-2 statement for 2002 issued to the same person and showing paid wages of \$29,726.33, the social security number shown on the 2002 statement does not match the beneficiary's social security number as it appears in the I-140 petition and on the 2003 W-2 statements. Furthermore, as the petition was filed in 2003, not 2002, wages paid to the beneficiary in 2002 have no probative value in this proceeding, as they do not address the relevant time in question. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Additionally, the W-2 statements aside, the petitioner's Form 1120 corporate tax return for 2003 shows that the petitioner was operating at a net loss of \$46,125 the year in which the petition was filed. This furthers the director's determination that the petitioner did not have the ability to pay the beneficiary's wage.

On appeal, counsel focuses on the petitioner's net assets, which he determined as \$44,398, an amount sufficiently higher than the beneficiary's proffered wage. However, a thorough review of the petitioner's 2003 tax return clearly indicates at lines 15 and 28 of Schedule L that the beneficiary's liabilities are equivalent to the amount of its assets. Counsel has provided no supporting documentation to corroborate the amount he claims as the petitioner's net assets. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503.

Counsel also provides a copy of the "Yates Memo," which is a memorandum internally generated within CIS in which Service officers are given permission to consider additional evidence, such as bank account records, in an effort to determine a petitioner's ability to pay. However, a closer review of the memo also states that "CIS adjudicators are *not* required to accept, request, or RFE for additional financial evidence," and specifies that review of such "documents by CIS is *discretionary*." Interoffice Memorandum from William Yates, Associate Director for Operations, Citizenship and Immigration Services, to Service Center Director et al., *Determination of Ability to Pay under 8 C.F.R. § 204.4(g)(2)*, 3 (May 4, 2004) (emphasis in original). Thus, even if the AAO were to consider the unbinding memorandum of a service office, the memo does not support counsel's assertions. Based on the evidence submitted, the petitioner has failed to establish its ability to pay the beneficiary's proffered wage. Therefore, based on this additional ground, 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.