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**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: TEXAS SERVICE CENTER

Date: MAR 03 2005

SRC 02 243 56069

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

The petitioner filed this immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of Florida that is operating as a horseback riding school and horse boarding and training center. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner did not demonstrate that: (1) it has been doing business in the United States for one year prior to the filing of the petition; or (2) the beneficiary has been and would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel states that as the president of the petitioning organization, the beneficiary "is the only executive with the empowerment within the business to be able to steer the business at the high levels that have been developed as corporate policy." Counsel claims that the beneficiary has the knowledge, credentials, experience, and contacts to develop the corporation's strategy. Counsel submits a statement in support of the 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 or 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. 8 C.F.R. § 204.5(j)(5).

The AAO will first address the issue of whether the petitioner demonstrated that it has been doing business for at least one year prior to the filing of the immigrant petition as required in the regulation at 8 C.F.R. § 204.5(j)(3)(D).

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he 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.

The petitioner filed the immigrant petition on August 9, 2002 noting that it is operating as a horseback riding school. In an appended letter, dated July 16, 2002, the petitioner stated that it was formed in May 1999 to operate as a horseback riding school, and for horse boarding, training and international horse trading. The petitioner noted that in 2001 its gross receipts totaled \$266,771 and it earned a profit of approximately \$36,000. In addition to the letter, the petitioner provided a warranty deed, dated September 6, 2000, for the purchase of land in Florida, its occupational license to engage in business in Seminole County, Florida, its 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, its 2001 State of Florida Form F-1120, Florida Corporate Income/Franchise and Emergency Excise Tax Return, bank statements for March 2002, three invoices from February, April and May 2002, and a purchase agreement dated July 2001. The petitioner also provided copies of its promotional material, such as copies of its website, an outline of its services and prices, and its newspaper advertisement.

The director issued a request for evidence, dated August 11, 2003, requesting that the petitioner submit documentation of its business in the United States. The director stated that such evidence should include invoices, bills of sale, and product brochures from August 2001 to the present.

Counsel responded in a letter dated October 27, 2003, and provided the following documentation of the petitioner's business: (1) two purchase agreements for horses dated July 2002 and March 2003; (2) five bills for services provided by the petitioner, dated December 2002 through October 2003; (3) a bank statement for September 2003; (4) copies of its services and fees for boarding, horse shows, and lessons; (5) magazine articles highlighting the beneficiary's performance in horse shows; (6) a veterinarian bill dated May 18, 2003; (7) copies of checks paid by the petitioner in February, July, August and September 2003; and (8) its 2002 U.S. corporate income tax return.

In her decision, dated March 5, 2004, the director determined that the petitioner had not demonstrated that it has been doing business for at least one year prior to the filing of the immigrant petition. The director noted that the majority of the documentation submitted by the petitioner was for the years 2002 and 2003. The director stated that other than its 2001 corporate tax return, the petitioner did not submit evidence, such as invoices or sales receipts, that it has been doing business since August 9, 2001. Consequently, the director denied the petition.

In an appeal filed on April 2, 2004, counsel submits documentation related to the petitioner's business operations in 2001, including purchase agreements, bills for services rendered by the petitioning organization, veterinarian bills, bills for services received and products purchased by the petitioner, and a bank statement for June 2001.

Upon review, the petitioner has not demonstrated that it has been doing business in the United States for at least one year prior to the filing of the immigrant petition as required in the regulation at 8 C.F.R. § 204.5(j)(3)(D). While the record contains the petitioner's 2001 corporate income tax return, wherein the petitioner reported gross receipts or sales of approximately \$266,000, the petitioner failed to provide additional requested documentation evidencing its "regular, systematic, and continuous provision of goods and/or services" during 2001. The petitioner was put on notice of its obligation to demonstrate its business operations in the United States during the year prior to the filing of the petition. *See* 8 C.F.R. § 204.5(j)(3)(D). Additionally, the director specifically requested that the petitioner submit invoices, bills of sale and brochures from August 2001 through the present. The petitioner neglected to submit documentation of its services in 2001 and instead provided documents dated during the years 2002 and 2003.

The regulation allows the director to request appropriate additional evidence when reviewing a petition for a multinational manager or executive. *See* 8 C.F.R. § 204.5(j)(3)(ii). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the beneficiary has been and would be employed by the United States entity in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 noted on its August 9, 2002 petition that the beneficiary would be employed as the president of the United States entity and would direct all major functions of the company. In its attached letter, dated July 26, 2002, the petitioner stated that as the president of the organization, the beneficiary performed the following "executive and managerial" job duties during his first year of employment:

- Created Corporate objectives and company policies for operation; (single time developed activity)
- Directed the recruitment of the Administrative Manager to perform the day-to-day handling of the operations;
- Performed indirect recruitment and decision making authority on the hiring of other employees forming the complete actual full time staff of the company (direct recruitment was handled by the Administrative Manager, who reported directly to [the beneficiary], who after analyzing the candidate's profile, finally decided on the hiring); Due to its young age and the expansion phase through which [the petitioning organization] is still undergoing, [the beneficiary] still spends approximately 10% of his weekly time on the review of potential candidates to fulfill available positions with [the] Company;
- Day-to-day direct supervision of the managers and indirect supervision of the current staff; decision making authority over daily problems brought to him by the managers; [the beneficiary], as the president exercises full time/all time supervision of the Company's business;

- Confers with the Board of Directors of [the foreign entity] during Corporate meetings to discuss the ongoing commercial and financial status of [the petitioning organization] and latest developments; (10% of his week schedule);
- Reviews and analyses financial statements and other financial corporate documents in order to stay informed of the Company's financial situation and progress status; (10% of his time)
- Directs and coordinates the formulation of financial forecasts and budgets for the Company's future stability and presentations for the Board of Directors of the parent Company; (8% of his time)
- Participates in corporate meetings with clients in cases in [sic] which require his final decision authority; [the beneficiary] is usually present at meetings where commercial contracts involve significant sums of money and/or commitments and delivery terms; (12% of his weekly time)

The petitioner explained that under the immigrant petition, the beneficiary would continue performing the above-outlined job duties, which "will tend to be much more [of] a managerial nature than [they] currently [are]."

The petitioner further noted that it presently employed four full-time workers and contracted with a certified public accountant for accounting services. An appended organizational chart of the United States company and a payroll journal identified the petitioner's employees as the beneficiary, an administrative manager, a head trainer, and a trainer for jumping horses. The petitioner explained that it anticipated transferring a general manager from the foreign entity, and hiring a barn supervisor and horse sales manager. The petitioner also stated that it utilizes subcontractors, such as stable hands, farriers, and horseback riding trainers, to perform some of its business functions.

In her August 11, 2003 request for evidence, the director asked that the petitioner submit a statement outlining the beneficiary's proposed duties and identifying the beneficiary's position title, the percentage of time he would devote to each task, the number of subordinate employees who would report to the beneficiary and whether they are managers or supervisors. The director also requested that the petitioner provide a brief description of the job titles, duties and educational levels of the employees supervised by the beneficiary, and submit evidence, such as Forms W-2 and 1099, of contract employees.

Counsel responded in a letter dated October 27, 2003, stating that the beneficiary, an internationally known rider, "is not only responsible for the overall administration of the business as President of [the petitioning organization] but also for maintaining his very well rounded reputation, attending as many international competitions as he possible can." In an attached statement, the petitioner provided the following outline of the beneficiary's job duties:

- Manages and participates in all operational activities of the company, such as purchases and sales of horse[s], to include negotiating the value of each horse based on its past performance and future possibilities; (30% of his time)

- Reviews and analyzes financial reports and other financial corporate documents in order to stay informed of the Company's financial situation and progress status; (20% of his time)
- Reviews and makes recommendation[s] of company's policies and objectives. Maintains a regular rotational program for key personnel at the managerial and executive levels applying unique knowledge of the horse business; (20% of his time)
- Develops marketing strategies to reach both professional riders for international competitions and to individual programs for families, adults, and children; (10% of his time)
- Day-to-day direct supervision of the General Manager and indirect supervision of the current staff; decision making authority over daily problems brought to him by the General Manager; (10% of his time)
- Directs and coordinates with the CPA the formulation of financial forecasts and budgets for the company's future stability and presentations for the Board of Directors of the parent company; (5% of his time)
- Participates in worldwide competitions to achieve international recognition among the professional riders as a promotional tool for [the petitioning organization] (5% [of his time]).

Counsel submitted a revised organizational chart for the United States corporation identifying the employment of nine employees, the beneficiary, a general manager, a barn supervisor, an administrative assistant-horse sales manager, a head trainer, two barn helpers, and two trainers, as well as the use of a certified public accountant, a veterinarian, and a farrier. Counsel provided a brief job description for each.

In her March 5, 2004 decision, the director determined that the petitioner had not established that the beneficiary had been or would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the beneficiary's vague and general job duties "[do] not provide an accurate portrayal of the actual day to day duties of the beneficiary." The director also stated that the petitioner had not demonstrated that the beneficiary's primary assignment has been or will be directing the management of the organization, or directing or supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing non-qualifying operations of running a horse farm. The director noted that because the petitioner did not employ a general manager at the time the petition was filed, the beneficiary was directly supervising the lower-level employees. Consequently, the director denied the petition.

In his April 2, 2004 appeal, counsel states that as the president of the company, the beneficiary makes corporate decisions relating to the purchase, sale and import of thoroughbred horses, and is the sole employee responsible for determining the company's "high level corporate strategy." Counsel also states that as a credentialed international horseman with "high level contacts," the beneficiary operates at the company's highest level of commercial relations, which enables the petitioning organization to execute executive

decisions, such as obtaining approval for the development of an equestrian center in Orlando, Florida. Counsel further states:

In summary, [the beneficiary] is the only executive with the empowerment within the business to be able to steer the business at the high levels that have been developed as corporate policy. This is what he has principally been engaged in. The Beneficiary, as President, not only has the knowledge and position to develop the overall corporate strategy, but, because of his credentials, experience and contacts within the highest level of the international equine trade[,] [h]e also has the ability, as seen with the attached contract with the City of Orlando, to carry these executive decisions into reality.

The lower levels, of day to day operations, are carried out by 8 functionaries, at the present time. Additional hiring is now taking place as a new staff will be required to operate the new installations of [the petitioning organization] in the City of Orlando.

Upon review, the petitioner has not demonstrated that the beneficiary has been or would be employed by the United States entity in a primarily managerial or executive capacity.

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's description of the beneficiary's job duties indicates that the beneficiary would devote the majority of his time to performing non-qualifying functions of the business. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While a portion of the beneficiary's described job duties are managerial and executive, the petitioner's job description indicates that the beneficiary would spend approximately 65% of his time performing the negotiations, purchasing, sales, finances, and marketing of the company. An additional 5% of the beneficiary's time would be spent personally participating in riding competitions. Based on the petitioner's description of the beneficiary's tasks, the majority of the beneficiary's time would be devoted to performing the day-to-day functions associated with the horseback riding school and training center. The petitioner has also essentially conceded the beneficiary's direct participation in these non-managerial and non-executive tasks in its response to the director's for evidence, wherein the petitioner stated that the beneficiary "participates in all operational activities of the company." 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).

A critical review of the varying job descriptions submitted with the immigrant petition and in response to the director's request for evidence undermines the purported managerial and executive job duties to be performed by the beneficiary. Although the petitioner noted in its July 26, 2002 letter that the beneficiary would supervise managerial employees and a supervisor, the petitioner identified only one subordinate manager, an administration manager, as an employee at the time of filing the petition. The employee's status as a "manager" is questionable, as she does not supervise any lower-level employees. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the

employees supervised are professional. 8 C.F.R. § 204.5(j)(4)(i). In addition, even though counsel stated in the petitioner's October 27, 2003 response that the beneficiary would spend approximately 10% of his time supervising the company's general manager, the petitioner did not employ a general manager at the time of filing the petition. 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).

Furthermore, the petitioner's staff is insufficient to support the beneficiary in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner employed the beneficiary as president, plus an "administrative manager," a head trainer and a horse trainer. The AAO again notes that although the beneficiary and the administrative manager have managerial and executive titles, the petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, administrative operations of the company. While the petitioner stated that it utilized subcontractors to perform functions of the business, the petitioner has not offered evidence of payments made for services performed by outside employees. The petitioner did not identify amounts paid for outside labor on its 2001 and 2002 corporate tax returns. Nor did the petitioner provide copies of checks or Forms 1099-MISC, Miscellaneous Income, for independent contractors. 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).

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and its additional three employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO notes that counsel's vague claims on appeal fail to clarify the beneficiary's employment in a qualifying capacity. Counsel repeatedly states that the beneficiary is "empowered" to decide the corporation's "high level corporate strategy," is "able to steer the business at the high levels that have been developed as corporate policy," and is able to carry out "executive decisions." Counsel however, fails to outline the tasks that the beneficiary would perform in association with these responsibilities, and does not define the corporation's strategy and policies or the executive decisions to be carried out. In light of counsel's undefined and vague descriptions, it is unreasonable to expect the AAO to surmise the managerial and executive tasks performed by the beneficiary. The actual duties themselves 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary has been or would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed overseas in a primarily managerial or executive capacity for at least one year during the three years preceding his entry as a nonimmigrant as required in the regulation at 8 C.F.R. § 204.5(j)(3)(C). The petitioner provided a brief statement in its July 26, 2002 letter that the beneficiary, as the financial operations manager and owner of the foreign organization, oversaw six departments of the company, managed the division managers, exercised final authority over the departments, including hiring and firing personnel, established policies and procedures for operation, and reported only to the company's board of directors. The petitioner's restatement of the statutory definitions of "managerial capacity" and "executive capacity" is insufficient to demonstrate the beneficiary's employment in a qualifying capacity. See the Act at §§ 101(a)(44)(A) and (B). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, although the foreign entity's organizational chart identifies six departments the beneficiary may have supervised, it does not identify the specific position of "financial operations manager." In fact, based on the organizational chart, the "director" oversees the six departments of the foreign entity. As a result, the beneficiary's actual position in the organizational hierarchy is unclear. Absent additional documentation, the AAO cannot determine whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Consequently, the appeal will be dismissed for this additional reason.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.