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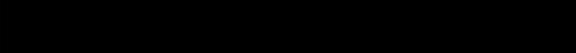


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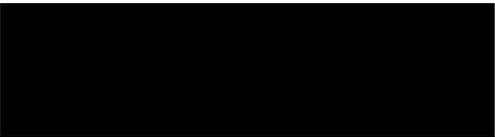
FILE: 
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Office: CALIFORNIA SERVICE CENTER

Date: **NOV 10 2005**

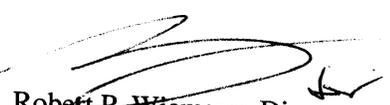
IN RE: Petitioner: 
Beneficiary: 

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, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 2001 the state of California. It is currently engaged in the business of purchasing and exporting chemical products. 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 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 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 issue in this proceeding is whether the beneficiary would be employed in a qualifying 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.

In support of the petition, the petitioner submitted a letter dated May 12, 2003 that provided the following description of the duties to be performed by the beneficiary under an approved petition:

As [p]resident of the U[.]S[.] company, [the beneficiary] has been responsible for the overall financial, administrative and business projects of the company. He has been formulating company business policies and directives for implementation by the department managers. He is directing the coordination among the company departments and the Chinese parent company. He directed the lower managers in the establishment and improvement of systematized marketing transactions with American distributors and suppliers.

He also managed company officers to plan business objectives to increase sales volume and products quality. In the process, [the beneficiary] also allocates responsibilities for the different company departments according to the company[s] general business plan and [the]

parent company's directives. He supervises and evaluates [the] performance of lower managers for compliance [with the] company[s] business policies and objectives. He reviews activity reports and business documents. Finally, he interviews and recruits corporate employees in accordance with the subsidiary's corporate needs.

[The beneficiary] has been, and will continue to be, in essence, directing the management of [the petitioner], establishing [the petitioner]'s goals and policies, exercising wide latitude in discretionary decision making, and receiving only general supervision from the Board of Directors and the Chinese parent company. His duties are in conformance of [sic] "executive capacity"

The petitioner also submitted its organizational chart illustrating an organizational hierarchy, which consisted of eight positions. The petitioner stated that the beneficiary oversees the work of the company employees all of whom possess baccalaureate degrees and carry out professional duties.

On July 22, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit its organizational chart describing the company's managerial hierarchy and staffing levels as of the date the petition was filed in May 2003. The petitioner was instructed to clearly identify the beneficiary's position in the chart as well as his subordinates' names and job titles. Additional documentation was also requested in the form of the petitioner's wage reports for five quarters, including the quarter during which the petition was filed, as well as its corporate tax return for 2003.

The petitioner complied with the director's request resubmitting the previously submitted organizational chart, which named the beneficiary at the top of the hierarchy as the company's president. The president's direct subordinates included an export department manager, a chief financial officer (CFO), a marketing department manager, and a corporate secretary. It is noted that the beneficiary was shown in the position of CFO, thereby indicating that the beneficiary, in his capacity as president, supervised himself in his other capacity as CFO. The positions of export department manager and corporate secretary are also shown as being occupied by one individual. The lowest level in the petitioner's hierarchy included the following positions: two trading specialists supervised by the export department manager; an account supervised by the beneficiary in his capacity as CFO; and two marketing representatives supervised by the marketing department manager. It is noted that one of the marketing representatives is also shown to occupy one of the two trading specialist positions.

The petitioner also submitted the requested quarterly DE-6 wage reports, including the report for the second quarter of 2003 during which the petition was filed. The report names six individuals, only four of which are identified in the petitioner's organizational chart for the corresponding time period. All of the employees, with the exception of the beneficiary, earned salaries commensurate with those of part-time employees earning less than \$8,000 annually.

The petitioner also provided the following additional description of the beneficiary's proposed job duties:

Manage overall financial, administration/business projects of [the] U.S. co.; formulate company business policies/directions for implementation by department managers; assign business tasks and targets to lower managers; direct business coordination with [the] Chinese parent co.; direct lower managers in improvement of systematized marketing transactions

w/U.S. business; manage co. officers to plan business objectives to increase sales volume, diversify business scopes, product quality; allocate duties for different departments; supervise/eval [sic] perform[ance] of lower managers for compliance w/co[.] policies/objectives; review activity reports, business documents; interview/recruit employees per corporate needs; report to parent co. on U.S. co. developments; review and approve employee hiring and changes.. [sic]

The director denied the petition noting that the petitioner described the beneficiary's job duties in general terms, which do not convey a thorough understanding of the beneficiary's day-to-day job activities. The director also commented on the petitioner's organizational chart, which shows several employees occupying more than one position, but still receiving salaries that are commensurate with those of part-time employees. The director concluded that the petitioner's organizational hierarchy lacks the complexity to support a primarily managerial or executive position.

On appeal, counsel reiterates the petitioner's claim and asserts that the petitioner submitted sufficient evidence and information to warrant a favorable decision. Counsel further argues that the petitioner has not submitted evidence to contradict the claim that the beneficiary is at the top of the petitioner's hierarchy and that his duties fall within the statutory definitions of managerial and/or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). However, contrary to counsel's interpretation, the petitioner has the burden of submitting evidence to affirmatively support its claim. Merely submitting information and evidence that does not contradict the petitioner's claims is not sufficient, unless the submissions include a detailed description of the beneficiary's proposed duties accompanied by evidence corroborating that description.

Counsel also disputes the director's reference to the educational levels and salaries of the beneficiary's subordinates claiming that there is a tier of managerial employees that separates the beneficiary and the first-line employees like the sales and import representatives. While counsel's assertion is partially correct in that two of the beneficiary's immediate subordinates possess managerial titles and are illustrated as managers of other personnel, the petitioner's organizational chart also shows that the beneficiary's list of subordinates includes a corporate secretary, who has no subordinates. Furthermore, the petitioner has included the beneficiary in the first and second tiers of its hierarchy in the positions of president and CFO, respectively. If counsel asserts that the beneficiary is separated from the first-line tier of employees by the managerial employees in the second tier, it is unclear why the petitioner would then include the beneficiary among its second tier of employees.

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). As previously stated by the director, the description of duties in the instant matter lacks sufficient detail and, therefore, does not convey a thorough understanding of what the beneficiary would actually be doing on a day-to-day basis. 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). The petitioner's entire description of the beneficiary's position consists of a broad list of responsibilities, which includes directing and managing lower-level employees as they carry out their respective duties. However, the petitioner does not explain what actual tasks are involved in such personnel management.

Furthermore, even if the petitioner were to submit a detailed description of the beneficiary's duties, that description must be supported by the evidence of record. In the instant matter, the beneficiary's position description primarily focuses on his duties as personnel manager. However, as previously pointed out by the director, the petitioner's DE-6 wage reports indicate that none of the beneficiary's subordinates are compensated with what is equivalent to a full-time salary or wage, earning no more than \$600 per month. Contrary to counsel's argument, the salaries of the beneficiary's respective subordinates are relevant in the instant matter to the extent that they indicate how much time the subordinate staff devotes to the petitioner's daily operational tasks. If the beneficiary is the petitioner's only full-time employee, doubts arise as to the beneficiary's ability to focus primarily on qualifying tasks when his entire support staff is comprised of part-time employees. The AAO must question who performs the tasks of these part-time employees during their respective absences. Without further information, the AAO can only assume that during the respective absences of the beneficiary's subordinates, the beneficiary himself is required to carry out the duties necessary for the petitioner's daily operation. 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).

Additionally, only four of the six individuals named in the petitioner's organizational chart are also named in its DE-6 wage report for the second quarter of 2003. Based on this wage report, the petitioner employed one rather than two trading specialist and did not employ the individual identified in the organizational chart as the marketing department manager. The remaining two individuals named in the wage report are not identified in the organizational chart. 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 submitted evidence, nor even acknowledged, the inconsistency between its organizational chart and the quarterly wage report that accounts for the time period during which the petition was filed.

Finally, counsel properly points out that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

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 petitioner has failed to provide credible evidence that accurately illustrates its organizational hierarchy; nor has the petitioner provided a detailed description of the beneficiary's proposed duties as required by 8 C.F.R. § 204.5(j)(5). The record indicates that at the time the petition was filed the petitioner did not have a sufficient support staff to relieve the beneficiary from devoting considerable portions of his time to nonqualifying operational tasks on a daily basis. 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.

Additionally, though not addressed by the director, the record lacks sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity for at least one out of three years prior to coming to the United States as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B). The record contains a general description of the beneficiary's foreign job responsibilities and an organizational chart that fails to specifically identify the beneficiary and his position with respect to his claimed subordinates.

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 ground discussed in the paragraph above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.