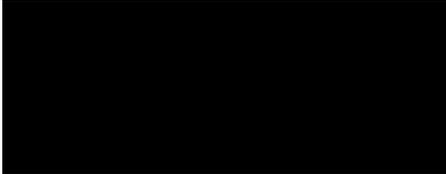


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FILE: EAC 04 201 51170 Office: VERMONT SERVICE CENTER Date: SEP 16 2005

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:

SELF-REPRESENTED

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 branch office of a company established in Russia in 1989. The branch office was registered in March 2002 as a foreign corporation in the State of New York. It primarily provides air transportation for oversized cargo between Russia and the United States. It seeks to employ the beneficiary as its president and chief executive officer. 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, determining 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, the petitioner asserts that the director misstated the facts of the matter and failed to support her conclusion that the beneficiary would not function as an executive and would not manage a subordinate staff of employees who would relieve him from performing non-executive and non-managerial duties. The petitioner notes that the director did not request further evidence in the matter and on appeal provides additional information regarding the number of hours the beneficiary spends on his listed duties as well as descriptions of the job duties of five subordinate employees. The petitioner provides a brief and other evidence 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 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).

Preliminarily, the AAO acknowledges that the director denied the petition without requesting further evidence to clarify whether eligibility for the benefit sought had been established. *See* 8 C.F.R. § 103.2(b)(8). In the director's October 21, 2004 decision, the director observed that the record did not contain a comprehensive description of the beneficiary's duties sufficient to enable Citizenship and Immigration Services (CIS) to make a favorable decision on the petition. On appeal, the petitioner contends it was denied an opportunity to clarify any arguable issues noted by the director.

The applicable regulation for this preliminary issue is at 8 C.F.R. § 103.2(b)(8). This regulation requires that the director request additional evidence in instances, "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. In this matter, the director denied the petition ostensibly because the petitioner had not provided sufficient evidence regarding the beneficiary's proposed duties. Such a denial without further explanation appears to be procedural error on the part of the director. However, it is not clear what remedy for any procedural error would be more appropriate than the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. The AAO will consider the totality of the evidence including the petitioner's evidence submitted on appeal.

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.

The director denied the petition on October 21, 2004, determining that: the petitioner had not included sufficient documentation to clearly establish that the beneficiary's managerial experience and education would qualify him as an executive/manager; the record did not clearly establish that the beneficiary had been or would be performing the duties of an executive/manager; the record showed the petitioner had paid \$96,225 in salaries in 2003 to eleven employees and that the \$16,000 more or less paid to each employee was not sufficient to establish that the subordinate employees held managerial positions; restating the definitions of manager/executive was not sufficient evidence to demonstrate that the beneficiary's duties for the foreign and United States entities involved or would involve responsibilities that are primarily executive or managerial; based on the size and nature of the organization the beneficiary would not be engaged in primarily managerial or executive duties; and the record did not provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary would have managerial control and authority over a department, subdivision, or component of the United States entity or that the beneficiary would operate at a senior level within the entity's hierarchy or with respect to a function or that the beneficiary would function as an

executive and manage a subordinate staff of employees who would relieve him from performing non-executive/non-managerial duties.

On appeal, the petitioner contends that the director reviewed a record unrelated to this petition based on the director's statement that the petitioner employed 11 individuals. The petitioner asserts that the director does not articulate the basis of her repetitious conclusions that the evidence failed to support the beneficiary's classification as a manager or an 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.

On the Form I-140, Petition for Immigrant Worker, the petitioner checked the box in Part 2 indicating that it is seeking to employ the beneficiary in a managerial or executive capacity. The petitioner notes in Part 5 of the Form I-140, that the petitioner employs six individuals. In the petitioner's June 4, 2004 letter appended to the petition and the petitioner's brief on appeal, the petitioner lists the beneficiary's job duties as:

- (1) Approve selected programs or projects of significant interest and beneficial for the company – 7 hrs;
- (2) Oversee performance of the contracts and agreements, execute new contracts and agreements with our current and prospective customers – 6 hrs;
- (3) Daily oversee work performance of all departments of the U.S. Branch Office – 7 hrs;
- (4) Oversee obtaining, extension, and renewal of Foreign Carrier Permits, and flight landing permits for inbound and outbound flight to and from the U.S. from the U.S. Aviation Authorities, such as FAA and DOT – 2 hrs;
- (5) Meet with officials of FAA and DOT – 2 hrs;
- (6) Preside at meetings regarding the company's services and approaches to new projects – 6 hrs;
- (7) Supervise preparation and responses to invitations to bid, and provide full supervisory support for flights if a contract is awarded – 4 hrs;
- (8) Approve and oversee sales of "spare legs" – 3 hrs;
- (9) Review and supervise timely arrangement and submission of monthly business and financial reports to [the foreign office] provided by the Company's accounting staff – 2 hrs; and
- (10) Approve selection and hire of new personnel while expanding our company's intervention onto the U.S. market and supervise existing personnel in terms of performance of their corresponding duties – 1 hr.

On appeal, the petitioner also noted the beneficiary's previous experience with the foreign office and indicated that the beneficiary as president and chief executive officer of the petitioner would assume the "pivotal role directing [the petitioner's] overall commercial and financial operations, appointing the appropriate specialists and professionals, and sitting in on the various committees such as management, interdepartmental relations, budgeting, financial and consulting." The petitioner further indicated that the beneficiary would continue functioning at a senior level with the company's organizational hierarchy; would continue to establish the goals and policies for the petitioner's expansion effort; would exercise discretion on decisions related to the U.S. market; and would continue participating in formulating overall activities within the U.S. company's commercial, financial, budget, and credit operations, including reviewing figures of the petitioner's economic activity, costs, operations, and forecast data to determine the progress of the U.S. business operations, and conferring with the overseas company's higher management with regard to performance and objectives of the operations.

Finally, the petitioner contends that the beneficiary would be relieved from performing non-executive and non-managerial duties by his subordinate staff of employees. The petitioner points out that CIS approved the vice-president/commercial director as an employment-based manager or executive on February 19, 2004 (EAC 04 097 53822). The petitioner lists the vice-president/commercial director's duties as:

- 1) Select programs or projects of significant interest and beneficial for the Company (9 hrs);
- 2) Inspect and analyze performance of contracts and agreements, execute new contracts with current and prospective clients (4 hrs);
- 3) Execute day-to[-]day business operations pertaining to processing, storing, and shipping cargo of our clients and selling cargo transportation services (4 hrs);
- 4) Authorize payments per invoices, bills, or settlement of claims (1 hr);
- 5) Daily oversee interrelations with our customers (2 hrs);
- 6) Obtain, extend, and renew Foreign Carrier Permits, and flight landing permits for inbound and outbound flights to and from the US from the US Aviation Authorities, such as FAA and DOT (3 hrs);
- 7) Communicate with officials of FAA and DOT (2 hrs);
- 8) Conduct meetings to introduce the company's services and approaches to new projects, pricing for our services, and developing new customers' bases (4 hrs);
- 9) Arrange and provide data regarding cargo and passenger charter capacity to our clients and consolidators (2 hrs);
- 10) Prepare and respond to UN invitations to bid, and provide full operational support for flights if UN contracts are awarded (5 hrs);
- 11) Organize and participate in flight capacity sales with the United Nations (2 hrs);
- 12) Supervise timely arrangement and submission of monthly business and financial reports to [foreign office] provided by the company's accounting staff (1.5 hrs); and
- 13) Select and hire new personnel to be approved by the President (Director General) of the Company (0.5 hrs).

The petitioner indicated that the sales manager spent the majority of his time providing and coordinating worldwide charter cargo flight sales and additional time conducting and developing marketing and advertising campaigns, evaluating development and control over sales programs, analyzing statistical sales data, and organizing relief cargo flights for the United Nations. The petitioner stated that the administrative manager spent time on statistical reports utilizing the FAA website, providing mandatory data to U.S. Customs, preparing quarterly reports on agricultural fees, controlling timely payment on invoices, participating in promotional campaigns, and performing office management duties including maintaining files, performing secretarial duties, and booking hotel and air tickets. The petitioner indicated that the marketing analyst evaluated sales development, reviewed market trends, prepared prospective development plans, and researched other economically successful companies in the commercial aviation cargo transportation field. The petitioner also provided a job description for a bookkeeper but noted that she was not hired until August 2004, after the petition had been filed in June 2004.

The petitioner's observations on appeal regarding the misstatements in the director's decision are noted. The petitioner has consistently indicated that it employs six individuals. The director's reference to the petitioner's

employment of 11 individuals as well as the director's mathematical conclusion that the salaries paid to the 11 individuals was not sufficient to establish that these employees held managerial positions is withdrawn. The AAO notes, however, that when the petition was filed in June 2004, the petitioner did not actually employ six individuals as claimed, as the bookkeeper was not hired until August 2004. 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 AAO also acknowledges that the director's decision consists primarily of conclusory statements regarding the lack of evidence in the record that would establish that the beneficiary qualifies for this visa classification. The AAO observes that the director failed to focus on the principal problem with the petitioner's claim regarding the beneficiary's eligibility for this visa classification. In this matter, the petitioner provided almost verbatim job descriptions for the president/chief executive officer, the beneficiary's position, and for the petitioner's vice-president/commercial director. The petitioner uses similar detail in describing the duties of both positions changing only the beginning word so that it appears the beneficiary is responsible for oversight while the employee in the vice-president/commercial director position carries out the duties. For example, the petitioner indicates that the beneficiary "[a]pprove[s] selected programs or projects of significant interest and beneficial for the company," while the vice-president/commercial director "[s]elect[s] programs or projects of significant interest and beneficial for the Company." The AAO questions the petitioner's requirement of two managers or executives¹ responsible for essentially the same duties.

Further, the AAO questions the petitioner's veracity when describing the two positions, as the petitioner does not more thoroughly delineate the differences in the two positions. It seems the petitioner is relying on a previously approved position description to denote the beneficiary's duties, rather than providing an accurate depiction of the beneficiary's duties. 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 AAO declines to speculate whether the beneficiary's actual duties comprise primarily managerial oversight while the petitioner's vice-president/commercial director and other employees perform the petitioner's operational tasks. The AAO does find however that placing a verb with a managerial connotation, such as oversee, supervise, approve, or, review in front of a duty ascribed to a lower-level employee does not convey a comprehensive understanding of the beneficiary's actual duties within the organization. It appears at most an attempt to elevate the beneficiary's place in the organizational hierarchy without delineating the beneficiary's actual daily tasks.

¹ As the petitioner acknowledged the individual in the position of vice-president/commercial director has been approved as a Form I-140 employment-based manager or executive. As such, if the individual in the vice-president/commercial director position is actually performing the daily tasks associated with operating the company, the eligibility of this individual for a Form I-140 visa classification should be revisited. 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).

Further, the petitioner's additional description of the beneficiary's duties outside of the listed duties serves only to paraphrase elements contained in the definition of executive and managerial capacity. 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. at 1103. See sections 101(a)(44)(A)(iii) and (iv) and sections 101(a)(44)(B)(ii) and (iii) of the Act.

In this matter the petitioner has not established that the reasonable needs of the petitioning company might plausibly be met by the services of two managers/executives overseeing three employees engaged in sales, market analysis, and office administration; rather the record suggests that the beneficiary and the vice-president/commercial director both are engaged in the day-to-day public relations, promotion, permit obtaining, and administrative details necessary to operate a cargo airline. 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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance as well as the vice-president/commercial director's performance of essentially the same duties. 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. 158, 165 (Comm. 1998). Moreover, the petitioner has not sufficiently established that the beneficiary's and the vice-president/commercial director's duties comprise primarily managerial rather than operational and administrative tasks.

The petitioner has not established that the beneficiary will perform in a primarily managerial or executive capacity. For this reason the petition will be denied.

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.