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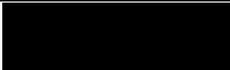
U.S. Citizenship
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Office: TEXAS SERVICE CENTER

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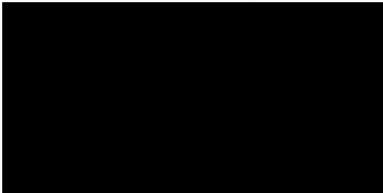
Petitioner:

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 appeal will be summarily dismissed.

The petitioner is an organization established in the State of Florida in May 1998. It operates a retail ice cream store. It seeks to employ the beneficiary as its sales manager. 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 on April 6, 2005, determining that the petitioner had not submitted sufficient evidence to establish: (1) that the beneficiary was employed in a managerial or executive capacity for the foreign entity; or (2) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity. The director specifically observed that the description of the beneficiary's duties for the petitioner was vague and general in scope and that the record showed that the petitioner was a retail ice cream store with four employees. The director noted that the evidence presented demonstrated that only two of the employees, the beneficiary and his son, worked full-time while the other employees worked part-time. The director concluded that the petitioner had not logically demonstrated who, other than the beneficiary, performed the day-to-day operations of serving ice cream to the customers. The director noted that the petitioner had not demonstrated that the beneficiary managed a function rather than performing tasks associated with the function. The director also observed that owning a business or having a managerial title was not an indicator of managerial or executive capacity.

On the issue of the beneficiary's managerial or executive capacity for the foreign entity, the director: (1) observed that the petitioner had not submitted a letter from the foreign entity describing the beneficiary's duties but that counsel had listed the beneficiary's duties for the foreign entity; (2) questioned the origin of the information contained in counsel's letter; (3) noted that the foreign entity's payroll records were illegible; and, (4) concluded that the evidence submitted did not clearly establish that the beneficiary's duties for the foreign entity were primarily managerial or executive.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

On the Form I-290B Notice of Appeal, filed on May 6, 2005, counsel for the petitioner indicates that a separate brief and/or evidence had been submitted with the Form I-290B. On the Form I-290B, Notice of Appeal, counsel restates the sections of the regulation defining managerial and executive capacity and listing the initial required evidence to support a Form I-140 Immigrant Petition for Alien Worker.

Counsel notes that the law does not require that the beneficiary be both a manager and an executive but allows the beneficiary to manage a function without personnel responsibilities. Counsel also observes "the new law specifically bars the number of persons supervised as the sole basis for denying managerial status to an employee; if staffing levels are taken into account, they must be considered in relation to the reasonable needs of the business and its stage of development."

Counsel asserts that because the petitioner's business is "self-service," the number of its employees corresponds to the needs of the business. Counsel also claims that the "Sales Manager position is the highest in the hierarchy within the petitioner Company, because its main activity is marketing of products." Counsel concludes by observing that the beneficiary has the experience for the proffered position due to his four years employment with the foreign entity. Counsel also attaches a copy of a letter from the petitioner's claimed parent company.

In the undated attached letter, the petitioner's parent company emphasizes the beneficiary's importance to the petitioner and indicates that the beneficiary directs the marketing of the petitioner's products, directs the "administrative area," and supervises the personnel and operations. The claimed parent company contends that the beneficiary has developed policies, increased the operation's sales, and provided a responsible image for the petitioner's clients and providers.

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.

The AAO acknowledges counsel's recitation of the regulations and agrees that the law does not require that the beneficiary be both a manager and an executive to qualify for this visa classification. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. The petitioner has not provided sufficient evidence that the beneficiary is either a manager or an executive.

The AAO also acknowledges that the regulations allow a beneficiary to manage a function rather than personnel. However, if a petitioner claims that the beneficiary is managing a function, the petitioner must

furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity and establish the proportion of the beneficiary's daily duties attributed to managing the function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages a function.

The AAO further acknowledges that if staffing levels are used, as the sole basis for denying managerial status, the reasonable needs of the petitioner must also be taken into account. However, the AAO emphasizes that it is appropriate for Citizenship and Immigration Services (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). Further, 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 of non-managerial or non-executive duties.

The AAO also acknowledges counsel's claim that the beneficiary markets the petitioning ice cream store's products and that the beneficiary occupies the highest position in the store. The petitioner however, has failed to address the deficiencies in the petition and supporting evidence. As the director observed, the petitioner has not provided evidence of who in the petitioner's organization provides its day-to-day operational services of selling ice cream. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Again, 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. at 604. An employee who primarily provides marketing services is not considered a manager or an executive. An individual who occupies the highest position in a store but who also primarily provides its day-to-day operational services is not considered a manager or an executive. Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

Counsel's indication on appeal that the beneficiary is involved in the "administration area" and is supervising personnel does not demonstrate that the beneficiary's duties are primarily managerial or executive. It is not possible to conclude from the totality of the evidence presented that the petitioner employs personnel to

perform the administrative tasks necessary to operate a company. Likewise, the record does not demonstrate that the beneficiary provides more than first-line supervisory duties of non-professional, non-managerial, and non-supervisory personnel, notwithstanding counsel's claim that the petitioner's small ice cream store employs a production manager and a purchasing director. First, the AAO observes that 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 (BIA 1980). Second, the totality of the record does not support a conclusion that the beneficiary's subordinates perform the duties of a "production manager" or a "purchasing director. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of serving ice cream. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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). In this matter, the petitioner failed to provide sufficient evidence to establish that the beneficiary primarily performs managerial or executive tasks rather than spending the majority of his time on the petitioner's day-to-day functions necessary to operate a retail ice cream store. Neither counsel nor the petitioner addressed these readily apparent deficiencies in the record on appeal. The decision of the director on this issue is affirmed, the petition will not be approved.

On the issue of the beneficiary's managerial or executive capacity for the foreign entity, neither counsel nor the petitioner address the director's concerns raised in her decision. As the record does not contain evidence sufficient to overcome the director's conclusion on this issue, for this additional reason, the petition will not be approved.

The AAO observes that the petitioner appears to operate a small retail ice cream shop. However, the director properly determined that the petition does not meet the basic eligibility requirements for this visa classification. As observed above, the record including counsel's statement on the Form I-290B and the attached letter are not sufficient to establish eligibility for this visa classification. Inasmuch as counsel does not identify an erroneous conclusion of law or a statement of fact as a basis for the appeal; the regulations mandate the summary dismissal of the appeal.

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. Here, that burden has not been met.

ORDER: The appeal is summarily dismissed.