



U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: **SEP 30 2005**

EAC 04 039 51035

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

The petitioner is a Texas corporation claiming to be a wholly owned subsidiary of Altadamon Rent a Car, located in Qatar.¹ In Part 5 of the Form I-140, the petitioner identified itself as an investment business. 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 evidence of record suggests that the beneficiary would not be employed in a managerial or executive capacity.

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 performing in a capacity that is managerial or executive.

¹ It should be noted that, according to the Texas Comptroller of Public Accounts, the petitioner is not currently in good standing in Texas due to its failure to satisfy all state tax requirements. Therefore, regardless of whether the petitioner's tax issues in Texas can be easily remedied, it raises the critical issue of the company's continued existence as a legal entity in the United States.

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 Part 6 of the Form 1-140, the petitioner stated that the beneficiary would be "[o]verall in charge of the management, supervision, decision-making and planning of the corporation." The petitioner also provided its organizational chart, which indicates that the petitioner's hierarchy consists of nine positions including the beneficiary as president; a vice president; a secretary; and import/export manager, a retail manager, and a business manager, all of whom are under the supervision of the vice president; an assistant retail manager and retail staff under the supervision of the retail manager; and a clerical assistant under the supervision of

the business manager. No additional information was provided regarding the beneficiary's proposed duties in the United States.

Accordingly, on April 29, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a complete position description for all of its employees, including one for the beneficiary. The petitioner was specifically asked to provide an hourly breakdown of the list of duties for each of its employees. Additional documentation was also requested in the form of W-2 and 1099 statements issued by the petitioner in 2002 and 2003.

The petitioner responded to the RFE with the following description of the beneficiary's proposed duties:

We would like to assure your kind administration that [the beneficiary's] job as [p]resident is permanent. He has been overall in charge of [the] company and he will carry on doing this.

He has been given wide latitude to make decisions for the company. [The beneficiary] will continue to manage the business and to supervise persons [sic]. He is planning to expand the company and we have full confidence that he has tremendous abilities to do this.

The petitioner also provided the following additional description of the beneficiary's position:

Hiring and firing of employees, check [b]usiness activities, monitor daily basis business related matters, check documents before sending to [the a]ccountant, get updates from [the] manager, [a]ttend business meetings, [m]onitor purchases [sic] activities, [c]heck banking documents, [c]heck account[s] payable, [c]heck [a]ccount receivable, [c]all [C]entral [T]owing and monitor daily activity of [the] business, [f]ollow business enhancements [sic] plans, [n]egotiations [sic] with business related vendors and check and rectify any customers [sic] complains [sic].

Although the petitioner stated that the beneficiary works Monday through Friday from 8 AM to 5 PM, the hourly breakdown of duties requested in the RFE was not provided. The petitioner indicated that its staff consists of one part-time shift manager, two auto mechanics (one of whom is part-time), and four cashiers (three of whom are part-time) for a total of seven employees. However, the petitioner issued only five W-2 wage and tax statements in 2003, not seven as claimed. Although additional employees were employed by Central Towing, Inc., this is a separate legal entity and cannot be considered as part of the petitioning entity. 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).

It is further noted that with the exception of the beneficiary's position, none of the other position titles discussed by the petitioner in response to the RFE match the position titles shown in the organizational chart initially submitted in support of the petition. Although the petitioner's organizational chart named Badar Sharif as its vice-president, the petitioner did not acknowledge his employment or provide a position description for this individual. The petitioner failed to reconcile this considerable inconsistency. *See id.*

On October 13, 2004, the director denied the petition noting that the submitted W-2 statements indicate that the beneficiary is the petitioner's only full-time employee. The director acknowledged that the petitioner has

experienced some level of progress, but concluded that the petitioner has not attained a stage in its development where a primarily managerial or executive employee would be necessary. The director also found that the petitioner's description of the beneficiary's duties was too vague and failed to disclose the scope and nature of the beneficiary's day-to-day duties.

On appeal, counsel challenges the director's finding that the petitioner did not submit a sufficient description of the beneficiary's proposed duties, stating that while the description may have been brief, it was nevertheless descriptive. Counsel's statement, however, is without merit. 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). 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 (E.D.N.Y. 1989), *affd*, 905 F.2d 41 (2d. Cir. 1990). According to counsel, any petitioner that merely paraphrases the statutory definitions of managerial and/or executive capacity in reference to the beneficiary's job duties would qualify for classification as a multinational manager or executive. 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 Citizenship and Immigration Services (CIS) with a specific list of duties, a determination cannot be affirmatively made that the beneficiary primarily performs qualifying tasks.

Counsel also points out that the director only recited the definition for executive capacity and asserts that the omission of the definition for managerial capacity is an indication that the director only considered the beneficiary's/duties in the scope of the statutory definition of executive capacity. However, contrary to counsel's allegation, the fact that the director did not provide the definition of managerial capacity in the denial appears to have been a mere oversight, not an indication of the director's refusal to consider the beneficiary for classification as a multinational manager. In fact, a thorough review of the director's decision suggests that the director's reference to the term executive capacity was generally accompanied by his reference to the term managerial capacity. Furthermore, the director referred to the statutory definitions of both terms in his analysis. Therefore, counsel's claim is baseless.

Counsel continues, stating that the director improperly second-guesses the adjudicators who previously approved the petitioner's nonimmigrant I-129 petitions. However, this argument is also without merit, as there is no evidence that the records of proceeding before the adjudications officers who approved the nonimmigrant petitions contained additional information and documents that were not present in the instant record of proceeding. In fact, the I-129 petitions were approved at an earlier time when the petitioner was at a less advanced stage of development than when the I-140 petition was filed. As such, the previously filed petitions were even less likely to warrant approvals than the current I-140 petition.

Counsel refers to the petitioner's employment of four full-time employees. However, the record lacks evidence to suggest that all four employees were employed on a full-time basis at the time the petition was filed. It is noted that 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). Accordingly, the AAO can only consider events that took place no later than the petition's filing date.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record lacks a detailed description of duties; thereby precluding the AAO from determining what actual duties the beneficiary would perform on a day-to-day basis. 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. *See* 8 C.F.R. § 204.5(j)(5). As the petitioner was primarily comprised of part-time employees at the time the petition was filed, the beneficiary's duties were likely comprised of primarily nonqualifying tasks. Without a sufficient support staff, the petitioner is unable to relieve the beneficiary from having to perform the company's daily operational tasks, which cannot be deemed managerial or executive. 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 reason, the petition may not be approved.

Beyond the decision of the director, the AAO will address additional issues that render the petitioner ineligible to classify the beneficiary as a multinational manager or executive. The regulation at 8 C.F.R. § 204.5(j)(3)(B) requires that the petitioner submit evidence of an established qualifying relationship with the beneficiary's foreign employer. In the instant matter, the petitioner claims to be a wholly-owned subsidiary of Altamon Rent a Car, located in Qatar. The only evidence submitted as proof of the claimed relationship is a stock certificate. However, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control.

Furthermore, the petitioner's tax returns for 2001, 2002, and 2003 contradict the petitioner's claim that it is wholly-owned by the foreign entity. Specifically, Schedule E of each of the tax returns shows the beneficiary as the 100% owner of the petitioner's stock. As previously stated, 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. at, 591-92.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the instant matter, the petitioner has submitted insufficient and contradictory evidence in support of its claim, thereby precluding the AAO from concluding that the petitioner has a qualifying relationship with the foreign entity as claimed.

Additionally, the regulation at 8 C.F.R. § 204.5(j)(3)(D) requires the petitioner to establish that it has been doing business for at least one year prior to filing the petition. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the 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."

In the instant matter, the petitioner has submitted a number of invoices from 2001 and additional invoices showing that the petitioner was doing business in September and October of 2003. However, the petition was filed in November of 2003. The evidence submitted does not account for the entire 12-month period prior to November of 2003. Therefore, the petitioner has failed to establish that it had been doing business for the one year prior to filing the petition.

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 grounds discussed 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.