



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

AUG 04 2006

SRC 04 221 50839

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The petitioner subsequently filed a motion to reopen or reconsider, or in the alternative, an appeal to the Administrative Appeals Office (AAO). The director treated the appeal as a motion to reopen or reconsider, and ultimately dismissed the motion. The matter is now before the AAO on Citizenship and Immigration Services' (CIS) motion to reopen in order to treat the instant matter as an appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition 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 the State of Florida that is engaged in providing painting services to residential and commercial properties. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that the beneficiary is employed by the United States entity as both a manager and an executive. Counsel submits a brief 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.

The issue in this proceeding is whether the beneficiary 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 filed the instant immigrant petition on August 13, 2004 noting that the beneficiary would be employed as the general manager in the four-person company. In an attached letter dated August 11, 2004, the petitioner provided the following job description for the beneficiary:

As our [g]eneral [m]anager, [the beneficiary] will continue to function at the most senior level within our organization. Through subordinate managerial personnel, she will continue

to direct the corporate policies of our corporation with regard to all business activities. In addition, she will plan, formulate and implement the administrative and operational policies for our corporation. This is an extremely important position since the continued success and expansion of [the petitioning entity] depends on [the beneficiary's] judgment with regard to hiring appropriate personnel, instituting and maintaining standards and ensuring that the employees, both managerial and non-managerial, comply with the standards of our corporation. [The beneficiary] will also continue developing and implementing aggressive sales and marketing strategies targeted at increasing sales and acquiring new clientele. [The beneficiary] will continue to represent the company in trade shows and will continue meeting with suppliers to maintain our current relationships. Additionally, by attending industry trade shows, she will obtain information on the latest painting techniques, materials, tools, procedures, etc. in order to expand the range of our services and allow us to compete in other markets within the industry. She will also continue to conduct continuous economic analysis so that as market and economic trends fluctuate, she can adjust our pricing schedule accordingly. [The beneficiary] will also be responsible for identifying new channels of advertising our company's services, including creating, developing and implementing a website for our company.

Further, [the beneficiary] will continue to direct the expense controls of the company, including maintaining the budget and reviewing the financial statements. Through our [s]ales [m]anager, [the beneficiary] will direct the company's sales and marketing activities and through our [a]dministrative [s]ervices [m]anager, she will direct the general day-to-day administrative operations. [The beneficiary] will continue to exercise wide latitude with regard to discretionary decision making and will continue to receive only minimal supervision from our [c]orporate [g]roup.

In a request for evidence, dated March 30, 2005, the director asked that the petitioner submit a "definitive statement" detailing the beneficiary's position as general manager of the United States company, including: (1) a list of job duties to be performed by the beneficiary, as well as the percentage of time the beneficiary would spend on each; (2) the names of the employees subordinate to the beneficiary and their job titles, job duties, and educational levels; (3) the qualifications necessary for each position held in the company; (4) an explanation of who provides the petitioner's services; and (5) clarification of whether the beneficiary would function at a senior level position in the corporation. The director asked that the petitioner also submit an organizational chart reflecting the beneficiary's position in the United States company.

Counsel for the petitioner responded in a letter dated June 14, 2005 and attached the following statement from the petitioner addressing the beneficiary's job responsibilities in the United States organization:

As [the petitioner's] [g]eneral [m]anager, [the beneficiary] will continue to spend 45% of her time:

- initially meeting with potential clients to introduce the company's services, as clients seek [the beneficiary's] name and reputation brought about through numerous client referrals;
- setting up client meetings with the [w]all [c]overing [s]pecialist so that the client and [w]all [c]overing [s]pecialist may discuss client's needs;

- analyzing monthly sales reports prepared by the [a]dministrative [s]ervices [m]anager to ensure that the company is operating at a profitable level and that the established monthly service goals are met;
- directing the assignment of projects to the company's [w]all [c]overing [s]pecialist or to subcontractors, as appropriate;
- negotiating and hiring all subcontractors on an as-needed basis;
- negotiating with product/supply vendors to obtain the best pricing on supplies;
- arranging vendor contracts;
- conducting personnel evaluation as well as personnel hiring and firing;

The beneficiary will continue to spend approximately 35% of her time:

- generating financial and managerial accounting reports including periodic income and expense statements, balance sheet statements, and special reports;
- conducting periodic financial analyses related to capital equipment expenditures;
- conducting and controlling all operations and strategic management activities;
- conducting extensive economic analysis of the market pricing of painting services to maintain the company's pricing schedule competitive, but at optimum profitability;
- directing the expense controls of the company, including outsourcing services;
- conducting periodic review of financial statements and analysis of the company;
- instructing outsourced services such as the company's [a]ccountant with regard to the preparation of accounts and submission of required governmental reports, i.e. Form 941s and Forms UTC-6;
- finalizes the company's payroll;
- directing the corporate policies of the corporation through subordinate managerial and professional personnel.

Further, [the beneficiary] will continue to spend 20% of her time:

- representing the company at trade shows;
- developing and implementing promotions;
- developing and implementing aggressive marketing strategies to drive sales;
- directing printers and advertisers with regard to the preparation and printing of flyers and promotional materials on behalf of the company;
- directing the development and implementation of a website for the company.

The petitioner explained that in addition to the above-named job responsibilities, the beneficiary would be responsible for directing the corporation and the activities of her subordinate workers, implementing the company's business plan, and "exercis[ing] wide latitude with regard to discretionary decision making."

The petitioner stated that the employees occupying the positions of administrative services manager, sales manager, and accountant would report directly to the beneficiary, and that the administrative sales manager would, in turn, manage the activities of the wall covering specialist. The petitioner noted that the position of

sales manager was currently vacant.¹ The petitioner provided a description of the job responsibilities for the positions of administrative sales manager, accountant, and sales manager, noting that those of the sales manager were "currently divided between the [a]dministrative [s]ervices [m]anager and [the beneficiary]."

In an attached organizational chart, the petitioner identified the beneficiary as the company's general manager, and noted the subordinate managerial positions of administrative services manager, sales manager, as well as the company's accountant, wall covering specialist, and painter. As noted previously, the petitioner's quarterly tax return for the period ending September 30, 2004 identified four employees, yet indicated that three were employed during the month of August, the period during which the instant petition was filed.

In a decision dated July 18, 2005, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that while the beneficiary "exercises discretion over the day-to-day operations of the activity, . . . he is also performing some of the day[-]to[-]day duties of the business." The director concluded that based on the amount paid in salaries by the petitioner in 2004, the beneficiary's subordinates are likely employed on a part-time basis. The director stated that, as a result, "[i]t is reasonable to assume that this business does not need a full[-]time executive to manage part[-]time employees and to make decisions regarding the company." The director further stated that the petitioner had not demonstrated that "the beneficiary's primary assignment has been or will be directing the management of the organization nor that the beneficiary has been or will be primarily directing or supervising a subordinate staff of professional, managerial or supervisory personnel, who relieve him from performing non[-]qualifying duties." Consequently, the director denied the petition.

On appeal, counsel for the petitioner contends that the beneficiary would be employed in both a primarily managerial and executive capacity. In his appellate brief, counsel references the job description offered by the petitioner in its response to the director's request for evidence and challenges the director's finding that the petitioner did not demonstrate that the beneficiary would be managing the petitioning organization or a subordinate staff of managerial personnel. Counsel claims that the director disregarded the information provided by the petitioner in its June 14, 2005 response, particularly the job duties performed by the beneficiary's subordinates. Counsel also disputes the director's finding that the petitioner's lower-level staff is employed on a part-time basis. Counsel states that both the administrative services manager and sales manager positions are full-time, with each employee working approximately thirty to thirty-five hours per week.² Counsel contends that regardless of the petitioner's staffing levels, "it is a fully operational and profitable company," for which the beneficiary makes decisions and directs the activities through managerial personnel. Counsel states that the beneficiary does not perform the "service work of the company," but rather

¹ It is unclear from the record whether the position of sales manager was occupied at the time of filing. The petitioner's quarterly tax return for the period ending September 30, 2004, identifies three workers employed during August 2004, the month during which the instant petition was filed, however, the petitioner did not identify the specific positions held by each worker at the time of filing. Nonetheless, based on counsel's reference in his brief on appeal, in which he states that "the [s]ales [m]anager position has been and is currently vacant," it is a reasonable conclusion that the petitioner did not employ a sales manager at the time of filing.

² The AAO clarifies that while counsel references the position of sales manager as being an occupied full-time position, as of the date of the appeal, the position had not yet been filled.

possesses the authority to "[make] all decisions related to the company's operational and policy management, as well as all decisions related to the company's financial and legal matters."

Upon review, the petitioner has not demonstrated that the beneficiary 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). While lengthy, the job description offered by the petitioner does not establish the beneficiary's purported managerial and executive role in the United States entity. The petitioner's representation as to the manner in which the beneficiary would allocate her time includes such vague claims as analyzing monthly reports to ensure the petitioner's profitable operations, conducting financial and economic analyses, "controlling all operations and strategic management activities," and "directing the [company's] expense controls" and the corporation's policies. The petitioner did not clearly define the managerial or executive tasks associated with the petitioner's financial functions, which, according to the petitioner, would consume 35 percent of the beneficiary's time. Of particular relevance to this function is the beneficiary's responsibility over outside contractors, which the petitioner identified as "instructing outsourced services such as the company's [a]ccountant." The petitioner has not explained the beneficiary's relationship with the company's accountant, who, incidentally, is not an employee of the petitioning entity, nor corroborated the claim that the beneficiary actually manages the accountant. Absent a more detailed description, the AAO cannot ascertain the specific managerial or executive job duties of the beneficiary. 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. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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 job description offered by the petitioner also suggests that the beneficiary would be performing many non-managerial and non-executive functions of the company. Counsel notes on appeal that the beneficiary would not be responsible for actually rendering the petitioner's services; in other words, painting the residences or businesses. However, the petitioner's non-qualifying functions are not limited to providing its painting services, yet include such tasks as marketing, advertising and selling the company's services, obtaining suppliers, negotiating contracts with regard to the supplies used by the petitioner, and maintaining the company's financial accounts, including its budget and payroll. Based on the petitioner's representations, the beneficiary would personally perform these day-to-day operational and administrative tasks, which are not deemed to be managerial or executive in nature. The beneficiary's additional responsibility of assuming a portion of the tasks assigned to the vacant sales manager position further suggests that the beneficiary would occupy a non-managerial and non-executive role in the company. The responsibilities of the sales manager were described as "implement[ing] programs to achieve overall sales objectives," "coordinat[ing] budgets, forecasts and reports on service and pricing trends," and "direct[ing] the preparation of promotional materials, mailings and advertisements." As the petitioner also identified these as tasks of the beneficiary, it is reasonable to conclude that the beneficiary is essentially responsible for performing the entire sales function of the company. The AAO notes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the petitioner's staffing levels do not corroborate the claim that the beneficiary would be employed 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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. It is also 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.*

The record contains several discrepancies relevant to the petitioner's staffing levels. At the time of filing, the petitioner was a three-year-old company that employed the beneficiary as general manager, plus an administrative services manager and an additional employee. The AAO first notes a discrepancy in the position to be held by the beneficiary. On the Forms I-485 and G-325, the beneficiary identified her current job title as "Sales & Marketing Dept. Manager." This raises the question of the beneficiary's actual job duties and her level of authority in the petitioning entity. Additionally, as noted previously, the record does not clarify the position held by the third worker employed at the time of filing.³ While the petitioner suggests the employment of a wall covering specialist, it does not appear that this position was occupied when the petition was filed. Evidence supporting this conclusion includes the petitioner's reference in its June 14, 2005 letter to a newly-hired employee who would hold the position of wall covering specialist. Moreover, counsel acknowledges on appeal that the sales manager position has been vacant, and suggests that it was not occupied at the time the petition was filed. As a result of these inconsistencies, the AAO cannot determine the tasks performed by the beneficiary's subordinate staff, as well as discern the non-qualifying job duties from which the beneficiary was relieved. 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).

Furthermore, despite the discrepancies in the petitioner's staffing levels, the record does not corroborate the petitioner's claim of using outside contractors to perform its day-to-day tasks. The petitioner's 2004 income tax return does not reflect compensation paid for "outside labor," and notes a minimal amount of \$776 paid for "casual labor." Also, the petitioner identified \$307 rendered as compensation for "professional fees" in 2004. Assuming this nominal figure includes those fees due to the petitioner's accountant, which have not been identified by the petitioner elsewhere, it is reasonable to assume that the accountant did not provide extensive financial services to the petitioner, as claimed in its June 14, 2005 response. Based on the foregoing, the AAO cannot conclude that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary and two additional 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

³ This third worker is subsequently identified by the petitioner in its June 14, 2005 response as its administrative services manager, thereby implying the termination of the previously identified administrative services manager.

sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Pursuant to the above discussion, the petitioner has not demonstrated that the beneficiary 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 petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities. The petitioner noted in its August 11, 2004 letter that the United States entity is the subsidiary of the foreign organization. As evidence of the parent-subsidiary relationship, the petitioner submitted two stock certificates issued by the petitioner naming the foreign entity and the beneficiary as owners of fifty-one and forty-nine shares of stock, respectively. The articles of incorporation for the petitioning entity authorize the issuance of 100 shares of common stock at a value of \$1.00 per share. The petitioner's 2004 income tax return, however, does not reflect a value for the petitioner's issued common stock. Additionally, Schedule K of the tax return fails to identify that the United States company is a subsidiary of a foreign corporation. The conflicting documentary evidence undermines the petitioner's claim of a parent-subsidiary relationship. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. For this additional reason, the petition will be denied.

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).

The AAO recognizes the beneficiary's previously approved L-1A nonimmigrant petition. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approval and denying the immigrant petition.

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 dismissed.