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U.S. Citizenship
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Services

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FILE:

WAC 05 100 51857

Office: CALIFORNIA SERVICE CENTER

Date:

APR 24 2006

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 is a California corporation engaged in the business of sales and distribution of giftware and crafts. 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 petitioner failed to establish that the beneficiary would 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 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 a letter dated February 17, 2005, the petitioner provided a description of the beneficiary's proposed position in the United States. The petitioner provided a more detailed description of the position in its response to the director's request for additional evidence (RFE), which the director issued on June 14, 2005. As the director has incorporated both descriptions in the denial, they need not be repeated in this decision.

Additionally, in support of the Form I-140, the petitioner provided its organizational chart, which illustrated the beneficiary at the top of the petitioner's hierarchy. The chart shows that the beneficiary's direct subordinates include a vice president, an accountant in the finance department, and an office manager in the administration department. The vice president is shown as having three direct subordinates—a sales person, an employee in charge of products, and a customer support employee. Each of those employees is shown as having an assistant.

Aside from a more detailed description of the beneficiary's position, the petitioner's response to the RFE included a separate employee list, naming each of the individuals listed in the original organizational chart and briefly describing each position, as well as the petitioner's 2005 first quarterly wage report naming the employees the petitioner employed between January and March of 2005. The petitioner noted in the employee list that the individual named as the company's vice president would be on the payroll soon and submitted an approval notice showing that the vice president's L-1A visa became valid on April 15, 2005, nearly two months after the Form I-140 was filed. The petitioner also noted that the warehouse employee listed in the original organizational chart has been replaced by [REDACTED] whose wages for the first quarter of 2005 and the prior quarter were \$800 per quarter.

On October 14, 2005, the director denied the petition, noting, in part, that the petitioner's lower level managers "cannot be considered 'managers,' [sic] for immigration purposes, because *they* are not managing professional employees." (Emphasis added in original). However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a professional, managerial, or supervisory employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. As the director's comment suggests an inaccurate interpretation of the law, it is hereby withdrawn.

Notwithstanding the director's error, he properly concluded that the petitioner failed to establish that the beneficiary would primarily perform qualifying tasks. The director reviewed the petitioner's organizational hierarchy and relevant wage report and noted that the products employee, the product assistant, the customer service assistant, and the accountant received wages commensurate with those of part-time workers while two other employees, i.e., the vice president and warehouse employee, were not included in the wage report at all.

On appeal, counsel challenges the director's focus on the size of the petitioner's staff and states that the director failed to consider the petitioner's reasonable needs in light of its overall purpose and stage of development. However, the AAO notes that the petitioner's needs will not override its statutory burden of having to establish that the beneficiary would *primarily* perform managerial or executive tasks. See §§ 101(a)(44)(A) and (B) of the Act. Furthermore, with regard to the director's focus on the petitioner's staffing structure, while counsel is correct that the director may not base his decision solely on the size of the petitioner's support staff, the director can and should consider this factor for the purpose of determining who within the organization would perform the nonqualifying operational tasks on a daily basis. Assuming that the petitioner is able to provide a job description that suggests that the beneficiary's proposed position would primarily consist of qualifying tasks, the job description must be supported by the evidence of record. 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)).

In the instant matter, the petitioner's ability to relieve the beneficiary from having to primarily engage in nonqualifying tasks is severely undermined by the petitioner's lack of a sufficient support staff. Counsel disputes this assertion, explaining that the vice president's name did not appear on the relevant wage report because he was not scheduled to start working until June 2005. However, 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). Counsel further states that Mr. [REDACTED], the warehouse employee, was not included in the wage report because he left the petitioner's employ after the Form I-140 was filed. However, the petition was filed at the end of February of 2005. Thus, based on counsel's explanation Mr. [REDACTED] should have been included in the fourth quarterly wage report for 2004 and in the first quarterly wage report for 2005 since he was still purportedly employed by the petitioner during January and part of February of 2005. Counsel's claim is entirely unsubstantiated by the documentary evidence submitted. Moreover, the petitioner indicated in its employee list that Yunyi [REDACTED] was hired as Mr. [REDACTED] replacement. However, Mr. [REDACTED] name is included in the petitioner's fourth quarterly wage report for 2004 and the first quarterly wage report for 2005. Thus, it is unclear why Mr. [REDACTED] was left out of the petitioner's organizational chart, which was submitted with the Form I-140. 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).

Notwithstanding the confusion regarding the petitioner's warehouse employee, the record shows that at the time the Form I-140 was filed the petitioner had a total of four full-time employees—the beneficiary, his office manager, the customer support assistant, and a sales person. The remaining individuals included in the petitioner's employee list were employed on a part-time basis, with the exclusion of the vice president, who was not employed at all during the relevant time period. Although counsel claims that the accountant and customer support personnel were employed on a full-time basis as a condition of the parent entity's purchase of the petitioning entity despite their respective part-time wages, the record lacks any contemporaneous evidence to corroborate counsel's claim. The AAO notes 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). Additionally, counsel's assertion that an employee receiving \$3,000 per quarter is a full-time employee has no merit. Based on California's minimum wage pay of \$6.75 per hour, an employee working full-time, or 40 hours per week, during the months of January, February, and March of 2005 should have earned approximately \$3,350 even when taking into account the federal holidays that fall within that time period. Any employee earning less than that amount cannot be deemed a full-time employee.

Furthermore, while the record suggests that the petitioner may have retained sales representatives to assist on a contractual basis, the only supporting documentation submitted consists of the front copies of checks, most of which do not contain the month and year of payment and none of which can be verified as having been cashed, as there are no photocopies of the backs of the checks.

Finally, counsel points to the director's error on the second page of the denial, claiming that the director's reference to the wrong petitioner and the wrong position title for the beneficiary suggest that the denial was based on a record of proceeding that does not pertain to the petitioner in the instant matter. However, a thorough review of the director's decision suggests that the error was typographical and not germane to the director's decision, which clearly referenced facts specific to the petitioner's record of proceeding. Thus, while the AAO acknowledges the director's erroneous statement, it cannot conclude that the denial was based on a record of proceeding other than the one belonging to the petitioner.

On review, the record illustrates a beneficiary with a heightened degree of discretionary authority accompanied by a top-level position within the petitioner's organizational hierarchy. However, given the

petitioner's organizational complexity during the relevant time period, the AAO cannot conclude that the beneficiary would have been relieved from performing nonqualifying duties. While the record shows that the petitioner has hired Spoor & Associates to contribute to the petitioner's sales force, this event did not occur until after the Form I-140 was filed and, therefore, cannot be considered in determining the petitioner's eligibility in the present matter. *See Matter of Katigbak*, 14 I&N Dec. 49. Based on the record as presently constituted, the AAO finds that the petitioner has failed to demonstrate that it had the ability to employ the beneficiary in a primarily managerial or executive capacity at the time the Form I-140 was filed. For this reason, the petition may not 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.