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U.S. Citizenship
and Immigration
Services

134

[Redacted]

FILE: [Redacted]
EAC 05 095 50071

Office: VERMONT SERVICE CENTER

Date: JUL 10 2006

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:
[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 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 was incorporated on May 18, 1997¹ in the state of New Jersey and is operating as a real estate development, interior design, and construction management company. It seeks to employ the beneficiary as its project 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 two separate grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of her 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.

¹ The director stated on page three of her decision that the petitioner was incorporated on June 1, 1997. The AAO acknowledges that this statement was made in error, as all evidence in the record indicates that the petitioner was incorporated on May 18, 1997. The director herself acknowledged this fact in the request for additional evidence dated July 20, 2005. The AAO will note the proper date of incorporation. However, the director's error will have no bearing in the outcome in this matter.

The two primary issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established at the time it filed the Form I-140 that the beneficiary would be primarily 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 support of the Form I-140, the petitioner provided a letter dated January 31, 2005, which included the following description of the beneficiary's foreign and proposed employment:

Position Held Abroad

[The beneficiary] began his distinguished career with our company in March 1987 as [p]roject [m]anager at our overseas parent company, Alum-Or, Ltd., in Jaffa, Israel, having a key senior managerial/executive responsibility participating in formulating and administrating our company policies and developing long-range goals and objectives; providing the overall direction of our entity within the guidelines set by the board of directors; being in charge of developing and implementing a management plan, and oversee [sic] all construction projects are carried out, from conceptual development thru final construction, efficiently and effectively within budgetary and time constraints; having the overall responsibility for completing construction projects in accordance with [the] [e]ngineer and [a]rchitect's drawings and specifications, and prevailing building codes; with the help of subordinates, such as [a]ssistant [p]roject [m]anager, [s]uperintendent, [f]ield [e]ngineer, [c]rew [s]upervisors, etc., directly reporting to him, plan, organize, budget, direct, control, and coordinate the overall activities of operations of our organization, overseeing business and financial decisions of our entity, and formulating business management policies; evaluate various construction methods and determine the most cost-effective plan and schedule; determine the labor requirements, supervising and controlling hiring and dismissal of workers; arrange for recruitment or assignment of project personnel; outline work plan[s] and assign duties, responsibilities, and scope of authority; review status reports and modify schedules or plans as required.

Proposed Position With the U.S. Petitioner

[The beneficiary] has held the position of [p]roject [m]anager, a position involving managerial/executive functions, participating in formulating and administrating our company policies and developing long-range goals and objectives; providing the overall direction of our entity within the guidelines set by the board of directions; being in charge of developing and implementing a management plan, and oversee all construction projects are carried out, from conceptual development thru final construction, efficiently and effectively within budgetary and time constraints; having the overall responsibility for completing construction projects in accordance with [the] [e]ngineer or [a]rchitect's drawings and specifications, and prevailing building codes; with the help of subordinates, such as [a]ssistant [p]roject [m]anager, [s]uperintendent, [f]ield [e]ngineer, [c]rew [s]upervisors, etc., directly reporting to him, plan organize, budget, direct, control, and coordinate the overall activities of operations of our organization, overseeing business and financial decisions of our entity, and formulating business management policies; evaluate various construction methods and determine the most cost-effective plan and schedule; determine the labor requirements, supervising and controlling hiring and dismissal of workers; arrange for recruitment or assignment of project personnel; outline work plan[s] and assign duties, responsibilities, and scope of authority; review status reports and modify schedules or plans as required.

On July 20, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following: 1) evidence of the staffing levels of both organizations indicating the number of employees, the duties performed by each employee, and the management structure of the foreign and U.S. entities; 2) evidence of any use of outside contractors and their respective duties; and 3) the petitioner's 2004 tax return, the relevant 2004 W-2 wage and tax statements issued by the petitioner, and any tax forms issued to outside contractors in 2004.

The petitioner responded to the director's request with a letter dated September 21, 2005 citing various relevant regulatory definitions. The AAO notes, however, as did the director in her decision denying the petition, that 8 C.F.R. § 1214.2 is not relevant in the instant matter, as it pertains to alien victims of severe forms of trafficking of people and aliens in pending immigration proceedings. For purposes of the instant proceeding, the AAO will assume that the petitioner meant to reference portions of 8 C.F.R. 214.2(l), which pertains to nonimmigrant L-1A intracompany transferees filing Forms I-129. Nevertheless, even given the AAO's assumption for the benefit of the petitioner, the provisions of 8 C.F.R. 214.2(l) are irrelevant in the instant matter in light of the petitioner's filing of a Form I-140 seeking an employment-based *immigrant* visa, which would classify the beneficiary as a multinational manager or executive. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). However, the eligibility requirements for petitioners of nonimmigrant visas are significantly different from the requirements that pertain to immigrant visa petitioners. The AAO will only consider those regulations that directly pertain to the Form I-140 immigrant petition, which has been filed in the instant matter.

With regard to the beneficiary's employment capacity, the petitioner stated that the beneficiary has functioned and would continue to function at the top of the organizational hierarchy as a key member of the management team, which entails the following list of responsibilities:

[O]verseeing construction projects, developing and implementing a management plan to complete various construction projects according to the owner's goals that allows the design and construction processes to be carried out efficiently and effectively within budgetary and schedule constraints; directing and monitoring the progress of field or site construction activities; responsible for obtaining all necessary permits and licenses; directing and monitoring compliance with building and safety codes; reviewing engineering and architectural drawings and specifications to monitor progress and ensure compliance with plans and specifications

Contrary to the director's statement on page four of the denial, the petitioner also provided job descriptions for the beneficiary's entire subordinate staff, which are identical with regard to his foreign and U.S. job posts. Based on the information provided, the AAO will concede that the beneficiary's subordinate staff has been and would be comprised of supervisory, managerial, or professional employees and will withdraw the director's conclusion to the contrary. The duties of the support staff are adequately delineated and the petitioner's employment of the claimed subordinate staff is adequately documented by the 2004 W-2 wage and statements and Forms 1099, which the petitioner provided in response to the director's request in the RFE.

Notwithstanding the AAO's favorable concessions, however, the director properly issued a decision dated November 30, 2005 denying the petitioner's Form I-140. The director noted the petitioner's incorrect citation of an irrelevant section in the regulations and properly addressed the petitioner's numerous references and improper reliance on various unpublished decisions² issued by the AAO and the service center as well as information provided in the Department of Labor's Occupational Outlook Handbook. The director ultimately

² While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, the AAO is not legally bound to follow the principles set out in unpublished decisions.

determined that the record does not contain sufficient evidence to affirmatively conclude that the beneficiary has been and would be employed in a qualifying managerial or executive capacity.

In a lengthy appellate brief, counsel addresses specific portions of the director's denial and aggressively challenges the director's ultimate conclusion. The AAO has responded to several of counsel's concerns by withdrawing comments and statements of the director that the AAO deemed erroneous. The director's, and presently the AAO's primary concern, however, is the lack of sufficient evidence to establish that the beneficiary's duties abroad and in the United States have been and would be primarily of a qualifying nature.

With regard to this conclusion, counsel asserts that the petitioner has provided thorough descriptions of the duties performed by the beneficiary both abroad and in the United States. She states that the beneficiary's primary duties are "providing comprehensive leadership and intergrat[ing] diverse operational functions" in the context of construction projects. However, despite the fact that the AAO acknowledges the beneficiary's supervision of a supervisory, managerial, and professional support staff as a part of his role as project manager within both the foreign and U.S. organizations, the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). 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).

In the instant matter, the petitioner has provided the AAO with a general overview of the beneficiary's position as a project manager. The petitioner has also established that the beneficiary's overseas and U.S. positions are both at the top of each organization's managerial hierarchy. Notwithstanding these factors, the AAO cannot assume that the beneficiary's duties have been and would be primarily of a qualifying nature if the beneficiary's actual daily tasks are undisclosed. 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), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Thus, despite the beneficiary's position within each entity's hierarchy and the beneficiary's supervision of a supervisory, managerial, or a professional support staff, the key to the AAO's determination of the beneficiary's employment capacity is an analysis of his day-to-day job duties. *See* 8 C.F.R. § 204.5(j)(5). To clarify, the petitioner must provide a list of the actual duties the beneficiary performs in his effort to carry out his overall responsibilities. Merely conveying the general objectives of the beneficiary's job as project manager only provides a broad illustration of the beneficiary's overall function within the context of the organization. Thus, while the AAO does not rule out the possibility that the beneficiary's duties abroad and in the United States may have been and would be primarily of a qualifying nature, the AAO cannot make an affirmative conclusion based on the record as presently constituted.

Additionally, though not addressed in the director's decision, the record lacks sufficient evidence to show that the petitioner had been doing business for one year prior to filing the Form I-140 as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

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."

While the petitioner has provided evidence to establish that it had been doing business as early as July 2004, there is no documentation showing that the petitioner had been doing business from February through June of 2004, which is necessary in order to meet the requirements set out in 8 C.F.R. § 204.5(j)(3)(i)(D).

The AAO notes that 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 ground of ineligibility as 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 it is shown 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 at 1043, *aff'd*. 345 F.3d 683..

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.