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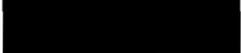
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JUN 02 2006

EAC 05 075 52615

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on 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 New Jersey that is engaged in international trading. The petitioner seeks to employ the beneficiary as its president.

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 qualifies for the requested immigrant classification as he is employed in the United States as an executive in accordance with the statutory definition of "executive capacity." Counsel submits a brief and documentary evidence 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 immigrant petition on January 10, 2005 noting the beneficiary's employment as the president of the four-person United States company. In an attached letter, dated September 7, 2004, the petitioner provided the following description of the beneficiary's proposed employment:

In this capacity, [the beneficiary] will continue to manage and direct the daily operation of the [c]ompany. He will be responsible as follow[s]: Hires, fires and supervises the [c]ompany's employees; Supervises and directs managers to deal with the suppliers and to make contracts with them. Receive the reports and data from the managers in order to organize the sales campaigns and to make better marketing formulas. Direct the managers to formulate the marking, pricing and sales activities of the [c]ompany in the United States. He will be responsible for the daily operation and management of the [c]ompany.

The petitioner further provided the following outline of the beneficiary's job responsibilities:

1. Plans, develops, and establishes policies and objectives of the U.S. company in accordance with the [p]arent company's policies & objectives toward the U.S. market: 8 Hours
2. Confers with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments (The [c]ompany in U.S. and [t]he [p]arent [c]ompany in Korea), and to establish responsibilities and procedures for attaining objectives. : 7 Hours
3. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. : 10 Hours
4. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.: 5 hours
5. Plans and develops industrial, labor and public relations policies designed to improve company's image and relations with customers. Employees, and public.: 5 Hours
6. Evaluates performance of employees (Managers/Employees) for compliance with established policies and objectives of company. Have authority to hire and fire the employees within the U.S. branch.: 5 Hours

An appended organizational chart of the petitioning entity identified the beneficiary as supervising the company's marketing and accounting managers, while the position of information technology/marketing assistant was identified as subordinate to the marketing manager. The petitioner provided a brief description of the job duties performed by each of the workers subordinate to the beneficiary.

While the director issued a request for evidence to the petitioner, he did not specifically request evidence related to the beneficiary's proposed employment.

In a decision dated October 27, 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 noted that the job description offered by the petitioner is vague, and that many of the beneficiary's responsibilities paraphrase the statutory definitions of "managerial capacity" and "executive capacity." The director further concluded that the petitioner has not "grown to a point where any of its staff of four are acting entirely in the capacity of managers or executives." The director noted that the petitioner received monthly deposits from the foreign entity, and concluded that the petitioner could not financially support a subordinate managerial or professional staff who would relieve the beneficiary from performing non-qualifying tasks of the business. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on November 25, 2005. In a subsequently filed appellate brief, dated December 19, 2005, counsel contends that the beneficiary would be employed as an executive of the

United States organization. Counsel challenges the director's conclusion that the petitioner had not grown to a level sufficient to employ a staff of four workers, claiming that the director relied on an improper standard. Counsel explains that the petitioner's primary purpose in the United States is to act as "a marketing arm" of the foreign entity and to assist in developing its sales and distribution network. Counsel focuses on the financial relationship between the foreign and United States entities, stating that "as a component of [the] whole international organization body," the petitioner relies on financial support from the foreign organization. Counsel claims that as a result of this relationship, the director cannot incorrectly determine that the petitioner could not support a managerial or executive subordinate staff.

Counsel stresses the fact that the beneficiary occupies the positions of president for both the United States and foreign entities, stating that this "proves that the beneficiary has all the authority to be [employed] in [an] executive capacity." Counsel disputes the director's finding that the beneficiary's job description was paraphrased from the statutory definitions of "managerial capacity" and "executive capacity" and states that it depicts the beneficiary's "actual duties." Counsel contends that the beneficiary's subordinates are managerial and professional employees who "carry out the U.S. entity's business goals, policies and mission." Counsel states that the employees were hired by the beneficiary during his first year of employment, and that the beneficiary holds the authority to fire them. Counsel also challenges that the director failed to take into account the petitioner's function in the United States and its reasonable needs when considering the company's staffing levels and the beneficiary's employment capacity. Counsel submits the job descriptions already provided for the record at the initial filing, as well as Internal Revenue Service (IRS) Forms W-2, and its state and federal quarterly tax returns for the years 2003 through 2005.

Upon review, the petitioner had not established 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). Here, the petitioner has not offered a comprehensive description of the specific managerial or executive job duties to be performed by the beneficiary. The petitioner's vague outline fails to define the policies and business objectives to be developed, reviewed and revised by the beneficiary, a responsibility that appears to consume more than half of the beneficiary's workweek. Additionally, the petitioner has not clarified the beneficiary's role in the company's finances or "industrial, labor, and public relations." The petitioner states only that the beneficiary would review financial reports, direct the coordination of financial programs, and develop policies to improve the petitioner's image and public relations. 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).

Additionally, the generalized job description offered by the petitioner appears to be largely composed of language taken almost verbatim from the definition of "president" found in the U.S. Department of Labor's *Dictionary of Occupational Titles*. Generic job descriptions found in Department of Labor publications have no bearing on an assessment of this beneficiary's duties within the context of the petitioner's business, and the petitioner cannot satisfy its burden of proof by paraphrasing such descriptions; the regulations require the petitioner to submit a detailed description of the beneficiary's actual job duties. See 8 C.F.R. § 204.5(j)(5).

Although the director based his decision partially on the size of the United States company and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. Counsel correctly observes that a company's staffing levels, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is 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.* In the instant matter, counsel explains on appeal:

When we see the needs of the petitioner in light of their purpose (to serve as marketing arm of parent company) and state [sic] of development (relatively new and developmental stage), we can clearly see that the beneficiary's duties are not vague but prove to be one that meets the organization's needs of bridging the two entity's [sic] operation and of achieving international operation goals.

Counsel's explanation does not corroborate the suggestion that the petitioner's reasonable needs are met through the employment of the beneficiary as president, as well as two managers and an information technology support/marketing assistant. Again, the limited job description fails to clarify the beneficiary's role in various functions of the business, such as its finances, public relations and marketing, as well as those functions not specifically addressed by the petitioner, including the maintenance of personnel records and payroll, shipping, and document preparation. The AAO notes that given that the petitioner is an international trade company, it is reasonable that the petitioner would account for the performance of its import and export activities, including shipping, receiving, and customs regulations. The petitioner has not offered evidence of employing workers who would perform these essential non-qualifying functions. Absent additional evidence explaining the beneficiary's role, the AAO cannot conclude that the petitioner's reasonable needs are met through the work of its four-person staff. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that the petitioner's two employees holding managerial titles are not supervising any subordinate workers. Based on the job descriptions, they appear to be personally performing the actual day-to-day marketing and accounting activities of the company. Their employment in non-managerial positions is further suggested by the documentary evidence submitted by counsel, particularly the Department of Labor's definitions for "market research analyst" and "budget analyst," which were provided as an example of each employee's job duties¹. Counsel further contends that the three lower-level employees are performing "professional level" job duties, and emphasizes that these positions typically require the completion of a four-

¹ The job duties of a "market research analyst" are summarized as researching market conditions to determine potential sales, gathering information pertaining to "competitors, prices, sales, and methods of marketing and distribution," and creating marketing plans. A "budget analyst" is described as "[examining] budget estimates for completeness, accuracy, and conformance with procedures and regulations" and "[analyzing] budgeting and accounting reports."

year bachelor degree. While counsel maintains that each of the lower-level employees possesses a bachelor's degree, neither the petitioner nor counsel has submitted diplomas or transcripts confirming their completed level of education. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Id.* Regardless, even if the beneficiary is deemed to be managing professionals, this is just one factor in establishing employment in a primarily managerial capacity. See section 101(a)(44)(A) of the Act. The petitioner has not demonstrated that the beneficiary's employment in the United States entity would satisfy the remaining criteria of "managerial capacity." Moreover, counsel maintains on appeal that the beneficiary would be employed in a primarily *executive* capacity. 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).

Despite the beneficiary's ineligibility for the requested immigrant classification, the AAO notes that the director partially based his denial on an improper standard. The petitioner's financial status should not be considered when determining the beneficiary's employment capacity as either a manager or an executive. See 8 C.F.R. § 101(a)(44)(A) and (B); *but see* 8 C.F.R. § 204.5(g)(2) (requiring that the petitioner demonstrate its ability to pay the beneficiary his or her proffered annual wage at the time the priority date was established). The analysis of the nature of the beneficiary's proposed employment should not include a review of whether the petitioner is "financially capable . . . without external financing" of supporting the beneficiary in a primarily managerial or executive capacity.

Based on the foregoing 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 issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner stated in its September 7, 2004 letter that the beneficiary continues to occupy the position of president of the foreign organization. The petitioner's job description, however, is vague, and essentially paraphrases the statutory definition of "executive capacity." See 8 C.F.R. § 101(a)(44)(B). Based on the provided job description, the beneficiary's responsibilities were comprised of planning, either autonomously or with "company officials," the company's policies and objectives, determining the organization's progress, directing financial programs, and directing subordinate workers. 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. at 1108. Despite the beneficiary's title as "president," and the organizational chart reflecting a subordinate support staff, the lack of evidence associated with the actual job duties performed by the beneficiary prevents a finding that he was employed in a primarily managerial or executive capacity. For this reason, the petition will be denied.

An additional issue not addressed by the director is whether a qualifying relationship existed between the foreign and United States entities at the time of filing the petition. In its September 7, 2004 letter, the petitioner addressed its purported parent-subsidiary relationship with the foreign entity, and submitted a stock certificate identifying the foreign company as the sole owner of the shares issued by the petitioner. The petitioner, however, has not resolved this claim with the information contained on Schedules E and K of its 2002 and 2003 federal tax returns identifying the beneficiary as the owner of 100 percent of the petitioner's

issued stock. 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). Due to the unresolved discrepancy in the record, the AAO cannot conclude the existence of a qualifying relationship between the foreign and United States entities at the time of filing. The petition will be denied for this additional reason.

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.