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U.S. Citizenship
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FILE: WAC 03 141 50191 Office: CALIFORNIA SERVICE CENTER Date: MAR 21 2006

IN RE: Petitioner:
Beneficiary:



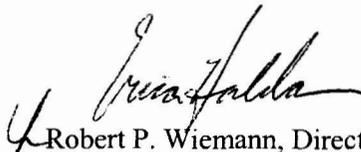
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 Director, California Service Center, denied the employment-based visa petition. Following the petitioner's appeal to the Administrative Appeals Office (AAO), the AAO withdrew the director's decision and remanded it to the California Service Center for further review and the entry of a new decision. In a September 26, 2005 decision, the director again denied the petition on grounds different from the previous denial. The matter is now before the AAO on certification from the director. The AAO will affirm the director's decision.

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 California that is operating as a vehicle processor for major automobile manufacturers. The petitioner seeks to employ the beneficiary as its chief executive officer.

The director denied the petition concluding that the petitioner had not established the existence of a qualifying relationship between the foreign and United States entities. In a decision dated May 20, 2005, the AAO withdrew the director's decision concluding that the petitioner had established the requisite parent-subsidiary relationship. The AAO remanded the instant matter to the director for further review, noting the petitioner's failure to demonstrate that the beneficiary had been employed abroad or would be employed in the United States in a primarily managerial or executive capacity. Following the director's request for additional evidence, to which the petitioner timely responded, the director concluded that the beneficiary had not and would not be primarily employed in a qualifying managerial or executive capacity. Consequently, the director denied the petition and certified it to the AAO for review. The AAO notes that this matter was certified to the AAO on September 26, 2005. As of this date, the petitioner has not supplemented the record with additional evidence. Therefore, the record will be considered complete.

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 AAO will first consider the issue of 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 petition on April 3, 2003, noting that the beneficiary would be employed as the chief executive officer of its nineteen-person staff. In a March 24, 2003 letter submitted with the petition, the petitioner explained that the beneficiary "[would] be responsible for the 'success' or 'failure' of the U.S. operation," including such responsibilities as vehicle processing operation, marketing, business strategy, financing, company culture, human resources, hiring, firing, regulatory compliance, and public relations. The petitioner outlined the company's six-person "management team" who would work under the beneficiary, and noted the employment of an additional twelve employees.

In a request for evidence, dated May 24, 2004, the director asked that the petitioner provide the following documentary evidence in support of the beneficiary's employment in a primarily managerial or executive capacity: (1) an organizational chart describing the company's managerial hierarchy and staffing levels at the date of filing, and clearly identifying the beneficiary's position in relation to the petitioner's staff; (2) a brief description of the job duties performed by each employee under the beneficiary's supervision; (3) an explanation of the source of remuneration for each employee; and (4) copies of the petitioner's state quarterly wage reports for the first and second quarters of 2003.

The petitioner's former counsel responded in a letter dated July 14, 2004, in which he presented an organizational chart of five employees under the beneficiary's supervision who occupied the positions of chief executive officer, chief operating officer and vice-president, senior operation director, assistant chief executive officer, and senior executive vice-president. Counsel also noted the positions of an additional fifteen lower-level workers, as well as two teams under the "warranty" department. Counsel submitted the requested quarterly wage report for the period ending June 30, 2003, the period during which the instant petition was filed.

The director initially denied the petition based on the petitioner's failure to demonstrate the existence of a qualifying relationship between the foreign and United States entities. Upon review of the appeal, the AAO noted that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Specifically, the AAO stated that the petitioner had not provided a detailed description of the specific managerial or executive job duties to be performed by the beneficiary as the company's chief executive officer. The AAO also noted a discrepancy in the employees the petitioner claimed to employ, noting that the employment of workers named on the petitioner's organizational chart was not confirmed by the petitioner's state quarterly wage reports.

Following the AAO's remand of the instant matter, the director issued to the petitioner a decision dated June 13, 2005 addressing the issues raised by the AAO and requesting additional evidence. The director asked that the petitioner submit evidence that would "address the AAO's concerns" regarding the beneficiary's proposed employment as a manager or executive.

The petitioner's current counsel responded in an undated letter and referenced the beneficiary's individual income tax return, as well as its company brochure, 2005 payroll and business plan, and an article from the Los Angeles Times as evidence that "clarifies the questions of the AAO."

In a September 26, 2005 decision, 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.

Upon review, the AAO affirms the director's September 26, 2005 decision and concludes that the petitioner had not demonstrated that the beneficiary would be employed in the United States 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). The petitioner's limited description of the beneficiary's job duties fails to identify the specific managerial or executive job duties to be performed by the beneficiary in the United States company. It is insufficient for the petitioner to merely state that the beneficiary would be responsible for the United States operation, including developing the company's strategy and direction, "leading the organizational long and short range planning," establishing a positive work atmosphere, and "hir[ing], fir[ing], and lead[ing] the management team." 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). The AAO notes that the petitioner neglected to submit a comprehensive description of the beneficiary's proposed job duties in response to the AAO's May 20, 2005 decision and the director's June 13, 2005 request for evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Additionally, based on the brief outline of responsibilities that "will fall on the CEO's shoulders," it would appear that the beneficiary would be responsible for the company's "vehicle processing operation," marketing, financing, human resources, regulatory compliance, and public relations. This conclusion is supported, in particular, by the petitioner's lower-level staff at the time of filing, which, as discussed below, did not appear to include workers who would assume the performance of these administrative and operational tasks of the petitioner's business.

The AAO notes numerous discrepancies in the workers employed at the time of filing. Contrary to the petitioner's claim on Form I-140 of nineteen workers, the petitioner's quarterly wage report for the period ending June 30, 2003 represents the employment of nine workers during April 2003, the month during which the instant petition was filed. Of the six management employees identified by the petitioner in its March 24, 2003 letter, five are confirmed on the quarterly wage report as being employed during the second quarter of 2003. There is no evidence that at the time of filing, the petitioner employed a marketing manager or any workers who would perform its marketing functions. Additionally, seven lower-level workers named by the petitioner in this same letter are not identified on the corresponding quarterly wage report.

The record is further complicated by counsel's July 14, 2004 response to the request for evidence, in which counsel identified five employees supervised by the beneficiary in positions different from those identified in the petitioner's initial letter filed with the petition. The beneficiary's revised subordinate staff also included two workers who are not identified as employees on the petitioner's June 30, 2003 quarterly wage report. Moreover, based on the corporate manual for "P&Y Vehicle Processors," the petitioner's former name¹, the position of "chief executive officer," the beneficiary's proposed position, is occupied by another individual. Furthermore, despite the information presented on the petitioner's organizational chart, the petitioner has not confirmed that at the time of filing workers were employed in the positions of chief financial officer, chief operating officer, human resources, information technology, operations, and quality assurance. Clearly, the

¹ The petitioner provided a Certificate of Amendment, dated December 30, 2002, reflecting a change in the petitioner's corporate name to the present.

numerous inconsistencies in the record prevent a finding of the petitioner's staffing level at the time of filing. This information, and particularly a correct outline of the employees working subordinate to the beneficiary, is essential to determining whether the beneficiary would be relieved from performing the above-outlined non-managerial and non-executive tasks of the organization. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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).

The AAO notes that on remand, the petitioner presented a business plan for 2005, which included yet another revised organizational chart for the petitioning entity. Again, the position of "chief executive officer" is represented as being occupied by someone other than the beneficiary. The petitioner's statement in its response to the director's June 13, 2005 request for evidence that the petitioner's personnel changes in 2003 "result[ed] in conflicting organizational charts and payroll" is not sufficient to clarify the petitioner's staffing level, and particularly the beneficiary's support staff, at the time of filing. 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. *Id.* The petitioner has not presented satisfied this requirement.

Based on the above discussion, the petitioner has not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity at the time of filing. Accordingly, the AAO will affirm the director's September 26, 2005 decision.

The AAO will next consider whether the beneficiary had been employed overseas in a primarily managerial or executive capacity.

In its March 24, 2003 letter submitted with the immigrant petition, the petitioner identified the beneficiary's former "executive" position in the foreign company as "vice-president." In a description of the foreign company's organizational hierarchy, the beneficiary's job duties as vice-president were described as advising the chief executive officer in the company's business goals and in setting priorities, managing the development of policies according to changes in the industry, assigning work to subordinate managers, solving marketing and logistical consulting problems, establishing performance standards and evaluations for subordinate employees, determining personnel actions, and analyzing investment opportunities for the petitioning entity. The petitioner identified four workers who were subordinate to both the beneficiary and the company's chief executive officer and employed in the positions of e-logistics solution manager, e-logistics marketing manager, e-logistics strategic consulting assistant, and accounting manager. As evidence of the beneficiary's qualifying employment abroad, the petitioner submitted a certificate of employment identifying the beneficiary as having occupied the position of vice-president as of September 7, 2001. The petitioner submitted additional certificates of the beneficiary's working experience as a director at Hyundai Motor Company and as an adjunct professor in the Department of Mechanical Engineering at Korea Polytechnic University. While the director issued a request for evidence on May 24, 20004, he did not address the issue of the beneficiary's employment capacity prior to his transfer to the United States.

In its May 20, 2005 decision, the AAO addressed the beneficiary's overseas employment capacity, noting that the job description offered by the petitioner "fail[ed] to convey an understanding of the job duties the beneficiary was performing abroad." Following the AAO's remand, the director issued a request for evidence to the petitioner asking that the petitioner submit the following evidence of the beneficiary's employment overseas: (1) payroll records documenting the beneficiary's employment in the foreign company for the year preceding the filing of the present petition; (2) the foreign company's organizational chart describing its managerial hierarchy and staffing levels, and clearly identifying the beneficiary's position and all subordinate employees; (3) a brief description of the job duties performed by all employees supervised by the beneficiary; and (4) a detailed description of the beneficiary's job duties in the foreign company, including the approximate amount of time the beneficiary spent on each task.

The petitioner's present counsel responded in an undated letter stating that as the foreign company's vice-president, the beneficiary "was responsible for managing and developing businesses and delivering solutions to the company's e-logistics operation." Counsel states that the beneficiary "was also responsible for the initial definition of business engagement deliverables, budgets, and target dates, etc." Counsel references the attached organizational chart as evidence of the beneficiary's supervision of three "executives" employed in the areas of operation, finance and administration. In an attached statement, the petitioner provided the following allocation of the beneficiary's job duties:

Management of subordinates:	20%
Oversight of e-logistics:	35%
Client Contact/Negotiations:	25%
Business Development:	20%

In his September 26, 2005 decision, the director concluded that the petitioner had not established that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director questioned the validity of the foreign company's organizational chart, stating that it was unclear who would perform the non-executive and non-managerial tasks of the business. The director further noted the "vague and nonspecific" job description offered by the petitioner for the beneficiary's employment abroad, stating that the petitioner "fail[ed] to demonstrate what the beneficiary [did] on a day-to-day basis." The director indicated that the petitioner had not defined the company's goals, policies, or strategies, and did not "clarify who actually performs the marketing, budgeting, finance and accounting, advertising, and personnel functions." The director also stated that the beneficiary's responsibilities of engaging in client contact, negotiations, and business development demonstrates that the beneficiary had been performing tasks necessary to provide a service or produce a product of the foreign company. Consequently, the director denied the petition and certified it to the AAO.

Upon review, the petitioner has not demonstrated that the beneficiary was employed by the foreign 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). As addressed by the director, the petitioner has failed to offer a job description sufficient to determine the specific managerial or executive job duties performed by the beneficiary as the foreign company's vice-president. The petitioner did not define the "business goals," "priorities," or "policies" developed by the beneficiary, or more importantly, explain how the limited job responsibilities constitute employment in a primarily managerial or executive capacity.

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. at 1108.

In addition, the petitioner did not define the foreign company's "e-logistics" operation, which encompassed 35 percent of the beneficiary's time. The petitioner's claims that the beneficiary oversaw the e-logistics department and developed business and delivery solutions for the operation lacks the required specificity as to what associated managerial or executive job duties the beneficiary performed. Based on the representation that the beneficiary was responsible for "delivering solutions" for the operation, it would seem reasonable to conclude that the beneficiary personally performed functions related to the company's e-logistics. Additionally, without additional evidence explaining his true role in the company, it would appear that the beneficiary also performed non-qualifying functions related to marketing and logistics, as well as the company's negotiations and client communications. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604.

The AAO notes a discrepancy in the staff purportedly supervised by the beneficiary overseas. The positions of the four lower-level employees represented by the petitioner in its March 24, 2003 letter are different from the three subordinate positions noted in its response to the remand and the director's request for evidence. In addition, the positions and employees identified in the petitioner's initial letter are not reflected on the subsequently submitted organizational chart. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Absent a clear outline and clarification of the foreign entity's staffing levels prior to the beneficiary's transfer to the United States, the AAO cannot conclude that the foreign company employed a staff sufficient to support the beneficiary in a primarily managerial or executive capacity.

Based on the foregoing discussion, the petitioner failed to establish that the beneficiary was employed by the foreign company in a primarily managerial or executive capacity. Accordingly, the AAO affirms the director's September 26, 2005 decision.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification.

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 director's September 26, 2005 decision is affirmed. The petition is denied.