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U.S. Citizenship  
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Services

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By

FILE:



Office: TEXAS SERVICE CENTER

Date:

3 1 2006

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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

**DECISION:** The Director, Texas Service Center, denied the employment-based 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)(B). The petitioner is a corporation organized under the laws of the State of Florida that is engaged in the distribution of fruits and vegetables. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director also noted that as a result of conflicting salaries offered to the beneficiary, Citizenship and Immigration Services (CIS) could not conclude that the petitioner had demonstrated its ability to pay the beneficiary his proffered wage as required in the regulation at 8 C.F.R. § 204.5(g)(2).

On appeal, counsel for the petitioner contends that the beneficiary would be employed in the United States as an "executive manager," during which he would "plan[ ], organize[ ], direct[ ] and control[ ] the [petitioner's] major functions and work through other employees to achieve the organization's goals." Counsel asserts that while in this position, the beneficiary would not primarily perform tasks related to the production of the petitioner's product or to providing its services. Counsel explains that the disparity in the beneficiary's salaries represents the increase in compensation that he received since the time of filing the petition and the present. Counsel claims that the petitioner demonstrated its ability to pay the beneficiary his proffered annual salary. Counsel submits a brief and documentary evidence, the majority of which appears to have been previously provided in the petitioner's response to the director's request for 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 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 immigrant petition on November 8, 2004, noting the beneficiary's position as president of the three-person corporation. In an appended letter, dated October 19, 2004, the petitioner provided the following explanation for the beneficiary's employment in the United States:

By having a permanent executive in the United States of America our company will continue to prosper because [the beneficiary] has the abilities, skills, and managerial background to be trusted with the ongoing development of the US company. He has managed the marketing operation for the company organizing and overseeing all marketing matters, including exercising full responsibility for recruiting, hiring, training and dismissing employees. He has coordinated the marketing department, supervising all its workers. He has implemented policies and strategies to improve business holding full authority over all executive decisions aimed to achieve the profitability goals set by the main company.

The petitioner submitted its 2004 business plan, in which it outlined its present personnel as the beneficiary, as well as two professional drivers, who would be responsible for loading and maintaining the company's trucks and making deliveries. A "current" organizational chart confirmed the named positions.

The director issued a request for evidence, dated May 9, 2005, asking that the petitioner provide a "definitive statement" of the beneficiary's proposed employment, addressing such factors as: (1) the beneficiary's position title, related job duties, and the percentage of time spent on each; (2) the managers, supervisors, or subordinate employees who would report to the beneficiary, as well as a brief description of the job duties performed by each; (3) the qualifications required to hold the beneficiary's position; (4) the level of authority to be held by the beneficiary, and whether he would function at a senior level in the organization; and (5) an explanation of who would provide the services or perform the sales of the petitioning entity. The director also asked that the petitioner provide documentary evidence, including an organizational chart depicting the beneficiary's proposed position in the United States entity, copies of Internal Revenue Service (IRS) Forms 941 filed by the petitioner for the last three years, and IRS Form W-2, Wage and Tax Statement, for each worker employed in 2004.

Counsel for the petitioner responded in a letter dated July 25, 2005, in which she provided the following explanation of the beneficiary's proposed level of authority in the United States company:

[The beneficiary] works in an executive and managerial position whereby employees [report] directly to him. He maintain[s] a high level of authority, holding ultimate decision making power and responsibility. Employees that [would report] directly to [the beneficiary] [are] responsible for managing employees in their own departments. [The beneficiary] [is] not a front-line supervisor. His education and business experience [are] commensurate with his high level of authority within the company which allow him to have the final word for the company.

Counsel attached an outline of the beneficiary's proposed "management level duties" in the petitioning entity, in which counsel also identified the following percentages as the amount of time the beneficiary would devote to each task: (1) manage and oversee the company's financial department, including monitoring and reviewing the financial reports generated by the department (20 percent); (2) manage, oversee, and review reports from the sales department (30 percent); (3) manage the petitioner's transport and delivery department, and review reports generated by its legal and technology department (20 percent); and (4) manage and review reports

generated by the petitioner's buying department (30 percent). The AAO recognizes that counsel also included an outline of the staff presently employed by the petitioner, as well as the company's 2005 organizational chart. The AAO notes, however, that because these documents reflect the petitioner's staffing levels after the date of the instant filing, they will not be considered herein. 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).

In a decision dated August 4, 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 would exercise discretion over the petitioner's day-to-day operations, he would also be "performing some of the day-to-day duties of the business." The director stressed inconsistencies in the petitioner's staffing levels, noting that the same employee was identified by the petitioner as its manager of both the delivery and buying departments, as well as a buyer and driver of the company. The director noted that a second employee, who is the beneficiary's wife, was identified as occupying the positions of vice-president and manager of the financial and sales departments. The director expressed doubt as to the reliability of the evidence offered by the petitioner, as well as the beneficiary's position in the United States company. The director stated that the record did not demonstrate "that the beneficiary's primary assignment . . . will be directing the management of the organization nor that the beneficiary . . . will be 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.

Counsel for the petitioner filed an appeal on September 6, 2005. In an attached letter dated August 25, 2005, counsel claims that while occupying an "executive or managerial" position in the United States, "[t]he beneficiary does not primarily perform the tasks necessary to produce a product or provide services." Counsel states:

The beneficiary plans, organizes, directs and controls the [petitioning] organization's major functions and work[s] through other employees to achieve the organization's goals.

The Petitioner would be unable to function as a company without an executive manager at the head of the company. The company's continued growth, volume of sales and increasing client base requires the attention and oversight of an executive manager as any other type of company doing in excess of one million dollars in sales per year.

The petitioner respectfully submits that its beneficiary is an executive manager for which the company would not be able to function if there was no one with the education and experience of the Beneficiary and asks that the beneficiary be approved.

Counsel explains the inconsistent references to the positions held by the beneficiary's wife, [REDACTED] stating that the petitioner's articles of incorporation confirm her position as the company's vice-president. Counsel states that as the manager of both the petitioner's financial and sales departments, [REDACTED] utilizes her law degree, which counsel contends qualifies her as a professional. Counsel submits a translated copy of the diploma awarding a bachelor in law degree to [REDACTED]. The AAO notes that the additional evidence submitted by counsel on appeal with regard to the beneficiary's proposed employment capacity was previously provided for the record.

Upon review, the petitioner has 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). Despite the petitioner's outline of job duties to be performed by the beneficiary, the record does not substantiate its claim that the beneficiary's position would be primarily managerial or executive in nature. The petitioner's claim that the beneficiary manages the financial, sales, transport and delivery, legal and technology, and buying departments is not credible, as the petitioner has not represented the employment of a staff who would perform the functions associated with each of these departments.

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 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.*

At the time of filing, the petitioner's staff consisted of the beneficiary and two drivers. The petitioner indicated that the drivers' responsibilities were limited to loading and "arrang[ing]" the company's trucks at vendors and warehouses, making deliveries, and maintaining the conditions of the trucks. Other than the beneficiary, the petitioner did not employ additional workers at the time of filing who would perform the non-managerial and non-executive tasks of the financial, sales, transport and delivery, legal and technology, and buying departments. Based on the outline of job duties provided by the petitioner, these non-qualifying tasks would include preparing the company's financial reports, monitoring its financial statements, devising and presenting marketing campaigns, and ensuring the company's compliance with both federal regulations and contractual obligations. Due to the absence of a subordinate support staff, the beneficiary would also be responsible for interacting with the petitioner's customers and vendors regarding issues of credit, contract renewal, customer satisfaction, and pricing. Based on the record, it is reasonable to conclude that at the time of filing the beneficiary was personally responsible for performing all administrative and operational functions of the petitioner's business, except for the tasks of receiving and delivering the petitioner's products which were performed by the petitioner's drivers. Again, as the responsibilities of the petitioner's remaining two employees were limited to transporting its products, it cannot be assumed that the beneficiary was relieved from performing the above outlined non-qualifying 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 "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).

The AAO again notes that the current staff of the petitioning entity, which counsel stressed on appeal included the beneficiary's wife as the company's vice-president and manager of the financial and sales departments, will not be considered in the present analysis. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive

position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Again, 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).

The AAO further notes that the job descriptions offered by the petitioner with regard to the beneficiary's proposed employment are limited, and fail to specifically identify managerial or executive tasks to be performed by the beneficiary. Following the director's request for a "definitive statement" of the beneficiary's employment, the petitioner merely claims employment of the beneficiary in an "executive and managerial position," stating that he would hold "a high level of authority" over employees reporting to him, maintain responsibility for the decisions of the company, and essentially review any reports prepared by the company's financial, sales, transport and delivery, legal and technology, and buying departments. The petitioner neglected to outline the specific high-level responsibilities to be primarily performed by the beneficiary in his position as president, which would establish his eligibility as a manager or executive. See sections 101(a)(44)(A) and (B) of the Act. The AAO further notes that the job description offered by counsel on appeal also fails to specifically address any managerial or executive job duties to be performed by the beneficiary, stating only that "[t]he beneficiary plans, organizes, directs and controls the organization's major functions and work[s] through other employees to achieve the organization's goals." 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).

Moreover, while the petitioner references departments to be "manage[d]" by the beneficiary, both the petitioner and counsel repeatedly refer to the beneficiary as an "executive manager," implying his employment in both capacities. It is unclear whether the petitioner intends for the beneficiary to be considered both a manager and an executive. A petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next consider whether the petitioner demonstrated its ability at the time of filing to pay the beneficiary's proffered annual salary.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Any petition filed by or for any employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In her August 4, 2005 decision, the director stressed inconsistencies in the beneficiary's proposed salary, concluding that as a result of the conflicting amounts, CIS could not determine whether the petitioner possessed the ability to pay.

The petitioner indicated on Form I-140 that the beneficiary would receive \$550.00 per week, or \$28,600 per year. The AAO will therefore consider whether the petitioner demonstrated its ability to pay the beneficiary's annual salary of \$28,600 at the time of filing.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it previously employed by the beneficiary at a salary equal to or greater than \$28,600.<sup>1</sup> The AAO notes, however, that the petitioner provided the beneficiary's IRS Form W-2 for the year 2004, which identified that the beneficiary received an annual salary of \$29,600. The petitioner has therefore satisfied its burden of demonstrating its ability to pay the beneficiary his proffered annual salary. Accordingly, the director's decision with regard to this issue only will be withdrawn.

Beyond the decision of the director, an additional issue is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Counsel identified the beneficiary's previous position as general manager of the foreign entity, during which he supervised three subordinate managers. Counsel submitted with her July 25, 2005 letter a list of related job duties, which, despite different percentages of time spent on each, was identical to that offered for the beneficiary's position as president of the United States entity. The equally vague and limited job description failed to identify the specific managerial or executive tasks performed by the beneficiary in his former position. Moreover, it is unclear which employees the beneficiary purportedly managed while employed overseas, as counsel submitted an organizational chart that identified four departments subordinate to the beneficiary, as opposed to the two subordinate managers referenced by counsel in her July 25, 2005 letter. This information is essential to determining whether the beneficiary was supported by a staff sufficient to relieve him from primarily performing any non-managerial or non-executive administrative or operational functions of the foreign entity. 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). Absent additional documentation specifically addressing the beneficiary's role and subordinate staff in the foreign entity, the AAO cannot conclude that the beneficiary was employed in a primarily managerial or executive capacity. The petition will therefore 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).

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<sup>1</sup> Based on the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for 2004, the beneficiary received an annual salary of \$23,400 in 2003.

The AAO recognizes the beneficiary's previously approved L-1A nonimmigrant petitions. 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.

Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approvals by denying the present immigrant petition.

The AAO also noted that its authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.