



U.S. Citizenship
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By



FILE:

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SRC 05 094 51612

Office: TEXAS SERVICE CENTER

Date:

MAR 31 2006

IN RE:

Petitioner:

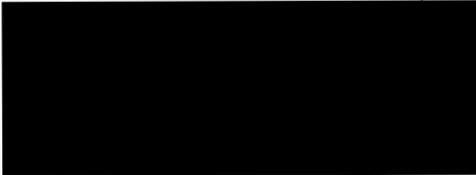


Beneficiary:

PETITION:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation engaged in importing and exporting textile goods manufactured by its claimed foreign affiliate. It seeks to employ the beneficiary as its chief executive officer. 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 the following independent grounds of ineligibility: 1) the beneficiary was not employed abroad in a qualifying managerial or executive capacity; 2) the beneficiary would not be employed in the United States in a managerial or executive capacity; 3) the petitioner failed to establish that it had been doing business for one year prior to filing the Form I-140; and 4) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

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

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Based upon a review of the petitioner's record of proceeding, which includes the description of duties and evidence of the foreign entity's organizational structure, the AAO concludes that the petitioner has shown by a preponderance of the evidence that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Accordingly, the AAO will withdraw the first portion of the director's denial and will proceed to address the three remaining grounds for denial.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary would be employed in the United States 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 petition, the petitioner submitted a letter dated February 6, 2004, which provided a description of the beneficiary's duties with the foreign entity.

The petitioner further stated that the beneficiary's foreign position involved overseeing the work of three senior level employees, including a manager of the manufacturing division, an administrator, and a personal assistant. The description was accompanied by a detailed organizational chart further illustrating the foreign entity's hierarchical structure, which supports either the manufacturing division or the administrative and marketing division.

Although the petitioner provided its own organizational chart showing a total of 19 employees projected to fill 12 positions, the only name on the chart was that of the beneficiary. Furthermore, in light of Part 5, Item 2 of the Form I-140, which indicates that the petitioner had a total of four employees when the petition was filed, the submitted organizational chart was clearly a projection of the petitioner's future structure, not a reflection of the petitioner's organizational structure at the time the Form I-140 was filed. The petitioner did not provide a description of the beneficiary's proposed duties in the United States.

On May 13, 2005, the director issued a notice of intent to deny (NOID) instructing the petitioner, in part, to submit a more detailed description of the beneficiary's job duties in the United States. The petitioner was instructed to state the beneficiary's daily duties as opposed to his responsibilities and to specify the percentage of time the beneficiary would spend on each of the listed duties.

The petitioner provided a response, which included the following description of the beneficiary's proposed duties in the United States:

- **Monday (12.5%):**

Morning: [The beneficiary] meets with [the] [g]eneral [m]anager and [the] [s]upervisor of [m]arketing in order to plan and set goals and deadlines for the company. The [g]eneral [m]anager and [the] [s]upervisor of [m]arketing provide [the beneficiary] with a summary of what their departments have completed over the past week for [the beneficiary]'s review. Based upon these reports, [the beneficiary] will provide general guidelines to the [m]anager and [s]upervisor to implement the week's goals. Based upon these general guidelines, the [m]anagers will create a to-do list for their departments with specific goals and deadlines.

Afternoon: Review the company's sales summary, marketing plan, and a summary of the equipment and personnel needs in order to make long-term policy decisions regarding the management and operation of the company. Review any expense changes with the [g]eneral [m]anager to ensure that such changes will fit into the company's budget. Dictate the final plan to the [s]ecretary for distribution to the [m]anager of the [g]eneral [m]anager and the [m]arketing [s]upervisor.

- **Tuesday (20%):**

Morning: Meet with the [g]eneral [m]anager to receive input as to whether there are any significant issues relating to customer satisfaction/dissatisfaction. Give instructions to the [g]eneral [m]anager on how to deal with such issues. These issues will be handled by the [g]eneral [m]anager after receiving general guidance from [the beneficiary]. If the issue involves customer dissatisfaction, then [the beneficiary] will direct the [g]eneral [m]anager to create a plan to ensure that the problem is solved.

Afternoon: The [g]eneral [m]anager negotiates contracts of sales, purchases and services with our customers. After the contract is finalized, the [m]anager will present the contract to [the beneficiary] for review and signature. [The beneficiary] reviews and signs these contracts.

- **Wednesday (25%):**

Morning: [The beneficiary] confers with the [g]eneral [m]anager and [m]arketing [s]upervisor regarding the production, design and quality of the company's products. The [g]eneral [m]anager and [m]arketing [s]upervisor provide suggestions on how the quality and design of our products can be improved. [The beneficiary] reviews these suggestions and makes a final determination on which suggestions the company will accept. The [g]eneral [m]anager provides [the beneficiary] with a list of custom orders and price listings. The [m]anager informs [the beneficiary] whether our manufacturing division in Nepal will be able to comply with the custom order and he will inform [the beneficiary] whether the listed price falls within our company's financial goals. [The beneficiary] authorizes the [g]eneral [m]anager to proceed with custom order[s] and authorizes the [m]arketing [s]upervisor to proceed with the listed price. If the custom order or price is unacceptable to [the beneficiary], then he directs the [g]eneral [m]anager to contact the customer to renegotiate.

Afternoon: The [m]arketing [s]upervisor provides a marketing plan to [the beneficiary] for his review. The marketing plan summarizes the strengths and weaknesses of our company's competitors. It will also pinpoint the strengths and weaknesses of our products, paying special attention to which specific product is successful and at which location the success is being enjoyed. The [m]arketing [s]upervisor provides [the beneficiary] with a summary of how his division plans to promote our products through the media, conferences, travel or other means. [The beneficiary] provides general guidance to the [m]arketing [s]upervisor as to the marketing plan. [The beneficiary] must authorize any major expense or plan by the marketing division before it can be implemented.

- **Thursday (25%):**

The [g]eneral [m]anager provides a personnel summary to [the beneficiary]. This report summarizes the personnel needs of the company, suggestions on hiring or firing personnel, the duties of each employee, and the expenses associated with each employee. [The beneficiary] must finalized any decision made concerning the hiring or firing of an employee before it can be implemented. If a certain division of the company requires more personnel, [the beneficiary] determines whether our company should be restructured . . . or whether additional hiring is required to meet that need. The day-to-day responsibility of handling personnel issues will be handled by the [g]eneral [m]anager. However, if any major issue involving personnel arises, such as legal issues, then the [g]eneral [m]anager informs [the beneficiary] so that [he] can seek the advice of corporate counsel.

- **Friday (17.5%):**

The [g]eneral [m]anager and the [m]arkeing [s]upervisor provide [the beneficiary] with a summary of their departments' achievements. [The beneficiary] reviews the work of the [g]eneral [m]anager and the [m]arketing [s]upervisor through reviewing these reports and

communicating with the two individuals. He meets with each of these two individuals separately to provide them with an outline of their strengths and weaknesses. He creates a to-do-list for both individuals which he will review during the following week. He rewards the [m]anager and [s]upervisor when a project is completed successfully. [The beneficiary] listens to suggestions which the [m]anager and [s]upervisor may have. He provides each individual with both long-term and short term goals to meet. He also provides them with a general outline as to new developments in our products as well as marketing trends which the [m]anager and [s]upervisor will share in detail with their departmental teams.

The petitioner also provided its quarterly wage statements for the first two quarters of 2005. While both wage reports list the same six employees, the first wage report indicates that in February of 2005, when the Form I-140 was filed, the petitioner had five employees. A comparison of the two reports indicates that [REDACTED] (with social security number ending in [REDACTED]) was the employee hired during the third month of the first quarter. The AAO notes that since the petitioner's employee list shows two individuals with the exact same initials without accompanying social security numbers, the AAO cannot determine whether the petitioner, at the time of filing the I-140, was operating without a secretary or without an administrative assistant, as both positions are occupied by an [REDACTED]. However, the AAO can determine, with a sufficient degree of certainty that during the relevant time period the petitioner was operating with two full-time employees, which included the beneficiary and the general manager, and three part-time employees, which most likely included the administrative assistant, the marketing supervisor, and the supervisor's assistant. It appears that the position of secretary had not been filled until after the petition was filed.

On August 4, 2005, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary's proposed position would primarily consist of managerial or executive duties.¹ The director specifically noted the confusing manner in which the petitioner chose to break down the beneficiary's job duties, suggesting that the petitioner did not provide a complete description of the duties that comprise the beneficiary's days on the job. The director also noted that one of the beneficiary's subordinates cannot be deemed professional because he only possesses a high school diploma. *See* 8 C.F.R. § 204.5(k)(2).

On appeal, counsel asserts that the director made a series of errors, which resulted in the denial. First, counsel states that the language in the NOID is ambiguous as it pertains to the request for a percentage breakdown of the beneficiary's daily duties. Counsel states that the director should have clarified whether the requested information was a breakdown of hours in one day or days in a week. Counsel's argument, however, is without merit. The director's goal was merely to gauge the amount of time, daily or weekly, the beneficiary would spend on each listed duty. In the instant matter, the petitioner provided what appeared to be a day-by-day description of the beneficiary's tasks. However, the description was severely muddled by the confusing addition of a percentage figure next to each day of the week, rather than each listed duty, leaving the director to assume that each set of duties was assigned a certain day of the week and once the particular duty was completed for the day, the beneficiary's work day was done, leaving several days where the beneficiary seemingly worked less than eight hours. For example, Monday's duties comprised 12.5% of the work week. Therefore, according to the petitioner's confusing breakdown, the beneficiary appears to work only five hours on Mondays, while working ten hours on Wednesdays based on the indication that Wednesday's duties

¹ On page one of the body of the decision, the director refers to 8 C.F.R. 205.5(j), suggesting that provisions regarding multinational managers and executives can be found there. However, the relevant provisions are found in 8 C.F.R. 204.5(j), as subsequently noted in page three of the director's decision.

comprise 25% of the work week. Although the petitioner adds to the original breakdown, thereby clarifying that the intent was to provide a weekly breakdown of duties, the initial breakdown lacked this clarification. Therefore, the director's comment pointing out this obvious deficiency was reasonable and appropriate.

Next, counsel argues that the director erroneously concluded that the beneficiary does not supervise the work of managerial, professional, or supervisory employees, claiming that the petitioner has maintained all along that the beneficiary oversees the work of a general manager and a marketing supervisor. However, the AAO notes that in the original organizational chart provided in support of the Form I-140, the petitioner indicated that the beneficiary would assume the position of general manager. Since then, the petitioner has consistently referred to one of the beneficiary's subordinates as the general manager. As such, the AAO must question the significance, if any, of the initial organizational chart and the inconsistency between the representations in the chart and the petitioner's subsequent claims. 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).

Counsel goes on to argue that the beneficiary does not perform lower-level duties as clearly suggested by the detailed description of the beneficiary's proposed position. While the AAO acknowledges the significance of a detailed job description, a determination regarding the beneficiary's eligibility for classification as a multinational manager or executive cannot hinge entirely on that description, particularly when the petitioner lacks a sufficient staff to support the beneficiary and relieve him from having to perform nonqualifying job duties. According to the beneficiary's description of job duties, his days are entirely comprised of overseeing the work of one claimed managerial and one claimed supervisory employee. However, at the time the petition was filed, only one of those subordinate employees, i.e., the general manager, was performing services on a full-time basis. The petitioner's marketing supervisor, who purportedly conducted feasibility studies, arranged for billing clients, and marketed the petitioner's products, was employed on a limited part-time basis according to the salary he was compensated during the first quarter of 2005.

Despite the strong implications of the beneficiary's job description, the petitioner's limited organizational hierarchy does not support the conclusion that the beneficiary was primarily performing duties of a qualifying nature. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). A company's size alone, 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. § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, an executive's or manager's duties must be the critical factor. However, if CIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the instant matter, the petitioner is engaged in selling a product manufactured by the petitioner's claimed foreign affiliate. Thus, the nature of the business requires individuals to market and sell the petitioner's products. The fact that the petitioner has only one part-time marketing employee and one part-time sales employee leads the AAO to question who actually sells the petitioner's products. A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. Although the petitioner may be in the process of undergoing an expansion, as pointed out by counsel on appeal, 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). The petitioner in the instant matter has not established that it would have employed the beneficiary in a managerial or executive capacity at the time the petition was filed.

The third issue in this proceeding is whether the petitioner had been doing business for at least one year prior to the date it filed the petition.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

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."

On appeal, the petitioner submits a number of sales invoices dating back to January of 2004 in an attempt to establish that the U.S. company has been doing business for at least one year prior to filing the Form I-140. However, none of the invoices identify the petitioner as a party to the sales transaction. While each of the invoices names the buying party and lists the purchased items, there is no indication that the petitioner was the selling party in any of the sales transactions.

Counsel asserts that the director's NOID did not address the fact that the petitioner failed to submit sufficient evidence to establish that it had been doing business for the requisite one-year period. However, even if the director had committed a procedural error by failing to solicit further evidence regarding this issue, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. Based on the evidence provided, the AAO cannot conclude that the petitioner meets the requirements of 8 C.F.R. § 204.5(j)(3)(i)(D).

The fourth issue in this proceeding is whether the petitioner established its ability to pay the beneficiary's proffered wage of approximately \$31,200 per year.²

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

Ability of prospective employer to pay wage. Any petition filed by or for an 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

² In Part III of the NOID, the director noted that the Form I-140 indicates that the beneficiary's proffered wage is \$32,600. This statement, however, is erroneous. Part 6, Item 9 of the petitioner's Form I-140 indicates that the petitioner would be paid \$600 per week. Based on a 52-week year, the beneficiary's proffered wage would be \$31,200. The AAO will determine the petitioner's ability to pay based on the proffered wage as indicated by the petitioner, not the miscalculated wage that appears in the director's NOID.

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 response to the NOID, the petitioner submitted its first and second quarterly wage statements for 2005. The petitioner's first quarterly wage statement for 2005 shows that the beneficiary was compensated \$7,500, which is equivalent to \$30,000 per year, a figure that is \$1,200 shy of the proffered wage. While the petitioner is not required to pay the proffered wage unless and until the Form I-140 is approved, the ability to pay the full \$31,200 must be established at the time the petition is filed. Although the second quarterly wage statement suggests that the beneficiary was paid more than the proffered wage as of April 2005, the petitioner filed its Form I-140 on February 14, 2005. The record lacks proper evidence to establish that the petitioner had the ability to pay the beneficiary \$600 per week as of such date.

Additionally, though not discussed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(C) require the petitioner to have an established qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 is filed. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the instant matter, the petitioner submitted two letters, one dated February 6, 2004 and another dated February 12, 2004, both claiming that the U.S. company is 100% owned by the beneficiary's foreign employer. The petitioner submitted a stock certificate dated January 12, 2004 showing that the foreign entity owns all of the petitioner's 200 authorized shares. However, in response to the NOID, the petitioner provided a copy of its 2004 tax return containing Schedule E, which indicates that the beneficiary is the owner of all of the petitioner's outstanding stock. The beneficiary is also identified as the petitioner's owner in a lease agreement dated June 9, 2005 (exhibit 12 in response to the NOID). Counsel reiterates the claim that the beneficiary is the petitioner's owner on page two of the appellate brief where he indicates that the beneficiary owns the U.S. and foreign entity. Although the two entities can be deemed affiliates based on the above

definition, the petitioner's inconsistent claims regarding its ownership cannot be disregarded. The AAO reiterates the petitioner's responsibility to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. In the instant matter, the petitioner has neither resolved, nor even acknowledged the inconsistent claims and documentation regarding its ownership. Therefore, the AAO cannot conclude that the petitioner has established the existence of a qualifying relationship between itself and the beneficiary's foreign employer.

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). Accordingly, based on the additional ground of ineligibility 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 she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 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.