

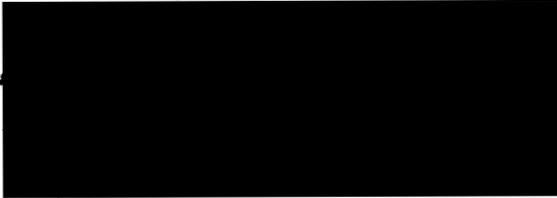
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 31 2006
WAC 04 215 50950

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



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, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in the business of investment and management of real properties. It seeks to employ the beneficiary as its president/general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition on the following independent grounds of ineligibility: 1) the beneficiary would not be employed in the United States in a managerial or executive capacity; 2) the beneficiary was not employed abroad in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish that it is a multinational entity affiliated with a foreign entity that continues to do business.

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

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

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

* * *

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

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

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

The first issue in this proceeding is whether the beneficiary would be employed in a capacity that is managerial or executive.

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 July 2, 2004, which provided a percentage breakdown of the beneficiary's proposed job responsibilities under an approved petition. As the director included the description in the decision denying the Form I-140, the AAO need not repeat the petitioner's statements in the instant matter. The petitioner also provided a copy of its organizational chart depicting the beneficiary at the top of the U.S. entity's hierarchy. The petitioner indicated that the beneficiary's direct subordinates include an accounting manager, a personnel and administration officer, a marketing manager, and a legal officer (who is assisting the petitioner in the instant matter). It is noted that, with the exception of the legal officer, each of the beneficiary's direct subordinates are depicted in supervisory roles. However, the positions illustrated as subordinate to the beneficiary's subordinates appear to be vacant. Additionally, the

petitioner provided its quarterly wage report for the second quarter of 2004. The wage report identifies four employees only one of whom was receiving a wage commensurate with that of a full-time employee.

On March 30, 2005, the director issued a request for additional evidence (RFE) informing the petitioner that the record as constituted at that time did not warrant approval.

On August 13, 2005, the director denied the petition noting that the evidence submitted suggests that the petitioner was not adequately staffed to relieve the beneficiary from having to perform nonqualifying duties. The director concluded that the petitioner failed to establish that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

On appeal, counsel asserts that the director placed too much emphasis on the size of the petitioner's personnel, citing a district court case in support of her argument. However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court, even for cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). While the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Furthermore, while the size of the petitioner's staff should not be the only consideration in determining the petitioner's eligibility to classify the beneficiary as a multinational manager or executive, this factor can and should be taken into account in order to determine who is actually performing the daily operational tasks. In the instant matter, the submitted evidence strongly suggests that the petitioner's only full-time employee at the time the petition was filed was the marketing manager. Based on the documentation submitted, the remaining employees were employed on a limited part-time basis. The director properly considered the petitioner's limited staff and questioned the petitioner's ability to relieve the beneficiary from the necessary, yet nonqualifying, daily operational tasks that must be carried out in order to ensure the petitioner's continued operation. Despite the indication in the organizational chart that the petitioner intended to hire additional employees to fill the positions of accounting clerk, receptionist, building maintenance staff, and a marketing and research assistant, none of those positions were filled at the time the petition was filed. It is noted that 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).

Counsel also states that the petitioner retains the services of at least six independent contractors. However, 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)). The AAO notes that 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). While the petitioner submitted its second quarterly wage report for 2004, which identified the employees it had prior to the filing of the Form I-140, it did not submit the third quarterly wage report, which would have included the names of the individuals it employed during the relevant time period. It is noted that the petitioner submitted its withholding certificates for 2005. However, as previously stated, a petitioner must establish eligibility at the time of filing, which took place in August of 2004. Thus, any documentation,

including the petitioner's 2005 employee withholding certificates, that reflect the petitioner's personnel structure in 2005 is irrelevant. *See Matter of Katigbak*, 14 I&N Dec. at 49.

Furthermore, even if the petitioner submitted evidence of a full-time staff, the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the description of the beneficiary's job duties consists primarily of the beneficiary's vague job responsibilities or broadly-cast business objectives with little indication as to what the beneficiary would actually be doing on a day-to-day basis. More specifically, the petitioner does not state the duties associated with implementing activities within the approved plans and budgets and overseeing the activities that would ensure that the petitioner meets its objectives. The petitioner also does not specify what actual duties the beneficiary would perform in keeping track of the industry and economic trends. Thus, at least 50% of the beneficiary's time would be spent carrying out a set of tasks that are entirely undefined. It is noted that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The beneficiary's description of duties also refers to additional staff, which had not been hired and was not a part of the petitioner's organization at the time the petition was filed. Thus, the claim that the beneficiary would spend approximately 30% of his time overseeing a staff of primarily part-time employees is simply not credible, as it is not corroborated by the evidence of record. While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties, which is absent from the instant record. It is noted that 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). In the instant matter, the record lacks evidence of sufficient support staff and fails to identify what specific duties the beneficiary would primarily be performing. As such, the AAO cannot conclude that the beneficiary would primarily perform managerial or executive duties.

The second issue in this proceeding is whether the beneficiary was employed abroad in a qualifying managerial or executive capacity.

In response to the director's RFE, the petitioner provided the foreign entity's organizational chart, which identifies the board of director's at the top of the company's hierarchy and the beneficiary directly subordinate to that body. The petitioner also identified the beneficiary's three immediate subordinates, including a legal officer, a general manager, and a vice president of finance. The chart suggests that each of those individuals has a subordinate. The petitioner also provided the following list of the beneficiary's responsibilities abroad:

1. Acts as the [c]hief [e]xecutive [o]fficer of the corporation. In addition to such powers as may be delegated to him by the [b]oard of [d]irectors, he also presides at all meetings of the stockholders of the corporation.
2. Undertakes general supervision of the business affairs and properties of the corporation and over its officers and employees.
3. Formulates management policies and control procedures to achieve company objectives.

4. Ensures [that] company operations are in compliance with government regulations and internal control requirements.
5. Plans, manages and oversees company assets and investments.
6. Executes all resolutions of the minutes of the stockholders meetings.
7. Submits to the [b]oard as soon as possible after the close of each fiscal year, and to the stockholders at each annual meeting, a complete report of the operations of the corporation for the preceding year and state of its affairs. He also reports to the [b]oard, from time to time [sic], [on] all matters within his knowledge[,] which the interests of the corporation may require to be brought to its notice.
8. Performs such other duties as may be assigned to him by the [b]oard of [d]irectors

On page five of the denial, which addresses the issue of the beneficiary's duties abroad, the director stated, "The petitioner has show that the beneficiary has been employed for at least one year in a manager[ial] or executive position in the United States." This statement is clearly a typographical error, as it contradicts the director's prior analysis and conclusion regarding the beneficiary's proposed position in the United States. As such, the erroneous statement is hereby withdrawn.

The director also discussed each employee's yearly salary, concluding, based on those salaries, that the foreign entity had no more than two full-time employees, including the beneficiary. However, as noted by counsel on appeal, the director failed to take into account the cost of living standards of the Philippines where the foreign entity is located. The record does not indicate that the director took note of all the relevant facts needed prior to making the determination that the foreign entity's employees were primarily employed on a part-time basis. As such, the director's statements commenting on the part-time status of the foreign entity's staff are hereby withdrawn.

Notwithstanding these errors in the director's decision, the director properly concluded that the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity. As with the petitioner's description of the beneficiary's proposed position in the United States, the description of the beneficiary's duties abroad is primarily comprised of generalized statements discussing the beneficiary's responsibilities. While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, the regulations require a detailed list of duties to define the general responsibilities of a given position. More specifically, the petitioner needs to explain what actual activities were involved in supervising the foreign entity's business affairs; formulating management policies; planning, managing, and overseeing company assets; and executing board resolutions. As previously stated, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The statements provided by the petitioner fail clarify what the beneficiary was actually doing on a day-to-day basis during his employment abroad. Accordingly, the director properly cited this issue as one of the grounds for denying the petitioner's Form I-140.

The third issue discussed in the director's decision was whether the foreign entity continues to do business in the beneficiary's absence.

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."

In his decision, the director questioned the foreign entity's ability to continue doing business on a "regular, systematic, and continuous" basis and in so concluding relied, in large part, on the assumption that the foreign staff was primarily comprised of part-time workers. As previously stated, however, the director based this determination on assumptions of various facts dealing with the average wages and the standard of living in the Philippines. As such, the AAO will not rely on the director's unfounded assumptions in making a determination as to whether the foreign entity continues to do business. Rather, the AAO will focus on the documentation submitted in order to make an accurate determination regarding the foreign entity's business activity in the beneficiary's absence.

In the instant matter, the petitioner claims that the foreign entity is engaged in the business of investing and managing real estate properties in Manila, Philippines. While the petitioner provided documentation of the foreign entity's various investment transactions from January through April 2003, the record lacks documentation showing the foreign entity's business transactions beyond that date, including the relevant time period during which the petitioner filed the Form I-140 in July 2004. The AAO acknowledges the petitioner's appellate submission of a letter dated August 15, 2005 from the foreign entity's president attesting to the foreign entity's viability and continuing business activity. However, attestations from the foreign entity's president are no different from the petitioner's own claim in that both require contemporaneous documentation as corroborating evidence. As previously stated, 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. at 165. Although the petitioner also submits several of the foreign entity's bank statements from 2005, such statements merely verify that the foreign entity continues to exist, which does not necessarily establish that the entity carries on doing business on a "the regular, systematic, and continuous" basis. The record lacks evidence documenting either the foreign entity's continued management of real estate or its investment in the stock market. Therefore, the petitioner has failed to establish that it is a multinational entity as defined in 8 C.F.R. § 204.5(j)(2).

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.