

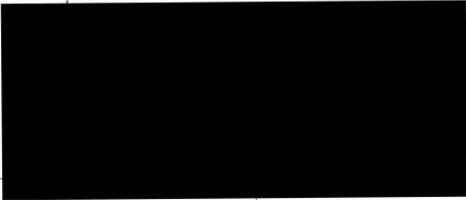


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FILE: LIN 05 023 50411 Office: NEBRASKA SERVICE CENTER Date: **MAR 31 2006**

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

The petitioner is a Virginia corporation engaged in the business of railroad transportation. It seeks to employ the beneficiary in the position of "yardmaster" at a salary of \$54,600 per year. 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 determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions 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.

The primary 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 October 18, 2004, which provided the following description of the beneficiary's proposed position in the United States:

In his capacity as [y]ardmaster, [the beneficiary] will be required to supervise yard and road crews, as well as the movement of trains into and out of the yard. He will also be required to oversee and direct the switching and proper make-up of outbound trains for on-time departure, as well as manage and supervise employees directly engaged in the switching, blocking, classifying, and handling of cars and trains. [The beneficiary]'s duties will also include the management and supervision of other employees performing work in the

After reviewing the documentation submitted, the director determined that the Form I-140 filed by the petitioner did not warrant approval. Accordingly, the director issued a request for additional evidence (RFE)

dated February 1, 2005. Specifically, the director instructed the petitioner to submit a detailed description of the beneficiary's proposed job duties including additional information regarding the types of employees the beneficiary would supervise, the beneficiary's level of authority, and the title and level of authority of the beneficiary's immediate supervisor. The petitioner was also asked to provide its organizational chart illustrating the petitioner's position in relation to other employees within the company.

The petitioner provided a response letter, which was dated April 22, 2005 and included the following job description broken down according to the four prongs of the definition for managerial capacity:

1. **Manages the organization, or department, subdivision, function, or component of the organization**—[The beneficiary] is responsible for insuring the overall safe and efficient operation of the Plymouth Michigan<sup>1</sup> rail yard during his assigned shift. The Plymouth yard is approximately two miles long and [the beneficiary] is responsible for 8 local and yard assignments that work in and around the Plymouth yard, in addition to road assignments that set off and pick up cars in and around the yard. Our company operates three shifts at this location, with [the beneficiary] supervising the work during one of these shifts.
2. **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**—[The beneficiary] will be responsible for supervising, directing, and coordinating activities of workers engaged in the make-up/break-up of trains and switching inbound/outbound traffic in the Plymouth yard which is a component of our transportation department. He will be responsible for supervising employees directly engaged in the switching, blocking, classifying, and handling of cars and trains, as well as other employees performing work in the yard. He assigns work to employees such as yard crew; mechanics; and train engine workers[.] He coordinates traffic with train dispatchers, and train crews with crew dispatcher, and he also works with supervisors and other management-level personnel to help resolve work-related problems.
3. **Reports on employee performance**—[The beneficiary] is responsible for ensuring that employees under his supervision perform their duties promptly, efficiently and safely. If he observes performance that violates company rules or policies, he is responsible for reporting the same to management personnel for possible disciplinary measures.
4. **Exercises discretion over the day-to-day operations of the activity or function for [sic] which the employee has authority**—[The petitioner] believes that [the beneficiary] exercises discretion over the day-to-day operations of the Plymouth yard in Plymouth, Michigan. He exercises such discretion through the supervision of the yard and road crews; the movement of the trains into and out of the yard; the overseeing [sic] of the proper make-up of the outbound trains for on-time departure; the assignment of work to employees in the yard; providing advice to management-level supervisors and other personnel to

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<sup>1</sup> The AAO notes that the petitioner's original support letter dated October 18, 2004 indicated that the beneficiary would work at ██████████ in Dearborn, Michigan, which is inconsistent with the claim made in the petitioner's response to the RFE. The record contains no clarification resolving this inconsistency.

resolve work-related problems; and to advise management level supervisors of employee rule violations that could result in discipline.

The petitioner also provided an official company list of the 45 tasks included in the beneficiary's proposed position. Such duties include performing flat and hump switching to classify train cars, assembling cars into blocks, inspecting all cars, checking switch points for proper aligning, checking track conditions, preparing required reports, inspecting the condition of trains and related equipment, interpreting and relaying hand signals, etc. Although this is by no means an exhaustive list of the beneficiary's current and prospective duties, the list adequately conveys the nature of tasks to be performed by the beneficiary under an approved petition.

On May 17, 2005, the director denied the petition, noting that the list of 45 specific tasks suggested that little employee supervision would be involved in the beneficiary's prospective position. The director also pointed out the petitioner's failure to disclose the level of employees to be supervised and observed that there is no indication that the beneficiary would have discretionary authority over any personnel actions. The director concluded that the beneficiary would be employed in the role of a first-line supervisor overseeing the work of nonsupervisory, nonmanagerial, and nonprofessional subordinates.

On appeal, counsel disputes the denial, claiming that the description of the beneficiary's duties clearly indicates that the beneficiary would supervise yard and road crews as well as other employees who perform various duties within the yard. Counsel also asserts that the beneficiary supervises managerial and supervisory employees. 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)). 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).

It is noted that the petitioner failed to provide the requested organizational chart illustrating the beneficiary's proposed position within the petitioner's hierarchy. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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). In the instant matter, the petitioner was instructed to provide its organizational chart for the express purpose of establishing the beneficiary's position with respect to others in the organization. The petitioner's failure to provide this crucial documentation precludes the AAO from gauging the beneficiary's position within the petitioner's personnel structure.

Moreover, in examining the executive or managerial capacity of the beneficiary, the U.S. Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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 beneficiary's job description strongly suggests that the beneficiary would be directly involved in performing

all the tasks necessary to ensure the smooth operation of the petitioner's business." Despite counsel's claim that the beneficiary oversees the work of supervisory employees, there is no further explanation as to the nature of employees the beneficiary would be supervising or their respective job duties and position titles. Without these essential facts, the AAO cannot conclude that that counsel's claim has merit.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Despite counsel's repeated assertions, the record lacks any indication that the beneficiary oversees the work of supervisory, managerial, or professional employees and further suggests that the beneficiary lacks the discretionary authority associated with a managerial or executive-level position. Furthermore, the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. Thus, based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, though not addressed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(B) requires that the petitioner establish that the beneficiary's duties abroad were of a qualifying nature. In response to the director's RFE, the petitioner stated that the beneficiary supervised a train crew engaged in freight transportation and switching. As with the beneficiary's proposed duties in the United States, the petitioner failed to submit evidence to establish that the beneficiary's subordinates included supervisory, managerial, or professional employees.

Moreover, even if the petitioner were able to provide an adequate description establishing the beneficiary's duties as qualifying within a managerial or executive capacity, the record lacks sufficient evidence, such as the beneficiary's pay stubs, to show that he was actually employed abroad for the requisite time period pursuant to the provisions specified in 8 C.F.R. § 204.5(j)(3)(i)(B).

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). Therefore, based on the additional issues 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 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.

**FURTHER ORDERED:** The director is instructed to review the beneficiary's stay in the United States as an L-1B nonimmigrant to ensure compliance with 8 C.F.R. § 214.2(l)(15)(ii). If the beneficiary is found to have remained in the United States as an L-1B nonimmigrant for longer than the allowed five-year period, the director shall review the matter in its entirety for possible revocation or partial revocation of the approval of any Form I-129 that violates the time constraints specified in 8 C.F.R. § 214.2(l)(15)(ii).