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U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER Date:

OCT 04 2006

SRC 05 008 51436

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, Chief
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 Florida corporation engaged in real estate development. It seeks to employ the beneficiary as its chief executive officer and president. 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 a managerial or executive capacity and denied the petition.

On appeal, counsel submits a brief disputing the director's conclusion and underlying analysis.

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 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 Form I-140, the petitioner provided a letter dated September 15, 2004, claiming that the beneficiary's duties would be directly related to operational or policy management rather than the supervision of lower level employees. The director deemed the petitioner's statements inadequate to enable a determination as to the beneficiary's proposed employment capacity.

Accordingly, on March 23, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following information to assist in determining the beneficiary's employment capacity in the proposed position in the United States: 1) evidence of the petitioner's staffing levels identifying its employees by name and position title and explaining the job duties of the beneficiary's direct subordinates; and 2) W-2 wage and tax statements issued by the petitioner in 2003.

In response, counsel provided a letter dated June 22, 2005, explaining that the beneficiary's role within the U.S. entity will be that of a function manager whose job duties will revolve around managing the petitioner's

real estate development projects. Counsel discussed the variety of contractors whose work the beneficiary would oversee as part of the development projects and provided a general list of job duties with the respective percentage of time the beneficiary would spend on each duty. Additionally, the beneficiary provided an hourly account of his typical daily work schedule, thereby adequately illustrating the duties to be carried out on a day-to-day basis.

Regardless, on July 15, 2005, the director denied the petition finding that the petitioner's description of the beneficiary's proposed duties was insufficient to warrant an approval of the petition. Although the AAO concurs in the overall conclusion that the record lacks sufficient evidence to establish that the beneficiary would be employed in a qualifying capacity, the AAO does not support the director's underlying reasoning in reaching this conclusion. Specifically, while the director discussed the general percentage breakdown of job duties provided by counsel, she failed to note the more detailed account of job duties provided in an hourly breakdown, which was also part of the petitioner's response to the RFE. Contrary to the director's analysis, the detailed hourly account of job duties provides a reasonable illustration of a function manager whose job primarily focuses on overseeing the work of contractors. Thus, if eligibility were dependant entirely on the description of prospective job duties, approval of the petition might be warranted.

However, the petitioner's burden is not satisfied with a mere description of duties. Aside from an adequate job description, the petitioner must establish that it is adequately staffed to relieve the beneficiary from having to perform qualifying tasks. That being said, counsel is correct in his assertion that adequate staffing need not consist of personnel directly employed by the petitioner. As pointed out, contracted labor, if adequately documented, might relieve a beneficiary from having to primarily perform non-qualifying tasks. 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)).

In the instant matter, both counsel and the beneficiary discuss the myriad of contract labor that has been and would continue to be used in carrying out the petitioner's essential tasks, thereby relieving the beneficiary from having to carry out non-qualifying tasks. In support of these claims, the petitioner has submitted labor contracts describing the duties to be carried out by the various contracted individuals. However, such contracts merely serve to establish the petitioner's intent to employ contracted labor. Contrary to counsel's assertions, the contracts alone do not establish that the individuals were in fact contracted or that any work was actually performed.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary, who was also employed in the real estate industry, met the requirements of serving in a managerial and executive capacity for L-1 classification. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner also submitted a number of letters from individuals claiming to provide the petitioner with legal, financial, and real estate services. However, the third party claims, much like the petitioner's own claim, must be corroborated with documentary evidence. In the instant matter, the record lacks documentation to establish that the claimed contractors and service professionals were paid for services that they purportedly rendered. 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).

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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). In light of the petitioner's failure to adequately document its claims regarding the hiring of contract labor, the AAO cannot determine with any degree of certainty that at the time of filing the Form I-140 the petitioner was adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying tasks. Accordingly, based on the evidence furnished, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. In the instant matter, the petitioner has submitted a single stock certificate to corroborate the claim that it is a wholly owned subsidiary of the beneficiary's foreign employer. The record contains no evidence to establish the foreign entity's capital contribution toward the purchase of the petitioner's stock.

Additionally, the petitioner provided a letter from counsel dated August 17, 2004 (exhibit A6) in which counsel stated that the beneficiary has been the petitioner's "sole shareholder, officer and director." Although counsel's claim in itself is not conclusive evidence of the petitioner's ownership, the AAO cannot overlook the fact that the petitioner's own claim is directly contradicted by this statement from counsel, a third party acting on behalf of the petitioner's interests. 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). As the petitioner has provided insufficient documentation to support the claim that it is entirely owned by the beneficiary's foreign employer, the AAO cannot conclude that the two entities have a qualifying relationship.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it had been doing business for at least one year prior to filing the Form I-140. 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 the instant matter, the petitioner's claim that it has been doing business during the requisite time period rests entirely on sales and purchase contracts. While the AAO acknowledges the contracts as a clear intent to do business, they are not in and of themselves evidence that the petitioner has, in fact, engaged in business transactions on a "regular, systematic, and continuous" basis. *See id.* The record lacks any evidence, such as cancelled checks or even tax returns, to show the petitioner's source of revenue.

Moreover, the record contains a copy of the petitioner's lease, which shows that the petitioner did not acquire office space from which to conduct its business until November 15, 2003 and, therefore, could not have been doing business as of October 12, 2003. The claim that the petitioner was doing business since October 12, 2003 is further undermined by service records that indicate that the beneficiary's employment authorization did not commence until November 9, 2004. In light of the claim that the beneficiary is solely in charge of the petitioner's entire business operation, the AAO is unclear as to the means by which the petitioner would have been able to carry on business transactions without the beneficiary's involvement.

Additionally, in light of the denial of the petition and the subsequent termination of the beneficiary's work authorization as of July 15, 2005, the date of the denial, the AAO questions the petitioner's ability to continue doing business in the United States and, therefore, its ability to maintain the status of a multinational organization. *See* 8 C.F.R. § 204.5(j)(2) for a definition of *multinational*.

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

In the instant matter, the petitioner claims that the beneficiary would be paid \$40,000 annually under an approved petition. However, the record lacks documentation to support the petitioner's ability to pay this proffered wage. 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.

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 grounds 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 it is shown 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.