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**U.S. Citizenship  
and Immigration  
Services**

**B4**



FILE:



EAC 05 139 53027

Office: VERMONT SERVICE CENTER

Date: **AUG 07 2007**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a Delaware corporation operating as a clothing retailer. It seeks to employ the beneficiary as its 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 it would employ the beneficiary 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 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 primary issue in this proceeding is whether the beneficiary would be employed by the U.S. petitioner in a qualifying 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 submitted a letter dated March 26, 2005, which included the following statement of the beneficiary's proposed responsibilities:

Hire and supervise sales and marketing related employees, defining goals and developing marketing strategies, maintaining regular contact with existing and potential buyers, participate in exhibitions, negotiate and finalize contracts with buyers, study and analyze market trend[s] and coordinate with the principal in India. Thus, [the beneficiary] will be the sole [sic] [in c]harge of [the petitioner's] marketing operations and will exercise full managerial control and highest level of discretion on business matters. [He] will continue to perform the above-mentioned duties upon obtaining permanent resident status in the United States.

On January 12, 2006, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) addressing, in part, the issue of the beneficiary's proposed employment in the United States. The RFE instructed the petitioner to provide the following documentation to assist CIS in determining the beneficiary's employment capacity in his proposed position with the U.S. entity: 1) a detailed description and hourly breakdown of the beneficiary's proposed day-to-day duties on a weekly basis; 2) the position titles and job duties of the beneficiary's subordinates; and 3) the petitioner's 2005 quarterly tax returns for the first two quarters and a copy of the petitioner's 2005 payroll roster.

In response, the petitioner provided percentage breakdowns for the duties and responsibilities assigned to a general manager, the sales staff, a sales associate, an accountant, and a secretary. The petitioner did not explain why the sales associate was discussed separately from the sales staff. The petitioner also submitted its first quarter wage report for 2005 in which three employees were identified. As the petitioner failed to name the employees occupying the position titles included in the percentage breakdown, it is unclear which positions were occupied by the individuals named in the quarterly wage report. While the request for an hourly breakdown of the beneficiary's assigned duties was acknowledged, the petitioner responded that the beneficiary's job duties "are all interlinked to each other" and did not provide the requested information. The petitioner also failed to provide its quarterly tax return and wage report for the second quarter of 2005. 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).

On June 7, 2006, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director discussed the lack of evidence to support the petitioner's claimed employment of four people and specifically noted the petitioner's failure to comply with a request for the petitioner's most recent W-2 wage and tax statements. While the AAO generally agrees with the director's finding, a review of the RFE indicates that the petitioner was not asked to provide its most recently issued W-2s. Rather, the petitioner was instructed to provide the W-2s issued in 2004, which would address the issue of staffing during the time period prior to the date the Form I-140 was filed. Therefore, the director's comment is inaccurate and is hereby withdrawn. Furthermore, since a petitioner must establish eligibility at the time of filing, its staffing levels prior to the filing of the Form I-140 are not relevant for the purpose of establishing the petitioner's eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Additionally, the director commented on the job duties of the petitioner's support personnel, noting that the subordinates are not clearly shown to be performing duties of a managerial or executive nature and instead are performing daily operational tasks. However, the definitions of managerial and executive capacity contained in sections 101(a)(44)(A) and (B) of the Act, respectively, apply to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager or executive if the organization's ultimate, lower tier subordinate was not a professional, managerial, or supervisory employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. As the petitioner is under no statutory or regulatory obligation to establish that the beneficiary's subordinates would also be managerial or executive employees as defined by the Act, the director's statement suggests an erroneous interpretation of portions of the act and is hereby withdrawn.

Nevertheless, the director properly concluded that the petitioner failed to provide an adequate breakdown of duties describing the beneficiary's proposed employment in the United States and properly found an overall lack of evidence establishing a sufficient support staff to relieve the beneficiary from having to primarily engage in the daily non-qualifying tasks. These accurate findings served as the primary basis for the director's denial.

On appeal, counsel asserts that the petitioner has provided sufficient documentation to establish that the beneficiary would be a function manager charged with directing the company's purchasing and marketing activities. Counsel focuses on the beneficiary's discretionary authority in making critical business decisions and setting the company's long- and short-term goals. However, a petitioner claiming that the beneficiary is managing an essential function must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In the present matter, the petitioner has declined to provide detailed information about the duties to be performed by the beneficiary in his proposed position. Instead, the petitioner has relied entirely on the general statement of responsibilities provided initially in support of the Form I-140. Neither the petitioner nor its counsel specify the actual duties the beneficiary would perform in managing the purchasing and marketing activities as indicated on appeal.

Moreover, in claiming that the beneficiary would oversee at least two of the petitioner's essential functions, the petitioner must establish the existence of a support staff that actually performs the duties related to the function managed. Thus, the claim that the beneficiary would manage the functions of purchasing and marketing requires a staff to perform the purchasing and marketing related duties. However based on the breakdown of job duties provided in response to the RFE, no one within the petitioner's support staff has been assigned purchasing or marketing duties, thereby leading to the inevitable conclusion that the beneficiary must be directly involved in performing these duties himself. As the petitioner has failed to provide the requested hourly breakdown of the beneficiary's duties, the AAO is precluded from making an informed determination as to the number of hours the beneficiary would spend on non-qualifying duties. Without sufficient information indicating how much of the beneficiary's time would be spent performing non-qualifying duties, the AAO cannot conclude that a majority of the beneficiary's time would be spent performing duties within a qualifying capacity.

Counsel also cites the case of *National Hand Tool Corp. v. Pasquarell* in which the court affirmed the underlying denial of a sixth preference visa petition based on the determination that the beneficiary would **primarily perform the duties related to an essential function.** 889 F.2d 1472 (5<sup>th</sup> Cir. 1989). Counsel apparently cites this case in an effort to distinguish the beneficiary in the present matter from the beneficiary whose duties were deemed to be primarily of a non-qualifying nature. Counsel's argument, however, lacks merit. As previously stated, the petitioner has failed to identify the specific duties to be performed by the beneficiary, which precludes the AAO from making an affirmative determination like the one made in *National Hand Tool Corp. v. Pasquarell*. *Id.* Furthermore, the very fact that the petitioner has failed to provide relevant information that is crucial to the question of the petitioner's eligibility suggests that a

favorable determination is not warranted. Additionally, counsel's claim that the beneficiary would supervise professional employees confuses the prior claim that the beneficiary would manage an essential function. The term "function manager" was designed to accommodate a manager that does not generally supervise employees, but rather monitors the various aspects of the function as it is performed by others and relies on these individuals to actually perform the duties necessary to carry out the essential function managed. The petitioner's claim that the beneficiary would manage others is inconsistent with the claim that the beneficiary would act in the role of a function manager and suggests counsel's lack of understanding of the difference between the role of a function manager versus the role of a personnel manager. Additionally, contrary to counsel's assertions, factors such as the beneficiary's broad discretionary authority and the amount of the petitioner's income do not override the lack of an adequate description of the beneficiary's job duties and the lack of an adequate support staff to carry out the petitioner's daily operational tasks.

Finally, the petitioner has supplemented the record with a copy of its Form 941 quarterly tax return for the first two quarters of 2005 and the corresponding wage reports for the same quarters. The AAO notes that the RFE previously instructed the petitioner to submit the quarterly tax returns for the first two quarters of 2005. However, the petitioner only complied with a portion of that request by submitting the quarterly tax return for the first quarter. The regulation states 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). As previously stated, 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). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Furthermore, with regard to the quarterly tax return and wage report for the first quarter of 2005, the petitioner previously provided this documentation in support of the Form I-140. However, on appeal the quarterly tax return and wage statement accounting for the same tax period contained information significantly different from the documentation originally submitted. Specifically, the originally submitted quarterly tax return for 2005 indicated that the petitioner had three employees in its payroll. The corresponding wage report for the same period identified those three employees and their respective salaries. The quarterly tax return submitted on appeal indicates that the petitioner had four paid employees and identifies one additional employee in the corresponding wage report for the same quarter. Additionally, while the wage reports have three employees in common, the wage report initially submitted indicates that each of the three employees' respective salaries was greater than the one indicated in the wage report submitted on appeal. 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). In the present matter, the petitioner has failed to resolve or even acknowledge the factual inconsistency presented by the unreliable documentation submitted in support of its claim. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* The director previously voiced his concern regarding the petitioner's submission of unexecuted tax documentation. The director's concerns over

the validity of this documentation are further justified by the petitioner's more recent submission of a tax document that directly contradicts information provided in the same document submitted at an earlier time.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as a multinational managerial or executive within the meaning of section 101(a)(44) of the Act. Rather, the petitioner must provide further explanation of the beneficiary's specific job duties and the job duties of others in order to establish that the support staff employed at the time the Form I-140 was filed was sufficient to relieve the beneficiary from having to perform primarily non-qualifying tasks. In the present matter, the petitioner failed to provide an adequate description of the beneficiary's job duties and has further supplemented the record with inconsistent documentation causing the AAO to question the authenticity and veracity of the documentation submitted and the petitioner's overall credibility. Therefore, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Furthermore, the record warrants 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 (BIA 1988); *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). As such, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature may include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

In the present matter, the petitioner claims to be a subsidiary of the beneficiary's foreign employer. In support of this claim, the petitioner has provided its Articles of Incorporation indicating that the petitioner is authorized to issue 200 shares of its stock with no par value and a stock certificate dated July 14, 2002 issuing all 200 shares of the petitioner's stock to the beneficiary's claimed foreign employer. Although the director did not specifically instruct the petitioner to provide evidence of monetary consideration in exchange for stock ownership, this issue is generally addressed in Schedule L, item 22(b) of the corporate tax return. In the present matter, there is no indication in the petitioner's 2003 tax return that any monetary consideration was received and retained in exchange for issuance of stock. 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)). Additionally, the petitioner has submitted a contract showing that it retained the services of an accountant. The contract identifies the beneficiary as the president and holder of 100% of the petitioner's equity, thereby indicating that the beneficiary, rather than the company that employed him abroad, is the petitioner's owner. As previously stated, the petitioner must 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*, at 591-92. As the petitioner has failed to provide consistent and reliable evidence to establish the foreign entity's payment for its claimed ownership of the petitioner's stock, a qualifying relationship has not been established.

Second, 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 present matter, the petitioner has provided documentation which the AAO has found to be lacking in credibility. Therefore, the quarterly wage reports that seemingly establish the petitioner's payment of the beneficiary's proffered wage have little to no probative value in establishing the petitioner's ability to pay. The record lacks other reliable documentation showing that the petitioner has satisfied the requirements cited in 8 C.F.R. § 204.5(g)(2).

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 as 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.