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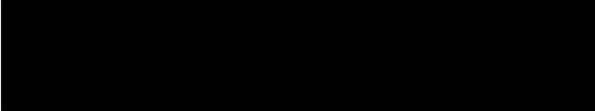


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 09 2007
WAC 02 026 57083

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, Chief
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 that was set up to facilitate Jingmei Biotech Co., Ltd., the beneficiary's foreign employer, to expand its bioresearch business into the U.S. market. The petitioner 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

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 petitioner would employ the beneficiary 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 October 7, 2001, which included the following description of the beneficiary's proposed employment in an executive capacity:

1. The beneficiary will direct the management of the organization.

[The beneficiary] will direct the overall business management of the company in the U.S. Initially, [his] primary responsibilities will involve aggressively establishing and developing [the petitioner]. Thus, he will be engaged mainly in [b]usiness [d]evelopment and [m]arketing functions, including managing and overseeing all business expansion and organizational aspects of the company, establishing commitments with U.S. employers, developing the company's image/presence in the U.S. market, and supervising the company's budgeting, finance/accounting, advertising, and personnel policies.

2. The beneficiary will establish [sic] the goals and policies of the organization.

[The beneficiary] will formulate, establish, and direct the [petitioner]'s overall development and marketing policies, strategies, and goals for the U.S. business program. He will work closely in conjunction with Jingmei Biotech back in China to implement the primary goals and administrative policies of the company. In addition, he will establish and direct the company's accounting, finance/investment, budgeting, advertising, and personnel policies.

3. The beneficiary will exercise wide latitude in discretionary decision-making.

As the sole executive in the U.S., [the beneficiary] will exercise wide latitude in discretionary decision-making. As discussed in detail above, he will be solely responsible for formulating, establishing, and directing the company's policies and strategies concerning development and marketing, as well as basic policies concerning financial, accounting, and personnel functions.

4. The beneficiary will receive only general supervision or direction [from] the board of directors and stockholders of the organization.

As [the beneficiary] will be virtually autonomously as CEO of the company, he will receive only general supervision or direction from the board of directors and company stockholders. As implicitly stated in the previous section, [the beneficiary] will receive only general supervision and direction from the parent company. Although he will transmit business activity and financial reports of the U.S. operations to the parent company, [the beneficiary] will be provided practically total decision-making power over all functions and activities of the U.S. subsidiary. He will establish and maintain business relationships with customers. He will solely be in charge of the day-to-day management of [the petitioner].

On February 6, 2002, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE). With regard to the beneficiary's employment capacity in the proposed position in the United States, the petitioner was instructed to provide the following: (1) the petitioner's organizational chart illustrating its staffing levels, identifying its employees, and providing their names, position titles, and brief descriptions of their job duties; (2) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty in order to indicate how much of the beneficiary's time would be devoted to each of the listed duties; and 3) four of the petitioner's quarterly wage reports.

In response, the petitioner provided a letter dated April 29, 2002 which contained the following supplemental job description:

[The beneficiary] has been extensively engaged in the company [b]usiness [d]evelopment and [m]arketing functions, including managing and overseeing all business expansion and organizational aspects of the company. (40% of time). He has been in charge of establishing operational/distribution and sales commitments with U.S. partners, developing the company's image through advertising/marketing, and developing/managing the company budget, finance/accounting, advertising, and personnel functions (30% of time). [The beneficiary] has been responsible for U.S. market research, facilities development, meeting clients, and

approving/signing all contracts. His overall mission is to create an efficient business infrastructure in the U.S. which is capable of supporting the massive amounts of the [p]arent [c]ompany's imported bioresearch products. [He] has been tasked with ensuring that the [p]arent [c]ompany's products and services are delivered quickly and efficiently to its U.S. clients in the context of an extremely competitive market (30% of time). . . .

[The beneficiary] was transferred to the U.S. to negotiate and execute contracts, network within the U.S. life science, pharmaceutical, health care markets, attend trade shows and seminars, and visit U.S. companies and research institutes. He has been given the responsibility to develop the [p]arent [c]ompany's business activities with its numerous U.S. vendors [The beneficiary] was transferred to the U.S. because his specialized and extensive knowledge and experience is necessary for the company to establish a solid network of life science, pharmaceutical, and health care product suppliers and customers in the U.S.

The petitioner also provided an organizational chart identifying a total of four employees: the beneficiary at the top of the organizational hierarchy, a business manager/corporate secretary as the beneficiary's immediate subordinate, and an administrative manager and an accountant as the business manager's subordinates. The accountant was identified as the only part-time employee with the remaining three employees working on a full-time basis.

On November 5, 2002, the director denied the petition noting that the petitioner's organizational chart illustrated a hierarchy primarily comprised of management positions. The director questioned who would actually perform the daily operational tasks necessary to run the business if the majority of the petitioner's personnel is comprised of managerial employees.

On appeal, counsel restates the claim that the beneficiary would be employed in an executive capacity. In support of this claim, counsel provides the expert opinion of [REDACTED] associate dean at the University of San Diego School of Business Administration. In his letter dated November 24, 2002, Mr. [REDACTED] commented on the nature of the petitioner's business and the beneficiary's qualifications. Based on his observations of both factors, [REDACTED] concluded that the beneficiary's knowledge of the biotechnology industry and the petitioner's business organization make the beneficiary critical and necessary for the petitioner's overall success. However, [REDACTED] statements do not address the director's adverse findings, which focus primarily on the petitioner's ability, or lack thereof, to employ the beneficiary in a primarily executive capacity. **Aside from appreciating the depth of the beneficiary's knowledge and abilities, there is no evidence that [REDACTED]'s expertise in business administration encompasses specific knowledge of the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. In fact, [REDACTED] acknowledges that in small organizations, such as the petitioning entity, the limited staff must possess the same skills "that are normally dispersed among many managers and employees."¹ While the petitioner's staffing hierarchy cannot be the sole consideration in determining the petitioner's eligibility, it is a factor that must be considered in an effort to establish whether the petitioner has the ability to relieve the beneficiary from having to primarily perform non-qualifying tasks on a daily basis. Given the size of the beneficiary's support staff and the lack of employees to carry out marketing, sales, and general office tasks, the director's adverse findings were justified.**

Furthermore, in examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant matter, the description of the beneficiary's job duties is too general to convey an understanding of the beneficiary's specific daily tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). Given the petitioner's lack of personnel assigned with the performance of marketing duties, it is likely that the beneficiary is both managing and actually carrying out marketing related tasks. As the petitioner did not define specific tasks involved in business development, it is unclear what portion of the 40% is comprised of non-qualifying tasks.

Further, the petitioner's initial description of the proposed employment indicated that the beneficiary would be charged with the responsibility of advertising the company's products and services, arranging client meetings, and drafting proposals and contracts for the products and services offered by the petitioner. Again, since the petitioner did not assign a specific percentage of time to any of the non-qualifying tasks mentioned, it is unclear what portion of the beneficiary's time they would consume. While the petitioner provided a general overview of the proposed employment, it did not provide a list of the beneficiary's specific duties or the specific portions of time attributed to the various duties that comprise the beneficiary's overall responsibilities. 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). Based on the lack of a sufficient support staff to perform the necessary operational tasks and given the lack of information describing the beneficiary's specific daily job duties, the AAO cannot conclude that the beneficiary's proposed employment would primarily consist of tasks within a qualifying managerial or executive capacity as claimed by the petitioner.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, 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. In the present matter, the petitioner claims to be a wholly owned subsidiary of Jingmei Biotech Co., Ltd., the beneficiary's foreign employer. 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 support of the initial Form I-140, the petitioner provided the following documents:

1. Articles of Incorporation filed on February 14, 2000. Article IV indicates that the petitioner authorizes the issuance of ten million shares of stock.
2. Stock certificate no. 2 dated April 24, 2000 showing that the petitioner issued two million shares of stock to Jingmei Biotech Co., Ltd., the beneficiary's foreign employer.
3. The petitioner's stock transfer ledger reiterating the information conveyed in stock certificate no. 2. The ledger does not indicate the amount of money paid for the issued stock.
4. Notice of Transactions Pursuant to Corporations Code Section 25102(f) indicating that the petitioner received \$300,000 as consideration for the shares issued.
5. The petitioner's year 2000 corporate tax return with several schedules attached. Schedule L, item 22(b) shows that the petitioner received \$5,000 in exchange for the issuance of common stock during the tax year. Federal Statement 2, which is also attached to the same tax return says that the beneficiary and his foreign employer each own 100% of the U.S. petitioner.

In response to the RFE, the director provided its tax return for 2001 of which Schedule L, item 22(b) continued to show that the petitioner received only \$5,000 in exchange for issuance of its stock; Federal Statement 3 reiterated the same confusing information as Federal Statement 2 of the prior year's tax return; and Schedule E identified the beneficiary as the owner of 100% of the petitioner's common stock.

Thus, when considered in its totality, the documentation provided by the petitioner is inconsistent in relaying information about the amount paid for the petitioner's stock, the amount of stock sold, and the recipient of the issued shares. While the petitioner's stock certificate identifies Jingmei Biotech Co., Ltd. as owner of its stock, both tax returns' federal statements indicate the foreign entity and the petitioner as each owning 100% of the petitioner's stock. Not only is this a factual impossibility, but the fact that an individual is claimed as owner of the stock contradicts the claim that the petitioner is a wholly owned subsidiary of a foreign parent entity.

The record is also inconsistent as to the consideration received in exchange for the stock issued. While the petitioner's notice of transaction indicates that \$300,000 was paid for the petitioner's stock, both of the petitioner's tax returns show that only \$5,000 was received. 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 provided no evidence or even acknowledged the existence of these considerable inconsistencies, which undermine the petitioner's claim regarding its ownership. Lastly, while the petitioner provided its stock

transfer ledger, no information was provided to explain what happened to stock certificate no. 1. This is a valid concern in light of the fact that the only stock certificate submitted was stock certificate no. 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 ground 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.