



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
WAC 05 230 51309

Office: CALIFORNIA SERVICE CENTER

Date: MAR 07 2007

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: SELF-REPRESENTED

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 was incorporated in the State of California in 1997. 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 denied the petition based on the following independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with a foreign entity; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 3) the petitioner failed to establish its ability to pay the beneficiary's proffered wage; and 4) the petitioner failed to establish that it continued to do business after filing the petition.

On appeal, counsel disputes the director's conclusions and submits additional documentation in an effort to overcome the grounds for denial cited by the director.

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 petitioner has a qualifying relationship with a foreign entity.

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 Form I-140, the petitioner submitted a letter dated April 29, 2005 in which it described its relationship with the beneficiary's foreign employer as that of parent and subsidiary, the latter term applying to the petitioner. More specifically, the petitioner claimed to be 80% owned by the foreign entity. The petitioner also provided a separate list of subsidiary companies and shareholders, which identified the petitioner as a subsidiary of LabMetrix Technologies with 60% of its stock held by the parent entity. Additionally, the petitioner provided stock certificate No. 1 showing that 200,000 shares of stock was issued to Mohammed Zoubair El Fallah and stock certificate No. 3 showing that LabMetrix Technologies I&T, S.A. was issued 200,000 of the petitioner's stock.

On January 31, 2006, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to establish the petitioner's relationship, if any, with the beneficiary's foreign employer: 1) documentation showing the foreign entity's payment for the petitioner's stock; 2) all stock certificates issued by the petitioner; 3) the petitioner's stock ledger; 4) Notice of Transactions Pursuant to Corporations; and 5) the foreign entity's annual report with a full list of its affiliates, subsidiaries, and branch offices.

In response, the petitioner resubmitted the stock certificates and the list of subsidiaries and shareholders, both of which were previously submitted in support of the petition. The petitioner also provided its tax return for 2004 in which Statement 9, supplement to Schedule K, states that LabMetrix Group owns 75% of the U.S. entity. Although, the petitioner provided the foreign entity's Articles of Incorporation, they do not assist CIS in determining the foreign entity's ownership interests in the petitioning entity. The petitioner failed to provide documentation establishing the foreign entity's payment for the petitioner's stock, and the record does not explain the absence of stock certificate No. 2 or the discrepancy regarding the percentage owned by the parent entity. 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 May 17, 2006, the director denied the petition citing as the first ground for denial the petitioner's failure to provide sufficient evidence and to reconcile certain discrepancies regarding its ownership. More specifically, the director questions the validity of the petitioner's initial claim and supporting documentation suggesting

80% ownership by the foreign entity, in light of subsequent documentation which suggest 60% or possibly 75% ownership by the foreign entity.

On appeal, the petitioner provides a letter dated June 12, 2006 in which its operations supervisor, [REDACTED], reiterates the petitioner's initial claim of 80% ownership by the beneficiary's foreign employer. [REDACTED] resubmits the petitioner's tax returns, claiming that they show the amount of money the foreign entity has contributed to funding the petitioner's operations. However, the tax returns, all of which account for time periods prior to the filing of the Form I-140, merely indicate the amount of funds borrowed by the U.S. petitioner. **Moreover, even though the petitioner's tax returns through 2003 indicate that LabMetrix Technologies, S.A. was the owner of 80% of the petitioner's stock, the petitioner was the direct source for this information.** In light of other conflicting documentation, i.e., the petitioner's stock certificates, the statement of subsidiaries and shareholders, and the petitioner's tax return for 2004, the reliability of information provided by the petitioner is dubious at best. The petitioner must submit competent objective evidence to reconcile the considerable inconsistencies presented by the petitioner with regard to the percentage of stock it has issued to its claimed parent entity. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant matter, such evidence has not been provided. 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.* Therefore, even though a qualifying relationship may exist regardless of whether the foreign entity owns 60%, 75%, or 80% of the U.S. entity, the fact that all three claims have been made at various times throughout this proceeding without reconciling the apparent inconsistency leads to overall doubts as to the petitioner's credibility. Accordingly, the AAO concludes that the petitioner has failed to overcome the adverse evidence cited in the director's decision and, therefore, has failed to establish that a qualifying relationship exists between the U.S. petitioner and the beneficiary's foreign employer as claimed.

The second 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 the denial, the director restated the beneficiary's job descriptions provided by the petitioner in support of the Form I-140. As such, the AAO need not restate the petitioner's statements in this discussion. The AAO notes that CIS found the petitioner's initial statement describing the beneficiary's proposed position to be insufficient. As such, the RFE specifically instructed the petitioner to provide a detailed list of the beneficiary's proposed duties and the percentage of time the beneficiary would spend on each individual duty. The petitioner was also instructed to list the employees under the beneficiary's supervision.

In response, the petitioner provided the following description of the beneficiary's proposed U.S. employment:

The position of CEO is an executive-level position primarily responsible for the entire company. It involves management of critical technical, research, marketing, and sales departments for the company. The CEO controls, plans, and oversees the company's major functions and works with department heads to achieve the company's goals. He is charged with guiding the business' growth, setting goals/objectives, and maintaining its reputation within the industry. He has wide-latitude in discretionary decision-making and serves as the company representative when meeting with partners, clients, and other industry players.

70% of his time is spent supervising and guiding the different departments at LabMetrix France. He spends his time meeting with different department heads as they report to him the current operations of each department. He provides guidance and directs the head of each department; however, he does not directly supervise the employees within each department, leaving that responsibility up to the department leader.

* * *

[The beneficiary] does possess unique technical expertise which is particularly useful in supervising the [r]esearch & [d]evelopment department. Occasionally, he will provide his

input to solve a challenging technical problem. However, his relationship with the R&D department is to provide guidance and supervision, not to be engaged in low-level production tasks. The beneficiary also does not engage in customer troubleshooting or customer service calls. 30% of his time will be spent on working with the [r]esearch & [d]evelopment team.

As noted by the director in the subsequent denial, the petitioner did not provide a quarterly wage report for the third quarter of 2005, the three-month period during which the petitioner filed its Form I-140. While the petitioner provided the quarterly wage reports for the three remaining quarters of 2005, the AAO notes, as did the director, that the petitioner's number of employees drastically dropped from the second quarter to the fourth quarter. The director further pointed out the discrepancy between the petitioner's initial claim of 12 employees and the organizational chart, which identified three employees under the beneficiary's supervision. Although the AAO notes that the RFE requested a current organizational chart, none of the petitioner's submitted quarterly wage reports for 2005 identified 12 employees during any one month. Rather, the largest number of employees in 2005 was during the first quarter when the petitioner had nine employees.

On appeal, the petitioner's operations supervisor, [REDACTED], provides a general overview of the beneficiary's discretionary authority. However, she does not elaborate or provide any specific duties, as had been previously requested in the RFE. Nor does she offer a plausible explanation for the petitioner's failure to provide the most relevant of the four quarterly wage reports, which would have provided CIS with an indication as to the personnel make-up of the petitioning entity during the relevant time period.

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 petitioner has provided a general description of the beneficiary's overall job responsibilities, which primarily include supervision over a staff of employees whose existence has not been substantiated by the submission of documentary evidence. 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)). Despite the RFE request for a specific list of the beneficiary's proposed day-to-day duties, the petitioner provided general information, which failed to disclose what the beneficiary would actually be doing on a daily basis. 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).

On review, the record as presently constituted is not persuasive in demonstrating that a majority of the beneficiary's duties would be primarily of a qualifying nature. The record is inconclusive as to the petitioner's staffing at the time the petition was filed. As such, the AAO cannot determine whether the petitioner was adequately staffed to relieve the beneficiary from having to primarily perform the petitioner's daily operational tasks. 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 evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage.

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 April 29, 2005 letter submitted in support of the Form I-140, the petitioner stated that the beneficiary would receive a net salary of \$118,784.00 annually. Part 6, Item 9 of the Form I-140, however indicates that the beneficiary would receive \$3,173.00 per week, which is approximately \$165,000 annually. While it is possible that the latter figure is a representation of the beneficiary's proffered gross salary, the petitioner did not clarify or explain the two distinct claims.

In the denial, the director enumerated the petitioner's net current assets as listed in tax returns 2001-2004. The director also discussed the beneficiary's W-2 statements for 2004, which showed a salary of \$118,784.74, and 2005, which showed a salary of \$93,669.63. Additionally, the director reviewed the letter submitted from the petitioner's CPA attesting to the petitioner's ability to pay the beneficiary's proffered wage as well as the letter from the petitioner's operations supervisor claiming that the beneficiary has been employed by the petitioner since July 2003 and has received a salary of \$165,000. The director properly found that neither letter was reliable evidence of the petitioner's ability to pay. The AAO further notes the petitioner's failure to provide evidence to support the claims made in the operations supervisor's letter.

On appeal, the petitioner provides a letter dated June 12, 2006 from the operations supervisor. [REDACTED] maintains the statements made in her prior letter and further explains that in addition to compensation provided directly by the petitioner, the beneficiary also received compensation from the petitioner's claimed foreign affiliate and that combined these two sources of compensation provided the beneficiary with a total of \$165,000. The petitioner also provides a letter from the French entity's account reiterating the financial figures in [REDACTED] statement. However, despite any compensation provided by the foreign entity, the above regulation specifically states that the prospective U.S. employer must be able to compensate the proffered wage. Therefore, the foreign entity's contribution is irrelevant. The record as presently constituted lacks evidence to show that the U.S. petitioner was able to pay the beneficiary a proffered wage of \$165,000 annually as indicated in the Form I-140. While the initial support letter indicates a proffered wage that is significantly lower than what was indicated in the petition, this discrepancy merely shows an inconsistency in the petitioner's claim. 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. at 591-92. In the instant matter, the petitioner has provided no plausible explanation for claiming two significantly different proffered wages in two documents that were submitted simultaneously. Thus, not only has the petitioner failed to provide evidence to support claims made in the Form I-140, the record also contains statements that are clearly inconsistent with the petition itself. As such, the AAO concludes that the petitioner has failed to provide evidence that is sufficiently consistent and reliable to establish its ability to pay.

The remaining issue in this proceeding is whether the petitioner has continued to do business since the filing of its Form I-140. In the denial, the director points out information provided in the petitioner's fourth quarterly wage report for 2005, which indicates that the petitioner went from having three employees during the first two months of the fourth quarter to having no employees during the last month of the same quarter. 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." The director expressed doubt as to the petitioner's ability to continue doing business at a time when it had no staff.

On appeal, the petitioner provides employee earning records for checks dated through December 31, 2005. The records identify four employees and indicate that each employee was paid biweekly through and including December 15, 2005, which falls squarely in the last month of the fourth quarter. However, the earning records and the petitioner's fourth quarterly wage report are inconsistent in a number of ways. First, the petitioner provided earning records for [REDACTED] and [REDACTED], neither of whom was identified in the petitioner's fourth quarterly wage report. Second, while the quarterly wage report shows the beneficiary as an employee of the petitioner, no earning record was provided for him. Thus, between the quarterly wage report and the earning records, the petitioner is hypothetically claiming to have had five employees from November through December of 2005. The AAO cannot overlook the fact that these two documents are entirely inconsistent as to the number of employees the petitioner may have had at any time during the third month of the fourth quarter of 2005. While the director's analysis does not review the "regular, systematic, and continuous" nature of the petitioner's business transactions, the petitioner's credibility is undermined by its submission of inconsistent documentation. 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. *Matter of Ho*, 19 I&N Dec. at 591. Based on the unreliable and inconsistent evidence provided, the AAO cannot conclude that the petitioner continued to carry on business in a "regular, systematic, and continuous" manner after the filing of its Form I-140. For this additional reason, the petition may not 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 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.