



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

B4

[REDACTED]

FILE: [REDACTED]  
SRC 06 110 52599

Office: FLORIDA SERVICE CENTER Date: **NOV 01 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:

[REDACTED]

**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.

Robe  
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 claiming to be operating as a multi-facility car-care service provider. 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 the beneficiary would be employed 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 capacity that is managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated February 15, 2006, which included the following percentage breakdown with regard to the beneficiary's proposed position:

- Oversee and direct both operations. (30%)
- Budget and finance. (10%)
- Establish and implement goals and policies. (5%)
- Ensure compliance with all government occupational safety and health regulations. (2.5%)
- Quality assessment/assurance. Ensure customer satisfaction. (7.5%)

- Supervise managerial staff. (20%)
- Hire/fire managerial staff. (2.5%)
- Approve/disapprove hiring/firing of non-managerial staff. (2.5%)
- Oversee banking deposits and payments made by [the] [a]ssistant [g]eneral [m]anager. (5%)
- Approve/disapprove contracts with vendors, repairmen, and suppliers. (2.5%)
- Conduct daily inspections of both business premises. Discuss discrepancies with [the] [a]ssistant [g]eneral [m]anager as necessary. (5%)
- Approve/disapprove the ordering of materials and/or equipment by [the] [a]ssistant [g]eneral [m]anager. (2.5%)
- Report to/maintain contact with [the] foreign company. (5%).

The petitioner also stated that there are nine managers and employees and three subcontractors under the beneficiary's direction for a total of twelve employees. The petitioner provided an organizational chart to illustrate its internal staffing hierarchy. The chart shows the beneficiary at the top of the hierarchy with the assistant general manager/staff supervisor as his direct subordinate. The general manager's subordinates include a functional manager of marketing services at retail gold sales, an administrative manager/head stylist of one beauty salon, and a head stylist of another beauty salon. No subordinates were identified in association with the functional manager.

On June 30, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a dated and signed statement from the petitioner describing the beneficiary's proposed duties in greater detail specifying the duties and functions the beneficiary would be expected to perform.

In response, the petitioner provided a letter from counsel dated September 15, 2006. Despite the RFE's indication that the prior submission did not contain all of the necessary information, counsel merely repeated the percentage breakdown that was previously provided in support of the Form I-140. Counsel further stated that the beneficiary is not a licensed beautician and, therefore, he does not perform any services offered by the salons he operates or deal directly with any of the salon customers. Counsel claimed that the beneficiary oversees and directs the operations of three businesses. An organizational chart similar to the one previously provided was submitted to show the changes that have occurred since the filing of the Form I-140. The chart shows that one of the petitioner's businesses was replaced with another. The two beauty salons remain active. The petitioner also provided copies of the W-2 statements issued to six employees in 2005 as well as the corresponding W-3 statement to show the total amount of wages paid.

On December 14, 2006, the director denied the petition concluding that eligibility had not been established. First, the director commented on the differences between the organizational chart initially submitted and the one provided in response to the RFE. The AAO notes that the director specifically indicated in the RFE that the petitioner must submit information reflecting the current staffing level, thus implying that the requested

information need not address the staffing at the time the Form I-140 was filed. As such, the director's suggestion that the differences between the two organizational charts are equivalent to some sort of impropriety is erroneous and is hereby withdrawn. That being said, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, while information about the petitioner's current staffing is relevant with regard to the issue of the petitioner's continued eligibility, it does not address the issue of whether the petitioner established eligibility in the first place, as this can only be done by reviewing the staffing levels that existed at the time the Form I-140 was filed.

Next, the director reviewed the information provided with regard to the beneficiary's proposed responsibilities and cited 8 C.F.R. § 204.5(j)(3)(i), which states, in part, that the Form I-140 must be accompanied by a statement from an authorized official of the U.S. petitioner, which establishes the beneficiary's qualifying duties abroad, the petitioner's qualifying relationship with the beneficiary's foreign employer, and the petitioner's business activity prior to filing the Form I-140.<sup>1</sup> The director noted that the petitioner's submission of a statement from counsel suggests a failure to comply with the cited regulation as well as with the RFE's specific instruction that the statement addressing the beneficiary's proposed duties must be signed by the petitioner. While the AAO agrees that the petitioner failed to follow the director's instructions as laid out in the RFE, the suggestion that the petitioner has also failed to comply with the cited regulation is erroneous, as 8 C.F.R. § 204.5(j)(3)(i) only specifies the manner of submission of evidence that is initially presented with the Form I-140; it does not address a petitioner's response to an RFE or make any reference to a specific manner in which a petitioner's response to an RFE must be submitted.<sup>2</sup>

Notwithstanding the director's incorrect or incomplete citation, the director properly concluded that the petitioner did not comply with the RFE, which specifically noted that the description of duties previously submitted was not sufficient and that a more detailed description of duties was therefore necessary. As previously noted in this decision, instead of expanding on the job description initially provided by the petitioner, counsel restated, verbatim, the percentage breakdown without providing further information to convey a comprehensive understanding of what job duties the beneficiary would perform on a daily basis. See 8 C.F.R. § 204.5(j)(5). 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). In the present matter, the description of duties provided by the petitioner lacks the information that is necessary in order to make an accurate determination as to the beneficiary's employment capacity. More specifically, the petitioner has stated that 30% of the beneficiary's time would be allotted to overseeing and directing "both operations." With regard to that statement, first, it is unclear what the petitioner means by "both," as the organizational charts provided in support of the Form I-140 and in response to the RFE show that the

---

<sup>1</sup> Although the director generally cited 8 C.F.R. § 204.5(j)(3), she only referenced a cited section from 8 C.F.R. § 204.5(j)(3)(i) and, thus, it is fairly clear that she was only referring to the subsection and not to section 8 C.F.R. § 204.5(j)(3) as a whole.

<sup>2</sup> Regardless, the AAO notes that an authorized representative, which may be the petitioner's attorney or some other individual representing the petitioner in this immigration matter, is separate and distinct from the petitioner's authorized official. It is clear that the director's intent here is to ensure that the description of the beneficiary's proposed job duties is generated by the petitioner itself, rather than by counsel, whose representation of the petitioner is limited to specific subject matter. As such, the director's right to request this relevant evidence and to specify its source was permitted by 8 C.F.R. § 204.5(j)(3)(ii).

petitioner consists of three different business operations. Second, no specific duties are associated with overseeing and directing the petitioner's business operations. Similarly, while the petitioner allotted another 10% of the beneficiary's time to budget and finance and 20% to supervising managerial staff (for a total of 30%), the petitioner did not identify any specific duties to explain the means by which the beneficiary meets these responsibilities within the context of the petitioner's business operations. Rather, these responsibilities, which together would comprise approximately 60% of the beneficiary's time, are so general that they may be applied to any number of positions within any given business setting. 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. *Id.*

On appeal, counsel focuses on the petitioner's organizational hierarchy, which she says is comprised of 13 managers and employees distributed among three different business operations. However, an entity's organizational hierarchy by itself can neither render the petitioner ineligible nor can it establish the petitioner's eligibility to classify the beneficiary as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Rather, the question of the petitioner's eligibility, or lack thereof, rests in large part on a thorough analysis of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, counsel does not address this deficiency in her appellate brief. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

Furthermore, with regard to claims concerning the petitioner's organizational hierarchy, 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)). 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). Although the petitioner provided a number of W-2 wage and tax statements for 2005, similar documentation was not provided for the 2006 tax year during which the Form I-140 was filed. As stated previously, eligibility must be established as of the date the petition is filed, which in the present matter took place on February 21, 2006. *See Matter of Katigbak*, 14 I&N Dec. at 49. The record currently lacks documentation establishing whom the petitioner employed during the relevant time period. Therefore, not only has the petitioner provided a job description that fails to identify the primary portion of the beneficiary's tasks with the requisite amount of specificity, but the petitioner has also failed to provide sufficient corroborating evidence to support the staffing hierarchy illustrated in the organizational chart submitted in support of the Form I-140. As such, it also cannot be determined whether the beneficiary would be adequately relieved from having to primarily perform the non-qualifying, operational duties necessary for the petitioner's operations.

Accordingly, based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

With regard to the adverse findings based on the name change of the foreign entity, counsel properly points out on appeal and the record supports her assertions that the RFE clearly instructed the petitioner to submit the foreign entity's organizational chart as it existed at the time the Form I-140 was filed. Given that the foreign entity's name change had not yet occurred at that time, the director's comment suggesting impropriety on the part of the petitioner in that regard is without proper basis and is hereby withdrawn.

Notwithstanding the director's comment, however, the record does not support a finding of eligibility 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 petitioner's claim that it is 51% owned by the foreign entity is inconsistent with Schedule K of the petitioner's 2005 tax return. Specifically, in Schedule K, line 5, the petitioner indicated that no one had an ownership interest of more than 50%, while in line 7, the petitioner indicated that 100% of its ownership interests belong to a foreign person. Although an attachment was provided, the section of the attachments that pertained to Schedule K and that could have identified the petitioner's owners was left blank. These inconsistent findings are furthered by the fact that Schedule L has no value listed for the amount of outstanding stock that has been sold. 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).

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has 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." Despite the petitioner's claim that it operates two beauty salons and a third retail operation, the record lacks documentation to establish that the petitioner was either involved in on-going business transactions during the one-year period prior to filing the Form I-140 or that it currently engages in business transactions. Merely submitting evidence to show that the petitioner has met the licensing requirements that would allow it to do business does not establish that the petitioner has and continues to engage in "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 204.5(j)(2). 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.