

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

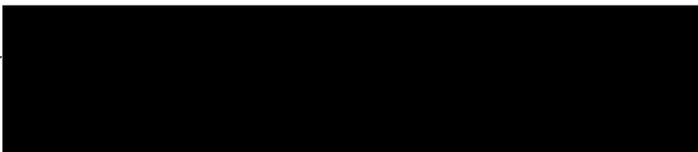
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



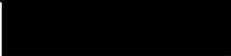
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



FILE:



Office: TEXAS SERVICE CENTER

Date: OCT 03 2007

SRC 04 104 50129

IN RE:

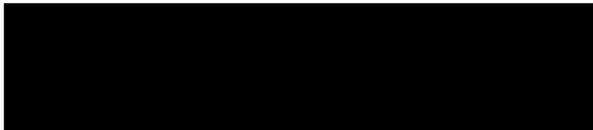
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner subsequently filed an appeal with the Administration Appeals Office (AAO), which the AAO summarily dismissed. The AAO granted the petitioner's subsequent motion to reconsider and affirmed its decision. The matter is now before the AAO on a second motion to reopen and reconsider. The AAO will reject the motion as untimely filed.

The petitioner filed the immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Florida that is engaged in the freight forwarding business. The petitioner seeks to employ the beneficiary as its customer service manager.

The petition was filed on February 27, 2004, and was ultimately denied on July 12, 2005¹ on two separate grounds: (1) the petitioner did not establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; and (2) the petitioner did not establish that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity.

On August 15, 2005, counsel for the petitioner filed an appeal. On appeal, counsel submitted a letter dated August 11, 2005, which was essentially identical to an April 26, 2005 letter submitted in response to the director's request for evidence, and a letter dated February 17, 2004, which was submitted at the time the Form I-140 petition was filed. The AAO noted counsel's failure to "identify specifically an erroneous conclusion of law or statement of fact" in support of the appeal, and summarily dismissed the appeal pursuant to the regulation 8 C.F.R. § 103.3(a)(1)(v).

Although the appeal was summarily dismissed, the AAO's decision dated February 23, 2006 included a discussion of the evidence submitted in support of the petitioner's claim that the beneficiary had been and would be employed in a primarily managerial or executive capacity, and why such evidence failed to support the petitioner's claims.

The petitioner subsequently filed a motion to reopen and reconsider on the grounds that the AAO had not reviewed the complete record, noting that the beneficiary's job description, as summarized in the AAO's decision, did not include responsibilities stated by the petitioner in its April 26, 2005 letter. The AAO addressed counsel's arguments and noted that the record did not support counsel's assertion that the beneficiary would manage a staff of 35 employees. The AAO also discussed deficiencies with respect to the position description and organizational charts related to the beneficiary's previous position with the foreign entity. The AAO affirmed its previous decision in a decision dated January 11, 2007.

The petitioner filed the instant motion to reopen and reconsider on February 16, 2007. The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by Citizenship and Immigration Services (CIS) be filed within 30 days of the decision that the motion seeks to reopen or reconsider, except that

¹ The director initially denied the petition on May 4, 2005, noting that the petitioner had failed to respond to a request for evidence issued on February 2, 2005. Counsel for the petitioner filed a motion to reopen on May 10, 2005, with evidence that the petitioner had in fact timely responded to the request for evidence. The director granted the motion and reopened the matter to consider the petitioner's response to the request for evidence.

failure to file before this period expires may be excused in the discretion of CIS where it is demonstrated that the delay was reasonable and was beyond the control of the petitioner. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed and accompanied by the correct fee. For calculating the date of filing, the motion shall be regarded as properly filed on the date that it is so stamped by the service center. In the present matter, according to the date stamp on the motion, the motion was received by the director on February 16, 2007, 36 days after the AAO's decision was issued. The record shows that the motion was mailed on February 14, 2007, or 34 days after the AAO's decision. Although the motion was already one day late when mailed, counsel offered no explanation for the delay.

Therefore, as a matter of discretion, the petitioner's failure to file the motion within the period allowed will not be excused as either reasonable or beyond the control of the petitioner. Accordingly, the motion will be rejected as untimely filed.

Although the motion will be rejected, additional notes will be made for the record.

Counsel's primary claim in the instant motion is that a letter from the petitioner dated February 17, 2004, which includes a lengthy description of the beneficiary's duties, was not given any weight in the AAO's January 11, 2007 decision. With respect to the beneficiary's job duties, the record contains a letter from the petitioner dated February 17, 2004, a letter from counsel dated April 26, 2005, and a letter from counsel dated August 11, 2006, all of which include the exact same job description for the proffered position of customer service manager with the U.S. company. The director issued a request for additional evidence on February 2, 2005 in which the director clearly advised the petitioner that the letter submitted was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity, yet the petitioner persisted in submitting the identical description on two subsequent occasions. Counsel's assertion that the position description contained in the February 17, 2004 letter was never considered is not persuasive, given that the description contained in that letter is the only description that has ever been provided.

The AAO's previous decisions have specifically referenced a document provided by the petitioner in response to the director's request for evidence, which indicates how the beneficiary allocates her time among six duties in a typical 40-hour workweek. This document was submitted in response to the request for evidence, in support of the initial appeal of the director's decision to the AAO, and in support of the petitioner's previous motion to reopen and reconsider. All of the duties included in this statement of "managerial duties" were included in the February 17, 2004, April 26, 2005 and August 11, 2006 letters. While counsel asserts that the February 17, 2004 letter included other qualifying duties not outlined in the list of six duties relied upon by the AAO, counsel fails to explain why the petitioner would have submitted an incomplete account of how the beneficiary allocates her time on three separate occasions. Since the duties outlined in the petitioner's statement comprised a 40-hour workweek, the AAO reasonably relied on this statement as a complete account of the beneficiary's position.

Furthermore, a description that indicates how much time the beneficiary spends on each duty has more probative value than a vague outline of the beneficiary's overall responsibilities. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his

or her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The AAO has consistently required the petitioner to establish what percentage or proportion of the beneficiary's time is spent on managerial or executive duties, and what percentage or proportion of time is allocated to non-qualifying duties. *See, e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Again, the position description contained in the February 17, 2004 letter was specifically identified by the director as overly broad.

The petitioner submits for the first time in support of the instant motion a description of the beneficiary's position, which indicates how she allocates her time among nine job duties. The new position breakdown identifies all duties included in the petitioner's initial letter. Counsel offers no explanation as to why the petitioner initially provided a list of only six duties on three separate occasions. 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).

Counsel also claims that the petitioner "was never given an opportunity to re-but the USCIS denial of the case." Counsel explains as follows:

On May 10, 2005, counsel for the petitioner filed a motion to reopen, and provided evidence that a response to the director's request for further evidence had been timely submitted on April 30, 2005. The director granted the motion to reopen the matter and on the same day denied the petition. USCIS then sent the case to the AAO using the Motion to Reopen as an appeal, duplicating its function. The AAO considered only the evidence sent as an RFE.

Counsel's outline of the procedural history of this matter, as outlined above, is incorrect. The petitioner filed a Form I-290B, Notice of Appeal, on August 15, 2005, which included a cover letter from counsel annotated "Notice of Appeal" in which she stated "this is a request [for] an appeal of your decision." Counsel submitted a letter dated August 11, 2005 and supporting evidence. Counsel's suggestion that the petitioner did not have an opportunity to appeal the director's July 11, 2005 decision is not supported by the evidence, which shows that the petitioner did in fact file an appeal. The director did not merely forward the motion to reopen to the AAO. The filing dated August 15, 2005 included supporting evidence, and there was no indication that additional evidence would be submitted. The AAO did not consider "only the evidence sent as an RFE," although, as noted in the AAO's decision dated February 23, 2006, the evidence submitted on appeal was essentially identical to that submitted in support of the RFE. The AAO had the opportunity to review, and did review, the complete record of proceeding.

The final argument made by counsel in support of the instant motion is that the AAO erred in its analysis of the organizational chart provided by the petitioner, by determining that the beneficiary would not manage a staff of 35 lower-level employees. Counsel asserts that a "plain reading" of the organizational chart demonstrates that the beneficiary's position is just below that of the general manager's position, and emphasizes that the beneficiary's management of subordinate employees is "implicit" in her job duties, which require her to manage, develop and review "major components" of the company. The petitioner submits an expert opinion letter from [REDACTED] who states that she reviewed the petitioner's organizational chart and determined that the beneficiary's position is at a senior level in the company's hierarchy, and includes supervision of ten subordinate managers.

Counsel's assertions are not persuasive for several reasons. First, the petitioner has never established that the beneficiary's claimed supervision of the employees of the petitioner's claimed affiliates, Global Parcel Services, L.L.C. and El Tropicico, L.L.C., should be considered in determining whether the beneficiary would be employed by the petitioner in a primarily managerial or executive position. The duties of a beneficiary for the petitioner and on behalf of the petitioner's affiliated companies may be viewed together in certain circumstances; however, the petitioner must establish that the companies are significantly interrelated. The statutory definitions of executive and managerial capacity refer to an assignment within an organization in which the employee either manages the organization or directs the management of the organization. Section 101(a)(28) of the Act defines "organization" as follows: "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanent or temporarily associated together with joint action on any subject or subjects." The statutory definition of an organization would not ordinarily include a partially owned corporation that is an entity separate and distinct from the petitioning organization. However, the petitioner may provide evidence to establish that the petitioner and the petitioner's partially owned entity are either permanently or temporarily associated through controlling ownership, contract, or other legal means. Accordingly, a beneficiary's claimed managerial or executive duties that relate to a partially owned entity may be considered in certain instances for purposes of an immigrant visa petition.

In this case, the two affiliated entities have not been shown to be true affiliates of the petitioning company. Two individuals own the petitioning company in equal proportions. These same two individuals each own a 20 percent interest in "El Tropicico, LLC" but that company has three other shareholders with no ownership stake in the petitioning company, and there is no evidence that management or control of the company has been turned over to the petitioner. The two companies do not have an affiliate relationship as defined at 8 C.F.R. § 204.5(j)(2). Similarly, the petitioner's two individual shareholders each own a one-third interest in Global Parcel Services, LLC, and there is no evidence that they have combined their interests such that they would control the company together. According to the operating agreement for Global Parcel Services, LLC, the company is managed by one manager, [REDACTED], who has no ownership interest in the U.S. petitioner. The petitioner has not established that El Tropicico, LLC and Global Parcel Services, LLC should be considered part of the petitioner's organization, and an analysis of the beneficiary's supervisory role should therefore be confined to employees of the U.S. company.

At the time of filing, the petitioner claimed to employ nine employees. The petitioner's organizational chart submitted in response to the request for evidence identified eleven employees by name, as well as sub-contractors. The petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the quarter in which the petition was filed, indicates that the petitioner had seven employees as of February 2004. 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). The AAO cannot determine who was actually employed by the company at the time of filing. Although the organizational chart provided does show that the beneficiary reports to the petitioner's general manager, it did not clearly depict any direct subordinates. Furthermore, the director had requested employee names, job titles and job duties for all positions managed by the beneficiary. The petitioner did not provide job duties for subordinate employees, and did not clearly indicate who would be supervised by the beneficiary. 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).

The AAO is not persuaded that the beneficiary's supervision of lower-level employees is "implicit" in her job duties, as suggested by counsel. The beneficiary's position description does not include any supervisory duties or suggest that she has the authority to hire or fire employees or recommend these and other personnel decisions. See section 101(a)(44)(A)(ii) of the Act. Counsel essentially requests that the AAO accept the organizational chart, which shows the beneficiary as having no direct subordinates, as prima facie evidence of the beneficiary's eligibility for the requested classification, notwithstanding the petitioner's failure to provide additional, specific evidence regarding exactly whom the beneficiary supervises and what duties they perform. 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 fact that the beneficiary reports to the general manager does not automatically lead to the conclusion that she supervises all lower level employees of the petitioner and two separate companies that share only a minority ownership interest with the petitioner.

Finally, even if the AAO were to find that the beneficiary would be employed in a managerial or executive capacity in the United States, it must be noted that neither counsel nor the petitioner has contested the finding that the beneficiary was not employed by the foreign entity in a managerial or executive capacity, and that determination would therefore be affirmed.

As the AAO's previous decision will stand, these issues will not be discussed further.

ORDER: The motion is rejected as untimely filed.