

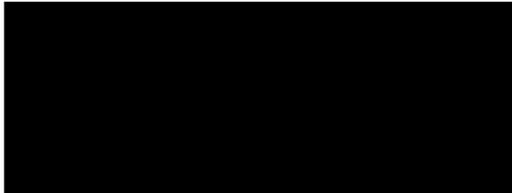
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] EAC 05 245 52642

Office: VERMONT SERVICE CENTER

Date: OCT 09 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.


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 was incorporated in the Commonwealth of Virginia and seeks to employ the beneficiary as its director and 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 beneficiary would not be employed in a managerial or executive capacity by the U.S. petitioner and denied the Form I-140.

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 beneficiary would be employed 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 August 29, 2005 in which the petitioner stated that the beneficiary's position in the United States would involve managing and overseeing all business activities including personnel, finances, contracts and tax planning. No further information was provided.

Accordingly, on May 26, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide further information and documentation to assist Citizenship and Immigration Services (CIS) in determining the beneficiary's employment capacity in the proposed position in the United States. Namely, the petitioner was asked to provide a list of the beneficiary's specific job duties accompanied by a breakdown of the number of hours that would be assigned to each duty. The petitioner was also instructed to provide its latest quarterly tax return and to discuss who is operating its business, how many individuals it employs, the duties performed by each employee, and the educational requirements for each position within the petitioner's business.

In response, the petitioner submitted a letter dated May 19, 2006 stating that the beneficiary "continues to serve [the petitioner] in an executive managerial capacity." The petitioner also stated that the beneficiary's responsibilities include "identifying, negotiating and executing business purchase contracts, new leases, equipment purchase and export, financial oversight, taxes, accounting and legal affairs." The petitioner claimed that the daily operational tasks are performed primarily by other employees whom the beneficiary oversees. While instructed to provide a list of duties and their respective hourly allotments, the petitioner instead provided the following percentage breakdown of the beneficiary's general job responsibilities:

Directs, manages and oversees all existing business of [the petitioner] (30%-40%), including personnel hiring, finances and taxes. Also negotiates and transacts export opportunities of printing press machines (10%); and examines, negotiates and executes new business acquisition and expansion opportunities (40%). Also, [the beneficiary] performs advertising and marketing activities, and coordinates legal affairs (10%-20%).

In a decision dated August 21, 2006, the director denied the petition noting that the petitioner's staffing composition and its description of the beneficiary's proposed employment fail to establish that the petitioner is able to employ the beneficiary in a managerial or executive capacity. The director discussed the seemingly overlapping tasks performed by the store's senior associate and the general manager. The director concluded that the petitioner failed to specify which of the beneficiary's duties would entitle him to classification as a multinational manager or executive.

On appeal, counsel contends that the beneficiary would maintain "absolute managerial oversight of all personnel" as well as all business-related matters, including all contract execution and allocation of funds. However, establishing that the beneficiary has a high degree of discretionary authority is only one of several components that are necessary in order to meet the statutory definition of a managerial or executive capacity position. See sections 101(a)(44)(A) and (B) of the Act, respectively. It is foreseeable for a beneficiary operating within certain business settings to oversee business operations and to actually perform the necessary operational tasks on a daily basis. However, 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). Therefore, 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). CIS is justified in placing high value on the description of a beneficiary's proposed duties, as 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 petitioner failed to comply with the director's explicit instructions that the beneficiary's specific job duties and their respective time breakdowns be provided to explain what duties the beneficiary actually performs on a daily basis and which of those duties consume the primary portion of his time. For instance, the petitioner allotted 30-40% of the beneficiary's time to directing, managing, and overseeing the business. While these overly broad responsibilities suggest that the beneficiary is in charge of the petitioner's business operations, they provide no insight as to the specific tasks the beneficiary performs or the means by which he meets these responsibilities. 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.* Alternately, while the petitioner more specifically stated

that the beneficiary negotiates export opportunities, seeks out and negotiates new business ventures, and performs marketing and advertising duties, these job duties, which cumulatively comprise at least 60% of the beneficiary's time, cannot be deemed managerial or executive, but rather are examples of the types of daily operational tasks that a bona fide multinational manager or executive would not primarily perform.

The petitioner's claim that its support staff relieves the beneficiary from having to primarily perform non-qualifying tasks is not persuasive. First, as discussed above, the petitioner has provided a job description that attributes mostly non-qualifying tasks to the beneficiary's position. Second, the petitioner has failed to provide sufficient evidence to establish that the five employees identified in the response to the RFE were actually employed at the time the Form I-140 was filed. Although the director did not specifically instruct the petitioner to provide its quarterly tax return for the third quarter of 2005 during which the Form I-140 was filed, precedent case law has determined that the 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). In the present matter, the petitioner claimed four employees in Part 5, Item 2 of its Form I-140 and identified a total of five employees in the response to the RFE. However, the petitioner's quarterly tax return for the third quarter of 2005, which counsel has provided on appeal, indicates that the petitioner had only three employees during the relevant time period surrounding the filing of the Form I-140. Furthermore, the petitioner has provided no evidence to establish which of the cited positions were actually filled during the relevant time period. 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)). Although the petitioner submitted its corporate tax return for 2005 showing that salaries and wages were paid, this document does not establish which employees were employed by the petitioner's organization as of September 2005, nor does it allow the AAO to verify whether such employees were working the number of hours claimed by the petitioner.

The fact that counsel asserts that the petitioner was adequately staffed with employees to handle the daily operational tasks is not sufficient, as 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). While the AAO considers the size of the petitioner's support staff with the understanding that this factor ought not be the sole basis for adverse findings, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). In the present matter, the petitioner has failed to provide documentation establishing just whom it employed during the relevant time period.

Accordingly, pursuant to a thorough review of both the relevant information regarding the beneficiary's proposed job duties and the evidence provided to determine the petitioner's available support staff at the time the Form I-140 was filed, the AAO cannot conclude that the petitioner was able to employ the beneficiary in a managerial or executive capacity such that the primary portion of his time would be consumed with qualifying managerial or executive duties. For this reason, the petition may not be approved.

Furthermore, 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)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the only information addressing the beneficiary's duties abroad is found in a letter dated August 5, 2003 in which the foreign entity's managing director stated, "[The beneficiary's] responsibilities [abroad] include[d] managing the production, marketing, sales and all financial dealings." Based on this brief and vague description, the AAO cannot determine the nature of the duties the beneficiary primarily performed on a daily basis.

Second, 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 claimed to be a subsidiary of Kalinga Offset Pvt., Ltd. In support of this claim, the petitioner provided two stock certificates. Stock certificate no. 1 shows the foreign entity as owner of 5,100 out of a possible 10,000 shares of stock; stock certificate no. 2 identifies the beneficiary and his wife as the joint owners of the remaining 4,900 shares. However, Schedule K of the petitioner's corporate tax return for 2005 indicates that the beneficiary and his wife each own 50% of the petitioner's stock. The tax return does not cite [REDACTED] Pvt., Ltd. as one of the petitioner's shareholders. 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 notes that the inconsistency cited above has neither been acknowledged nor resolved by the petitioner.

Additionally, the AAO notes the petitioner's submission of U.S. Income Tax Returns for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code*, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity or, alternately, by foreign individuals. This conflicting information has not been resolved and, as such, it cannot be found that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

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.